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CASE NOTES


The instant case was a consolidation of two cases, both involving the constitutionality of stops for questioning at permanent immigration checkpoints removed from the Mexican border. The United States Supreme Court granted certiorari to resolve conflicting decisions of the Fifth and Ninth Circuits.

The Ninth Circuit case, United States v. Martinez-Fuerte,1 consolidated three cases involving routine stops at the San Clemente, California, checkpoint to inquire about citizenship and illegal alienage,2 pursuant to which all defendants were arrested for illegally transporting Mexican aliens.3 Because of the large volume of traffic at that checkpoint, a "point" officer screens traffic as it proceeds through the checkpoint lanes and selects a small percentage of the cars for referral to a secondary questioning area.4 None of the challenged stops at San Clemente involved suspicion based on any articulable facts; the illegal alienage of the defendants' passengers was discovered during questioning after discretionary referral to the secondary area.5 The Ninth Circuit held such stops to be inconsistent with the fourth amendment because they were not justified by founded suspicion that the defendants' automobiles actually contained illegal aliens.6

In the Fifth Circuit case, Sifuentes v. United States,7 the defendant was stopped at the Sarita, Texas, checkpoint where all

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1. 514 F.2d 308 (9th Cir. 1975), rev'd, 428 U.S. 543 (1976).
2. Amado Martinez-Fuerte was convicted of illegally transporting aliens after his pretrial motion for suppression of evidence was denied. Id. at 309-10.
4. A full description of the checkpoint and procedure is set forth in the Court's opinion. 428 U.S. at 545-47. Fewer than one percent of the cars are stopped for questioning. Id. at 563 n.16.
5. 514 F.2d at 314-16. The circuit court reversed the conviction of Amado Martinez-Fuerte and affirmed the orders to suppress evidence in the other two cases. Id. at 322.
cars are stopped and subjected to brief inquiry about citizenship. Sifuentes' car contained four illegal aliens who were slumped down in their seats and not visible to the officer until he approached the car. The officer's questions revealed the passengers' status as illegal aliens. Sifuentes was convicted of illegally transporting aliens, and the Fifth Circuit affirmed.

The Supreme Court, affirming the conviction in Sifuentes and reversing the decision in Martinez-Fuerte, held that check-point stops for questioning are constitutional under the fourth amendment even if not justified by individualized suspicion and that permanent checkpoint operation does not require the advance authorization of a judicial warrant.

I. BACKGROUND

A. Historical Development of Immigration Search and Seizure Law

1. Statutory law

Immigration search and seizure law has always had a statutory basis. The first act restricting immigration in 1875 contained search and seizure provisions and guidelines. These searches and seizures were limited to national borders until 1946, when immigration officers were first empowered to conduct warrantless searches "within a reasonable distance" from the border. The current authorization, the Immigration and Nationality Act of 1952, adopts this same "reasonable distance" standard for searches away from the border. Specifically, the Act now empowers officers of the Immigration and Naturalization Service

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9. 428 U.S. at 545.
10. The Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477 (implied repeal 1917), authorized inspection by the collector of the port to search ships for undesirable aliens, such as felons or prostitutes, if he had reason to believe they were on board.
11. Act of Aug. 7, 1946, ch. 768, 60 Stat. 865 (amending Act of Feb. 27, 1925, ch. 364, 43 Stat. 1014, 1049) (repealed 1952). The 1925 Act had authorized the search of vehicles or conveyances in which the officer believed aliens were entering the country. The 1946 Act deleted the language "in which he believes aliens are being brought in to the United States" and substituted "within a reasonable distance from any external boundary of the United States."
(INS) without a warrant not only to board any vehicle or conveyance within a reasonable distance from the border to search for aliens, but also to interrogate anyone believed to be an alien concerning his right to be in the country.\textsuperscript{14} Pursuant to a regulation promulgated by the Attorney General, a reasonable distance was defined to be within 100 miles of an external boundary of the United States.\textsuperscript{15}

2. **Early judicial determinations**

The INS power to search and interrogate away from the border without a warrant or probable cause has long been recognized by the courts. But the only Supreme Court statement on the subject prior to 1973\textsuperscript{18} was dictum in a 1925 Prohibition Act case\textsuperscript{7} recognizing a probable cause exception at the border:

> Travellers may be so stopped [on the chance of finding something illegal in each automobile] in crossing an international boundary . . . But those lawfully within the country . . . have a right to free passage without interruption or search unless there is known to be a competent official authorized to search, [and] probable cause for believing that their vehicles are carrying contraband or illegal merchandise.\textsuperscript{16}

While that statement indicated a limitation on the government's power to search or seize once a person is within the country,\textsuperscript{19} it

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\textsuperscript{14} 8 U.S.C. § 1357(a) (1970):
(a) Powers without warrant.
   Any officer or employee of the Service authorized under regulations . . . shall have power without warrant—
   (1) to interrogate any alien or person believed to be an alien as to his right to be . . . in the United States;
   
   . . .
   (3) within a reasonable distance from any external boundary . . . to 
   board and search for aliens any vessel . . . conveyance, or vehicle . . . and within . . . twenty-five miles from any such external boundary to have access to private lands, but not dwellings . . .

\textsuperscript{15} 8 C.F.R. § 287.1(a)(2) (1977). This provision has been in effect without material changes since 1947. 12 Fed. Reg. 2744 (1947) amended the then current regulation by adding a section that defined "within a reasonable distance from any external boundary" to mean "within a distance not exceeding 100 air miles from any external boundary."

\textsuperscript{16} In 1973 the Supreme Court decided Almeida-Sanchez v. United States, 413 U.S. 266 (1973). For facts and holding, see notes 25 & 27 and accompanying text infra.

\textsuperscript{17} Carroll v. United States, 267 U.S. 132 (1925).

\textsuperscript{18} Id. at 154.

\textsuperscript{19} In 1925 when the statement was made, immigration law did not provide for searches and seizures away from the border. See note 11 and accompanying text supra. Customs search statutes, however, did authorize searches and seizures away from the border. See notes 41-44 and accompanying text infra.
has been cited by circuit courts in validating immigration or customs searches both at and away from the border.\textsuperscript{20} Circuit courts consistently upheld the constitutionality of warrantless immigration searches and seizures conducted away from the border within the 100 mile administrative limit.\textsuperscript{21} The justification for the searches and seizures, although not generally articulated, appears to have been that the statutory authorization provided a presumption of reasonableness under the fourth amendment.\textsuperscript{22} While the probable cause requirement for warrants was imposed on other warrantless searches and seizures to ensure reasonableness, border searches conducted by customs or immigration officials were treated as a statutory exception to a probable cause requirement.\textsuperscript{23} Greater law enforcement discretion was thus authorized for immigration and custom officials.

3. Almeida-Sanchez and its progeny

Current case law relies in part on distinctions between the three basic modes of INS law enforcement operation away from the border: First, permanent checkpoints are established where major roads from the border converge; second, temporary check-
points are periodically established on other roads near the border; and third, roving patrols operate along roads that smugglers of aliens may use to circumvent checkpoints. The fourth amendment protections applicable to these searches and seizures have become a subject of increasing interest since the Supreme Court first ruled on an INS search procedure away from the border.

In *Almeida-Sanchez v. United States*, the Supreme Court disallowed the exception to a probable cause requirement for a warrantless immigration search by a roving patrol away from the border. The government had claimed statutory justification for the warrantless search without probable cause, relying on part of the Immigration and Nationality Act of 1952. The Court held this statutory probable cause exception to be inconsistent with the fourth amendment for searches occurring at points away from the border or its “functional equivalents.”

Several subsequent Supreme Court decisions clarified and extended traditional fourth amendment protections to other immigration search and seizure situations. In *United States v. Ortiz*, the Court extended the probable cause requirement announced for roving patrol searches in *Almeida-Sanchez* to permanent checkpoint searches away from the border. The same day, the Court held in *United States v. Brignoni-Ponce* that reasona-

25. 413 U.S. 266 (1973). The border patrol stopped and searched a car without probable cause on a road twenty-five miles north of the border and parallel to it. *Id.* at 268. (The circuit court opinion reported the distance as 50 miles.) The Ninth Circuit had upheld the search as valid based on 8 U.S.C. § 1357, the 100-mile distance outlined by federal regulation, and its prior decisions. 452 F.2d 459, 460-61 (9th Cir. 1971).
27. “Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well.” 413 U.S. at 272.

Although functional equivalent was not defined, the Court gave two examples of places away from the border that might be considered functional equivalents: An international airport and an established stop near the border where two or more roads from the border converge. *Id.* at 273.

28. In *United States v. Peltier*, 422 U.S. 531 (1975), the Court declared that the *Almeida-Sanchez* probable cause requirement was not to be applied retroactively to roving patrol searches. *Id.* at 534-35. In *Bowen v. United States*, 422 U.S. 916 (1975), the *Almeida-Sanchez* standard was held to be nonretroactive in relation to permanent checkpoint searches. *Id.* at 918-19.
29. 422 U.S. 891 (1975).
30. *Id.* at 896-98. The Court again required the search to be at a functional equivalent of the border for an exception to the probable cause standard. It did not articulate further guidelines to determine functional equivalency. The search in *Ortiz* occurred at the San Clemente checkpoint. *Id.* at 896-97.
ble suspicion\textsuperscript{32} was required to justify a stop for questioning by a roving patrol.\textsuperscript{33} The stop, a seizure under the fourth amendment, was limited to questioning about illegal alienage; no search was involved. Among the many questions not yet addressed by the Supreme Court, and explicitly reserved in \textit{Ortiz}, was that of the applicable constitutional standards for stops at permanent checkpoints away from the border.\textsuperscript{34}

The change in immigration search and seizure law requiring some form of individualized suspicion (i.e., probable cause or reasonable suspicion) for INS searches and stops for questioning away from the border has generally not been liberally applied by those circuit courts which, by virtue of their geographical locations along the southern border, deal with Mexican aliens. The Fifth and Tenth Circuits have construed the Supreme Court decisions narrowly\textsuperscript{35} and allowed checkpoint stops without individual-

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\item \textsuperscript{32} The Supreme Court in \textit{Brignoni-Ponce} called the standard "reasonable suspicion" and defined it as "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion." \textit{Id.} at 884. The circuit court decision required "founded suspicion." 499 F.2d 1109, 1111 (9th Cir. 1974). The two standards, founded suspicion and reasonable suspicion, are equivalent. Both originate from the standard established in \textit{Terry v. Ohio}, 392 U.S. 1 (1968), sometimes referred to as articulable suspicion.
\item \textsuperscript{33} 422 U.S. at 882-84. The stop was made by a patrol car near the San Clemente checkpoint. The checkpoint was not operating due to inclement weather, and the patrol car had picked out Brignoni-Ponce's car because its occupants were of Mexican ancestry. Questioning revealed the occupants' illegal alienage. No challenge was made to the Ninth Circuit's characterization of the stop as a roving patrol rather than a permanent checkpoint stop. \textit{Id.} at 874-75. The Court also specifically declared that apparent Mexican ancestry alone was insufficient to establish reasonable suspicion. \textit{Id.} at 886-87.
\item \textsuperscript{34} 422 U.S. at 897 n.3.
\item \textsuperscript{35} The Tenth Circuit limited the precedent's effect by characterizing functional equivalency as a question of fact for the district courts. They found checkpoints 98 miles from the border to be functional equivalents. United States \textit{v.} King, 485 F.2d 353, 357-60 (10th Cir. 1973); United States \textit{v.} Maddox, 485 F.2d 361, 363 (10th Cir. 1973).

Although the Fifth Circuit applied the probable-cause-to-search requirement of \textit{Almeida-Sanchez} to roving patrols and temporary checkpoints, United States \textit{v.} Speed, 489 F.2d 478, 480 (5th Cir. 1973), \textit{vacated on other grounds}, 422 U.S. 1052, \textit{rev'd} 820 F.2d 322 (5th Cir. 1987), it declined to extend it to mobile checkpoints (those that alternate between two and three fixed locations), United States \textit{v.} Cantu, 504 F.2d 387, 389 (5th Cir. 1974), or permanent checkpoints, United States \textit{v.} Hart, 506 F.2d 887 (5th Cir.), \textit{vacated}, 422 U.S. 1053 (1975), \textit{aff'd}, 525 F.2d 1199 (5th Cir. 1976) (after review in light of \textit{Ortiz} and \textit{Brignoni-Ponce}).

The Fifth Circuit further limited the Supreme Court decisions by analyzing the search or seizure in two steps. The first was to ascertain whether the initial stop was constitutionally valid. Then the subsequent search was examined for constitutional justification. If the initial stop was valid (as were checkpoint stops without reasonable suspicion), then a search for \textit{aliens} did not require probable cause. United States \textit{v.} Cantu, 510 F.2d 1003 (5th Cir. 1975). The court stated: "Once they had stopped the car, [valid under the statute and 100-mile regulation,] they were empowered to search for aliens." \textit{Id.} at
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ized suspicion. The Ninth Circuit, however, has required a form of individualized suspicion for all searches and seizures occurring away from the border.

B. The Reasonableness Standard of the Fourth Amendment

The recent concern of the courts with delineating constitutional safeguards for immigration searches away from the border calls for a closer analysis of the protection guaranteed by the Constitution. The text of the fourth amendment establishes both a substantive protection, that a citizen's right to be secure against unreasonable searches and seizures shall not be violated, and a procedural safeguard, that no warrant shall issue but upon

1004. Any search for contraband, however, required probable cause. United States v. Santibanez, 517 F.2d 922 (5th Cir. 1975).


The constitutionality of checkpoint stops without founded suspicion continued to be upheld by the Fifth Circuit in United States v. Coffey, 520 F.2d 1103 (5th Cir. 1975) (per curiam), after remand by the Supreme Court for consideration in light of Brignoni-Ponce and Ortiz. 422 U.S. 1054, vacating 509 F.2d 574 (5th Cir. 1975) (mem.).

36. The Ninth Circuit required probable cause for checkpoint searches before the Supreme Court's Ortiz decision by holding most permanent checkpoints not to be "functional equivalents." See United States v. Morgan, 501 F.2d 1351 (9th Cir. 1974); United States v. Bowen, 500 F.2d 960 (9th Cir. 1974), aff'd on other grounds, 422 U.S. 916 (1975). Functional equivalency was limited to locations "where virtually everyone searched has just come from the other side of the border." 500 F.2d at 965.

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Stops for questioning at checkpoints were sanctioned only upon founded suspicion. United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974), aff'd, 422 U.S. 873 (1975); United States v. Juarez-Rodriguez, 498 F.2d 7 (9th Cir. 1974). The court did, however, recognize stops if founded suspicion developed as a car "rolled through" a checkpoint. United States v. Evans, 507 F.2d 879, 880 (9th Cir. 1974), cert. denied, 422 U.S. 1057 (1975).

The court also invalidated a judicially authorized checkpoint warrant as violative of the fourth amendment. United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975), rev'd, 428 U.S. 543 (1976). Cf. United States v. Esquer-Rivera, 500 F.2d 313 (9th Cir. 1974) (stop at a temporary checkpoint is unauthorized).

38. The fourth amendment 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.

U.S. CONST. amend. IV.
probable cause. The substantive protection applies to all searches and seizures: whether warrantless or authorized by a warrant, they must be reasonable. The procedural requirement specifies the standards for issuing a warrant that ensure the reasonableness of the search or seizure. While the fourth amendment’s substantive protection is generally afforded in terms of the warrant requirement, the Constitution does not mandate warrants in all situations; it only prohibits unreasonable searches and seizures. The standard of reasonableness for warrantless searches and seizures is therefore not specified in the amendment but is left for interpretation. The lack of clarity in this standard is aptly illustrated by the many warrantless INS search and seizure procedures that were once considered reasonable because of the statutes and regulations authorizing and defining them, but are now reasonable only when additional protection is afforded by elements of the warrant requirement. Courts have generally required that warrantless intrusions conform to one of the warrant requirements, the probable cause standard, in order to ensure reasonableness. For this reason, the probable cause and reasonableness standards have come to be regarded by many as equivalents.

It is not axiomatic, however, that the substantive protection in warrantless situations should be ensured by the same procedural safeguards required for warrants. The historical setting, recent scholarship, and some judicial authority all support the position that the fourth amendment’s procedural protections, particularly probable cause, are not always necessary for a reasonable warrantless search or seizure.

1. The historical setting and congressional enactments

The authors of the fourth amendment apparently considered certain warrantless searches to be reasonable without probable cause. A customs search statute authorizing a warrantless search based only upon the customs officer’s belief that goods subject to duty were on board a ship was passed by the same Congress that


40. The Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29 (repealed 1790), authorized customs officials to search any ship in which they had “reason to suspect” goods subject to duty were concealed. The Act specified issue of a warrant on oath or affirmation if they had “cause to suspect” the goods were concealed in a “particular” building or dwelling.
resolved to submit the Bill of Rights to the states for ratification.\textsuperscript{41} This statute was replaced in 1790 by another statute with expanded provisions not even requiring the officer's belief.\textsuperscript{42} Similar customs search authorization, including some expansions, has continued to the present.\textsuperscript{43}

Passage of the first customs statute by the same Congress that drafted the Bill of Rights, when viewed in light of English writs of assistance,\textsuperscript{44} argues persuasively against applying warrant requirements to all warrantless searches and seizures. These writs of assistance were general area warrants, and their use has been widely recognized as one of the primary grievances leading to the American Revolution.\textsuperscript{45} The probable cause and particularity requirements outlined in the fourth amendment for warrants were designed to protect citizens from the abuses of these writs. Although the first customs act passed by Congress authorized warrantless searches conditioned only on the officer's belief that goods subject to duty were on the ship, Congress apparently considered the problem of a general area warrant to be eliminated by limiting these warrantless searches to vessels. In order to search buildings or dwellings for goods subject to duties, the statute required a warrant meeting what later became fourth amendment standards.\textsuperscript{46}

Statutory authorization for warrantless searches and seizures at the border on less than probable cause has not been limited to

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  \item[41.] A joint resolution, passed by two-thirds of both houses of Congress, proposed twelve articles, ten of them forming our current Bill of Rights, to be ratified by the state legislatures as constitutional amendments. Resolution, 1 Stat. 97 (1789). The ten were ratified by 1791. Amendments to the Constitution, 1 Stat. 21, n.a (1789).
  \item[42.] Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145 (repealed 1799).
  \item[43.] Act of Mar. 2, 1799, ch. 22, 1 Stat. 627 (repealed 1922). Section 54 contained essentially the same provisions as § 31 of the 1790 Act. Section 46 of the statute authorized the discretionary search of a person's baggage when he arrived in the country. Sections 105 and 106 also extended these powers to entries made in the western districts by vessels, boats, and carriages. The Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231 (expired 1822), made the powers more explicit for land travel and specifically stated a warrant was not necessary.
  \item[44.] These writs authorized constables to break and enter houses, shops and any "other place" to seize prohibited or uncustomed goods. 13 & 14 Car. 2, c. 11, § 5 (1662). \textit{But see} Dickerson, \textit{Writs of Assistance as a Cause of the Revolution}, in \textit{The Era of the American Revolution} 40, 43-49 (R. Morris ed. 1939). Dickerson argues that the practice, not the statute, made the writs "general warrants."
  \item[45.] Dickerson, \textit{supra} note 44, at 40.
  \item[46.] See note 40 \textit{supra}.
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customs searches. Similar broad authority has been granted for immigration searches and seizures. Throughout its history, Congress has neither required a warrant nor considered probable cause necessary to ensure reasonableness in customs and immigration searches and seizures of statutorily limited scope.

2. Judicial authority and the reasonableness standard for warrantless searches and seizures

The judiciary has also treated the reasonableness standard as partially independent of the warrant requirements in certain warrantless situations when legitimate law enforcement interests would be impaired by adherence to that standard. In Terry v. Ohio, the Supreme Court created the "reasonable suspicion" standard based on the fourth amendment's reasonableness language for a specific factual setting, stop and frisk, where both a warrant and probable cause were considered inappropriate. This lesser standard of individualized suspicion also required judicial limitations on the extent of the intrusion to ensure reasonableness; judicial review of the facts against an objective standard was still required to ensure meaningful application of the fourth amendment protections. Brignoni-Ponce extended the reasonable suspicion standard to another warrantless law enforcement procedure, a stop for questioning by a roving patrol.

In addition to the Supreme Court decisions applying the lesser standard of reasonable suspicion to certain warrantless situations, some members of the Court have stressed the importance of looking beyond the warrant requirements to the reasonableness requirement in order to give greater recognition to law enforcement needs. Chief Justice Burger, for example, opined:

Perhaps these decisions [Brignoni-Ponce and Ortiz] will be seen in perspective as but another example of a society seemingly impotent to deal with massive lawlessness. In that sense history may view us as prisoners of our own traditional and appropriate concern for individual rights, unable—or unwilling—to apply the concept of reasonableness explicit in the Fourth Amendment in order to develop a rational accommodation between those rights and the literal safety of the country.50

47. See notes 10-12 and accompanying text supra.
49. Id. at 8-9, 21-22, 30-31.
50. United States v. Ortiz, 422 U.S. at 899 (Burger, C.J., concurring).
State and lower federal courts have also authorized certain seizures without probable cause when the law enforcement interest is sufficient. Stopping automobiles at roadblocks\(^5\) and various checkpoints\(^2\) has been judicially recognized as reasonable despite the intrusion on many innocent travelers. The requirement that all vehicles stop is one of the factors that courts have sometimes considered to ensure reasonableness in these situations.\(^5\) Additional protection is afforded by limiting the extent of the stop; probable cause has been required for intrusions exceeding the authorized purpose of the stop.\(^4\)

On the other hand, this concern for law enforcement interests has sometimes resulted in a dilution of the fourth amendment probable cause requirement for warrants. This divorce of probable cause from the reasonableness requirement for warrants evidences confusion in the application of the fourth amendment's substantive and procedural protections. In *Camara v. Municipal Court*,\(^5\) for instance, the Supreme Court required a warrant for administrative housing inspections. The Court distorted the probable cause requirement, however, because that requirement was considered satisfied simply upon showing the reasonableness of the search.\(^5\) This reasonableness involved no individualized suspicion. In addition, the *Camara* warrant can be issued for an area as well as a specific dwelling and thus presents an apparent conflict with the fourth amendment's mandate that a "warrant

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51. E.g., United States v. Millar, 543 F.2d 1280 (10th Cir. 1976) (roadblock for drivers license check on freeway); United States v. Jenkins, 528 F.2d 713 (10th Cir. 1976) (random stops for drivers license checks); City of Miami v. Aronovitz, 114 So. 2d 784 (Fla. 1959) (roadblock for drivers license check); People v. Euctice, 371 Ill. 159, 20 N.E.2d 83 (1939) (roadblock immediately following felony commission); Commonwealth v. Mitchell, 355 S.W.2d 686 (Ky. 1962) (roadblock for license and registration check); Williams v. State, 226 Md. 614, 174 A.2d 719 (1961) (roadblock after felony commission).


53. See, e.g., id. at 377; Commonwealth v. Mitchell, 355 S.W.2d 686, 687-88 (Ky. 1962).

54. See, e.g., Wirin v. Horrall, 85 Cal. App. 2d 497, 504, 193 P.2d 470, 474 (1948) (general search for evidence of crimes by roadblock without a warrant is illegal); City of Miami v. Aronovitz, 114 So. 2d 784, 788-89 (Fla. 1959) (stop for license check does not convey power to search); Stephenson v. Department of Agr. & Consum. Servs., 329 So. 2d 373, 376 (Fla. Dist. Ct. App. 1976) (statute required consent or warrant for a search); Commonwealth v. Mitchell, 355 S.W.2d 686, 687 (Ky. 1962) (stops cannot have an ulterior motive). Cf. United States v. Millar, 543 F.2d 1280, 1282-83 (10th Cir. 1976) (probable cause, developed after the stop, justified the issuance of a warrant to search trailer).


56. The Court stated: "But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." Id. at 539.
shall issue” only upon probable cause supported by a particularized description of the subject of the search or seizure. This holding particularly illustrates confusion over the fourth amendment’s protections because it overruled Supreme Court precedent that administrative housing inspections (searches) were reasonable without a warrant.

3. Recent scholarship

Legal commentators have recognized the difference between the warrant and reasonableness requirements of the fourth amendment. The differences between warrant and warrantless situations are considered to be important for application of these fourth amendment standards. Historically there has been a shift of emphasis on these standards. The concern at the time of the drafting of the fourth amendment was with overly general warrants, not with warrantless searches and seizures. Thus, current reliance on the warrant as a “touchstone” of reasonableness under the fourth amendment has caused one scholar to claim that the courts have “stood the Fourth Amendment on its head.”

Ironically, the warrant requirements, originally imposing a more rigorous control on the issuance of a warrant, have been eviscerated in some warrant situations to meet law enforcement needs, while the warrant requirements have been applied to other situations (that were originally reasonable without warrants) in derogation of law enforcement interests.

In an attempt to establish sound doctrine for searches or seizures both with and without a warrant, legal scholars have pointed to the importance of the distinction between the fourth amendment’s warrant and reasonableness requirements. While legal commentators acknowledge the historical reversal from protection from warrants to protection by warrants, they are di-

57. For the complete text of the fourth amendment, see note 38 supra.

In Martinez-Fuerte the Court suggests that the greater intrusion on privacy when searching a private residence and the traditional warrant requirement for such searches may have been the reason for the Court requiring a warrant in Camara. 428 U.S. 564-65.

58. See Frank v. Maryland, 359 U.S. 360 (1959). The dissent in Camara claimed that the decision was a prostitution of the fourth amendment and that better protection would be afforded if it were authorized as a reasonable warrantless search. 387 U.S. at 546-55 (Clark, J., dissenting).

59. See notes 44-45 and accompanying text supra.


61. E.g., Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 367 (1974).
vided on the appropriate application of the reasonableness doctrine to warrantless intrusions. One suggestion, a sliding scale of safeguards that vary with the intrusiveness of the search or seizure, holds some promise, but harbors potential problems. In spite of the diversity of recommendations, scholars generally consider a greater focus on the fourth amendment's reasonableness requirement independent of the warrant requirements to be desirable.

II. Instant Case

In the instant case, the Court defined the protection afforded by the fourth amendment as freedom from arbitrary and oppressive interference into privacy and personal security by law enforcement officials, and declared that weighing the public interest against the fourth amendment interests of the individual is the procedure to be followed in establishing constitutional safeguards. This balancing was used to resolve the question whether to require reasonable suspicion to validate the stop for questioning, a seizure under the fourth amendment. The Court found a strong public interest in authorizing stops without reasonable suspicion, since the traffic on major routes is too heavy for an officer to have more than a brief opportunity to observe any single car and develop the requisite suspicion. Thus, the checkpoint's deterrent effect on smugglers of aliens would be lost if reasonable suspicion were required. In addition, the Court noted that while such stops intrude on a right to free passage and, to a more limited extent, on the right to personal security, the magnitude of this intrusion is less than for roving patrol stops.

62. One scholar recommends categorizing searches and seizures by fact situation so that standards of reasonableness can be delineated. E. Griswold, Search and Seizure: A Dilemma of the Supreme Court 47-52 (1975). Another proposes administrative rules by police departments that outline procedures for searches and seizures that are reviewed for reasonableness. Amsterdam, supra note 61, at 416-17.

63. See Amsterdam, supra note 61, at 390-93.

64. See id. at 375-76, 393-94. See also E. Griswold, supra note 62, at 39-42.

65. See generally Amsterdam, supra note 61, at 414-18; E. Griswold, supra note 62, at 49-52; T. Taylor, supra note 60, at 46-50.

66. 428 U.S. at 554. The Court supported this definition by citing Brignoni-Ponce, Ortiz, and Camara.

67. 428 U.S. at 555. As authority for the balancing analysis, the Court cited Brignoni-Ponce and Terry and described the balancing and resultant protections used in Almeida-Sanchez and Brignoni-Ponce.

68. 428 U.S. at 556.

69. Id. at 556-57. For the facts the Court relied upon to establish the magnitude of the illegal alien problem, see id. at 551-54.

70. Id. at 557-60. While the objective intrusion is the same, the Court considered the
In delineating the constitutional protections required, the Court declared that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion." The Court granted wide discretion to the field officers in selectively referring cars to the secondary inspection area at San Clemente, noting that even if the referrals made are based upon apparent Mexican ancestry, there is no constitutional violation. The individual's protection was guaranteed by limitations on the intrusiveness of the stop and the nature and location of the checkpoint. The Court relied on the fact that location of fixed checkpoints is a high level administrative decision in which factors such as inconvenience to the public are considered. The Court rejected the argument for a warrant requirement because the stop had sufficient constitutional protections without a warrant and did not involve the search of a dwelling.

The difference in the subjective intrusion between a checkpoint and a roving patrol to be a significant distinction. The elements of this subjective intrusion were described as concern over authority to stop, fright, and surprise. Id. at 558-59. The stigmatizing effect, occurring when only a few cars are referred for secondary questioning at the San Clemente checkpoint, was considered not to involve fright but to actually further some fourth amendment protections by minimizing the intrusion on others. Id. at 560. The Court saw a minimized intrusion as being a furtherance rather than a violation of protection. The dissent viewed this as a convolution of fourth amendment guarantees. Id. at 572 n.2 (Brennan, J., dissenting).

71. Id. at 560-61 (citations omitted). For authority the Court cited Camara, where area warrants were authorized without particularized knowledge of individual dwellings.

72. 428 U.S. at 563. The Court's reasoning was that due to the minimal intrusion not requiring individual justification, wide discretion was necessary. The Court accepted the government's assertion that apparent Mexican ancestry is not the sole criterion for referral and supported this by figures indicating far fewer cars are referred for questioning than would contain persons of Mexican ancestry based on population percentages in Southern California. Id. at n.16.

The dissent points out that this fails to take into account the percentage of the population with apparent Mexican ancestry that drive cars as compared to the population at large. This arbitrariness and potential discrimination is challenged by the dissent as being unreasonable under the fourth amendment. Id. at 571-73 & n.4.

73. Id. at 559, 565-66. The Court also emphasized the possibility of poststop judicial review of checkpoint location as an additional safeguard.

74. The Ninth Circuit decision dealt entirely with the warrant issue. See note 37 supra. Sifuentes used the warrant requirement as an alternate theory to attack the constitutionality of the stop in this case. 428 U.S. at 564.

75. 428 U.S. at 565-66. The protections of a warrant considered to be already provided were assurance of authority, control of officer discretion, and prevention of hindsight distorting the reasonableness evaluation.

76. Id. This factual difference was used to distinguish the case from Camara. See notes 55-56 and accompanying text supra. The fourth amendment has been held to provide greater protection of homes than automobiles. McDonald v. United States, 335 U.S. 451 (1948).
III. Analysis

The instant case marks a reversal in the Court's trend to require either probable cause for warrantless searches or reasonable suspicion for warrantless stops by the INS away from an international border. Although there is some justification for this different treatment because the seizure in the instant case is either less intrusive or made under more controlled conditions than the immigration searches or seizures previously considered by the Court, the absence of a requirement of individualized suspicion in this case raises important questions about both the nature of an individual's fourth amendment guarantee and the appropriate procedural safeguards to ensure the inviolability of that guarantee in warrantless situations.

Accordingly, this case note will focus on certain fourth amendment procedural standards of protection and on analytical frameworks for determining the reasonableness of these standards. The analysis will first examine the efficacy of two alternative procedural requirements that the Court could have applied to ensure the reasonableness of interrogatory checkpoint stops under the fourth amendment. Next, it will analyze the Court's balancing approach and show that this method of determining reasonableness fails to ensure the inviolability of individual fourth amendment rights. Finally, an alternative analytical framework for determining reasonableness will be proposed that ensures protection of these individual rights without unnecessarily hindering law enforcement interests.

A. Alternative Procedural Requirements to Ensure Reasonableness

1. The checkpoint warrant proposal

A checkpoint warrant is a general warrant authorizing seizures at a specific checkpoint for a limited period of time. The warrant is issued after review by a federal magistrate of an INS affidavit setting forth the grounds for suspecting illegal aliens in the traffic passing through that checkpoint. This area warrant

77. This case note will not address the questions raised by the decision concerning which situations should be included in the Court's holding (i.e., temporary checkpoints, nonimmigration checkpoints) or the necessary limitations and clarification that should come from future decisions.

78. For details of the procedure, see United States v. Martinez-Fuerte, 514 F.2d 308, 310-12 (9th Cir. 1975), rev'd, 428 U.S. 543 (1976).
requires no individualized probable cause, but rests any protection it affords on the judicial officer's conclusion that the probable incidence of immigration violations at the checkpoint justifies stops for questioning.

The Court had ample authority for sanctioning a checkpoint warrant procedure. A warrant had been issued for the San Clemente checkpoint, and the warrant requirement was urged as an alternative by defendant Sifuentes. Such a procedure first found expression in *Camara* for administrative housing inspections and was recommended in *Almeida-Sanchez* by Justice Powell as an alternative in the context of immigration searches and seizures.

The Court, however, rejected a checkpoint warrant in the instant case, claiming that fourth amendment rights could be protected without it. The Court distinguished *Camara*, in that

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79. A copy of the "warrant of inspection" is set forth in full in the circuit court's opinion. 514 F.2d at 311 n.2.

The warrant was not a requirement mandated by the courts. The rationale for obtaining the warrant appears to have been the Ninth Circuit's statement in United States v. Bowen, 500 F.2d 960, 964 (9th Cir. 1974), requiring a permanent checkpoint search to be based on probable cause. This attempt to justify checkpoint operation by a warrant was apparently premature because the Supreme Court criticized the Ninth Circuit for the statement. The decision in *Bowen* allowed the checkpoint search because the standard of *Almeida-Sanchez* was held to be nonretroactive. The *Bowen* court, however, also decided that absent probable cause permanent checkpoint stops and searches would be unconstitutional under *Almeida-Sanchez*. For a discussion of the *Almeida-Sanchez* standard, see text accompanying notes 25-27 supra. Although the Supreme Court affirmed the decision, it chastized the Ninth Circuit for deciding the latter issue because the nonretroactivity holding was sufficient to dispose of the case. Bowen v. United States, 422 U.S. 916, 920-21 (1975). In any event, the warrant failed to survive judicial review in the Ninth Circuit. 514 F.2d at 332.

80. Note 74 and accompanying text supra.

81. Notes 55-57 and accompanying text supra.

82. Such a warrant procedure was outlined as a possibility for roving patrols. 413 U.S. at 283-84 (concurring opinion). Justice Powell proposed the warrant as a way to balance legitimate government needs and constitutionally protected rights. Id. at 275. He then suggested four criteria to consider in issuing the warrant: First, known or reasonably believed frequency of illegal alien traffic; second, proximity to the border; third, geographical considerations; and fourth, probable degree of interference with rights of innocent persons. Id. at 283-84.


83. See notes 55-57 & 76 and accompanying text supra.
the seizure in the instant case did not involve the search of a
dwelling and the notification function of a warrant\textsuperscript{84} was not
needed. More importantly in the present context, the Court con-
considered judicial review of the administrative decision on check-
point location to be a sufficient substitute for judicial review of
field officer’s discretion.\textsuperscript{85}

While the Court’s latter reason attempts to satisfy a well
known purpose of the warrant requirement, mere review of check-
point location will not fully control law enforcement discretion.
There are two types of discretion involved in border patrol stops
for questioning: Discretion as to \textit{where} cars are stopped and dis-
ccretion as to \textit{which} cars are stopped. The Court’s protection re-
moves the former from absolute law enforcement control, but the
decision eliminates arbitrariness\textsuperscript{86} in the exercise of the latter only
when \textit{all} cars are stopped. At San Clemente there was no admin-
istrative or judicial control of field officer discretion in selecting
the cars to be stopped. An area warrant would likewise fail to
eliminate arbitrariness in the exercise of this discretion, since it
does not control the manner of checkpoint operation.

Furthermore, while the Court properly rejected the area war-
rant procedure, its reasons for doing so overlooked the fundamen-
tal flaw with an area warrant: Such a warrant ignores the fourth
amendment’s procedural warrant requirements that “no War-
rants shall issue, but upon probable cause . . . and particularly
describing the place to be searched, and the persons or things to
be seized.” Probable cause and particularity are individualized
requirements that are violated by the general authorization pro-

\textsuperscript{84} One of the purposes of a warrant established by the Court in \textit{Camara} was to
assure the citizen that the inspector was duly authorized to inspect and to define for the
citizen the limits of the inspection. 387 U.S. at 532-33. This notification function appears
to take on greater significance when the warrant is issued on less than traditional probable
cause.

The notification function was performed at the checkpoint by the officers’ uniforms
and the clearly visible signs. 428 U.S. at 546, 565.

\textsuperscript{85} This view represents a change in the Court’s position, since the Court in \textit{Almeida-
Sanchez} was particularly concerned with field officer discretion. 413 U.S. at 270. For a
discussion of the judicial control necessary to curb this discretion, see Coolidge v. New
(1948).

\textsuperscript{86} The primary concern of courts in warrantless searches and seizures has been the
evil of unbridled law enforcement discretion. \textit{See, e.g.}, United States v. Brignoni-Ponce,
(1964).
vided by an area-type warrant.\textsuperscript{87} Authorizing such a warrant would maintain the confusion between the fourth amendment's substantive reasonableness guarantee and the procedural probable cause requirement—a confusion that has beset the courts for years.\textsuperscript{88} The area warrant is thus a step in the direction of writs of assistance.\textsuperscript{89}

2. The individualized suspicion requirement

An alternative safeguard the Court could have applied is an individualized suspicion requirement. Mandating individualized suspicion in permanent checkpoint stops would have been the next logical step in the Court's trend of requiring individual justification for INS searches and seizures away from the border.\textsuperscript{90} This would require a field officer to justify the stop of any particular car by articulable suspicious facts and resulting inferences.

Both types of law enforcement discretion would be controlled by this requirement. Individual justification of each stop eliminates the arbitrariness from discretionary selection of cars. Moreover, judicial review of law enforcement discretion in locating checkpoints ensures that the location is reasonable. While a checkpoint still involves some intrusion on the rights of innocent motorists, the inconvenience of driving through the checkpoint is not arbitrary because of congressional authorization and judicial review.

The Court declined to apply an individualized suspicion requirement because it found both law enforcement and individual interests to be different for permanent checkpoint stops than for stops made by a roving patrol.\textsuperscript{91} Individual interests at permanent checkpoints were found to be different because checkpoint stops are subjectively less intrusive\textsuperscript{92} than roving patrol stops; furthermore, the permanence of checkpoint location is a partial restraint on arbitrariness. Law enforcement interests at permanent checkpoints were perceived to be more compelling, since the checkpoints are central to all INS enforcement procedures away from the border. These interests were considered to be significant.

\textsuperscript{87} See generally Note, Area Search Warrants in Border Zones: Almeida-Sanchez and Camara, 84 Yale L.J. 355 (1974).
\textsuperscript{88} See notes 39, 44-45, 55-58, & 60 and accompanying text supra.
\textsuperscript{89} See notes 44-45 and accompanying text supra.
\textsuperscript{90} The dissent urged this requirement. 428 U.S. at 574-75 (Brennan, J., dissenting).
\textsuperscript{91} For an argument that the Court's factual analysis on these points was the main flaw in the opinion, see 14 San Diego L. Rev. 257 (1976).
\textsuperscript{92} See note 70 and accompanying text supra.
enough in the checkpoint context to obviate application of the more stringent reasonable suspicion standard applied in the roving patrol situation. Moreover, a reasonable suspicion would be harder to develop at a checkpoint than on roving patrol because officers only view the car as it makes a "fleeting stop." Further, it appears that no lesser standard of individualized suspicion could have been established to provide constitutional protection and still permit operation of the checkpoint. Since the Court

93. See notes 31-32 and accompanying text supra.

94. This raises the question whether or not a "fleeting stop" or a "roll-through" would be a seizure and subject to fourth amendment scrutiny. There was a factual dispute as to whether or not a "fleeting stop" was made in the instant case. The Court assumed it to be a seizure. 428 U.S. at 546 n.1. The Ninth Circuit had recognized stops based on founded suspicion developed as cars "rolled through" a checkpoint. United States v. Evans, 507 F.2d 879, 880 (9th Cir. 1974), cert. denied, 422 U.S. 1057 (1975).

95. An individualized suspicion standard must be objective if judicial review is to ensure constitutional protection. When the Court established the reasonable suspicion standard in Terry it declared:

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?

392 U.S. at 21-22 (emphasis added).

This objective control is required to give protection similar to a warrant or probable cause determination that requires a neutral judicial officer. See Coolidge v. New Hampshire, 403 U.S. 443, 449-51 (1971).

In order to be a lesser standard of individualized suspicion, the standard could only be authorization of the stop on more tenuous articulable facts. But the more tenuous the facts, the closer it approximates unfettered discretion. One potential lesser standard that illustrates this difficulty is reliance on apparent Mexican ancestry. While Mexican ancestry is relevant to illegal alienage along the southern border, the majority of people with such ancestry are citizens or legal aliens and would be subjected to these seizures arbitrarily. Thus, this standard would not curb arbitrariness any more than leaving the discretion with the field officer. Reliance on Mexican ancestry alone has universally been held insufficient for establishing founded suspicion. E.g., United States v. Brignoni-Ponce, 422 U.S. 873, 885-86 (1975); United States v. Del Bosque, 523 F.2d 1251, 1252 (5th Cir. 1975); United States v. Bugarin-Casas, 484 F.2d 853, 855 (9th Cir. 1973), cert. denied, 414 U.S. 1136 (1974); United States v. Mallides, 473 F.2d 859, 861-62 (9th Cir. 1973).

In the instant case, the majority condoned referrals to the secondary questioning area made "largely on the basis of apparent Mexican ancestry." 428 U.S. at 563. Since no justification was required for checkpoint stops, no facts needed to be relied on and the Mexican ancestry dictum was not essential to the Court's opinion. The majority implicitly recognized the inadequacy of such grounds by attempting to mitigate concern with reliance on Mexican ancestry by quoting statistics to demonstrate such ancestry was not the only basis for referral. Id. at 562-64 nn. 15 & 17. The dissent took particular exception to this part of the opinion and pointed out many of the inadequacies and dangers of reliance on Mexican ancestry. Id. at 573 & n.4.

96. The checkpoint ceased operation after the Ninth Circuit held the checkpoint
found the illegal alien problem to be serious, a loss of the deterrent effect that permanent checkpoints have on alien-smuggling operations was considered to be too high a price for the protection that reasonable suspicion would afford individual rights.

While an individualized suspicion requirement protects individual rights and marshals much judicial precedent, the Court properly recognized that it is not mandated by the Constitution. Although the fourth amendment's warrant requirements of probable cause and particularity require individualized justification, the reasonableness requirement for warrantless situations makes no such demand. Theoretically, any control on law enforcement action that would guarantee a person's security against unreasonable searches and seizures could satisfy the reasonableness requirement for warrantless intrusions without individualized suspicion. Thus an individualized suspicion requirement is a part of the reasonableness protection for warrantless searches and seizures only when necessary to ensure individual rights.

**B. The Court's Balancing Analysis**

One analytical framework the Court has used to determine the reasonableness of warrantless searches and seizures is the balancing of public interests against individual interests. The objective of this balancing analysis is to determine which procedural requirements should apply to the search or seizure. In previous decisions, this balancing analysis has resulted in procedures that are outgrowths of the fourth amendment's procedural warrant requirements.

The balancing analysis in the instant case, however, resulted in warrant to be invalid and required founded suspicion. Bernsen, Search and Seizure on the Highway for Immigration Violations: A Survey of the Law, 13 SAN DIEGO L. REV. 69, 73 (1975) (Bernsen is General Counsel for the Immigration and Naturalization Service).

97. See note 69 and accompanying text supra.

98. See 428 U.S. at 561. The traditional viewpoint has been that reasonableness is equivalent to probable cause or an individualized suspicion variant in warrantless situations. This viewpoint is reflected in the dissent's accusation that the majority decision "empties the Amendment of its reasonableness requirement." Id. at 568.


100. Brignoni-Ponce and Terry imposed the reasonable suspicion standard. Notes 48-50 and accompanying text supra. Although Camara did not require individualized suspicion as a result of the balancing, it did require the formalities of a warrant. Notes 55-56 and accompanying text supra.
in a determination that no individualized suspicion was required to ensure reasonableness. The Court did not denominate its analysis as a determination of reasonableness but simply declared that constitutional safeguards were determined by weighing "the public interest against the Fourth Amendment interest of the individual." The balance struck in the instant case was the first time the Court has permitted a warrantless intrusion without any of the procedural safeguards required for warrants. This pure reasonableness determination relies on checkpoint location and limitations on the extent of the seizure's intrusiveness to guarantee constitutional rights.

While the Court's determination reflects the realization that a reasonableness determination does not automatically dictate the infusion of aspects of probable cause, the method it adopted in determining reasonableness fails to guarantee individual rights as the Court defined them in the instant case. The Court stated that the amendment's guarantee "prevent[s] arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." This widely articulated standard is in harmony with the acknowledged purpose of the amendment to control unfettered law enforcement discretion. The difficulty with the Court's analysis is that the resulting controls on the extent of intrusiveness ensure that the seizure is not oppressive but do not control arbitrariness. Oppressiveness is curtailed by confining the stop to brief questioning concerning the motorist's right to be in the country and requiring probable cause to justify further inquiry or search. But the only control on arbitrariness is the nature of permanent checkpoint operation and location. Judicial review of this administrative decision fails to control the arbitrariness involved in selecting any given car for questioning.

The efficacy of judicial review as a control on discretion is seriously impaired by the precedent established in this case. If the San Clemente checkpoint, located on the freeway between

101. 428 U.S. at 555.
102. See id. at 556.
103. Id. at 554.
105. See note 86 and accompanying text supra.
two of California's largest cities is reasonable, it is unlikely that any checkpoint location within the 100-mile limit can be successfully challenged. While the location was chosen to minimize interference with traffic along the route, the traffic volume is so large that only a small percentage of the cars can be stopped by referring them to a secondary questioning area. Because the discretion of field officers in selecting cars is unlimited, there is no control on arbitrariness. On the other hand, had the decision been limited to approval of the Sarita checkpoint, the precedent would not have condoned such arbitrariness for the simple reason that the Sarita checkpoint involved the stop of every car.

The Court justified this unfettered discretion by weighing oppressiveness against arbitrariness: "As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol Officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved." Although the Court claimed this advanced fourth amendment protections by subjecting fewer people to the stops and facilitating traffic flow, it distorted its definition of the individual's protected interest. Thus, the balancing analysis is valid only if the Court foregoes its own definition of the individual's fourth amendment rights or holds those rights to be violable.

Establishing reasonableness by balancing interests has the danger that individual rights may be extinguished by a strong public interest. Admittedly the public interest in this case is strong because of the extent of the illegal alien problem and the possibility that the checkpoint would cease operation if a more stringent standard had been required. Yet the fourth amendment guarantees that the "right" (not merely an interest) to be

107. Id. at 562 n.15.
108. In an eight-day period, 146,000 cars passed through the checkpoint, only 820 were referred for questioning, and 171 contained illegal aliens. Id. at 554.
109. Id. at 563-64.
110. Id. at 560. The dissent claimed that such a rationale failed to consider freedom from intrusion to be the norm and thus "stands the Fourth Amendment on its head." Id. at 572 n.2.
111. The illegal alien problem is serious. In fiscal year 1963 the INS apprehended 38,361 deportable aliens. By 1973 the number had risen to 498,123. United States v. Baca, 368 F. Supp. 398, 404 (S.D. Cal. 1973). By 1975 the number of deportable aliens apprehended had risen to 596,796, of which 579,448 were Mexican aliens. [1975] INS ANN. REP. 103.

112. See note 96 supra.
secure from unreasonable searches and seizures "shall not be violated." To define reasonableness as the weighing of personal against public interests will not ensure inviolability. If arbitrariness is an evil of unreasonable searches and seizures, as the Court suggests, the balancing in this decision failed to cure that evil. Acknowledgement of law enforcement interests should not result in abrogation of fourth amendment rights. This possible erosion of individual rights argues strongly against a determination of reasonableness by weighing individual interest against public interests.

C. An Alternative Proposal to Determine Reasonableness

A close analysis suggests that reasonableness under the fourth amendment has two aspects: First, the reasonableness of authorizing the search or seizure without a warrant; and second, the reasonableness of the search or seizure procedural safeguards. The essence of the proposed analytical framework is to examine each of these questions separately and thereby segregate the impacts of public and individual interests in the reasonableness determination. The first examination takes public law enforcement interest into account in determining whether a warrant is required. The second takes the individual's fourth amendment right into account by scrutinizing the search or seizure procedural requirements to ascertain whether sufficient safeguards are present to guarantee that right. The consideration of public interest and individual rights in separate reasonableness determinations ensures that public interest cannot extinguish individual rights in the balance.

113. See notes 86 & 103-04 and accompanying text supra.

114. The Court refused to abridge constitutional rights for law enforcement necessity in Almeida-Sanchez. "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." 413 U.S. at 273.

In United States v. Bowen, 500 F.2d 960 (9th Cir. 1974), aff'd, 422 U.S. 916 (1975), the Ninth Circuit used similar reasoning: "[T]he government argues that fixed-checkpoint searches, even if not the functional equivalent of border searches, should be upheld simply because they are urgently needed. . . . The short answer to this argument, however, is that necessity alone cannot override the Fourth Amendment's prohibition against unreasonable searches and seizures." Id. at 967.

115. This possible erosion is undoubtedly one of the reasons many argue for the equivalency of reasonableness and warrant requirements for warrantless searches and seizures. Individualized suspicion requires articulable reasons for incursions on any individual's rights. Such reasons are subject to review by a neutral magistrate to ensure that the facts and resulting inferences were reasonable. With this impartial review, the individual rights are not as susceptible to extinction by considerations of public interest.
The examination of the reasonableness of authorizing a search or seizure without a warrant should begin by recognizing that a warrant should be required whenever feasible. If requiring a warrant defeats law enforcement interests, Congress or the courts could authorize a reasonable search or seizure without it. But if a warrant requirement is only an inconvenience to law enforcement objectives, reasonableness would demand a warrant. Clearly, any search or seizure pursuant to a warrant is still subject to the reasonableness requirement for procedural safeguards. Provided the intrusion is not unreasonable per se,\textsuperscript{116} the procedural requirements mandated by the Constitution, probable cause and particularity, will ensure reasonableness. Since these requirements always apply to a warrant, area or general warrants are precluded. Thus, a properly issued warrant will provide adequate protection of individual rights.

Warrantless searches and seizures, however, demand closer analysis of the reasonableness of procedural safeguards. Since no procedure is specifically mandated, courts should scrutinize available procedures to ensure that an individual's fourth amendment rights are not abrogated. This necessitates clearly ascertaining the substance of this right.\textsuperscript{117} Freedom from arbitrary and oppressive intrusions on privacy and personal security, the definition the Court used in the instant case, establishes a substantial and well-recognized standard.\textsuperscript{118}

The procedural safeguards necessary to ensure reasonableness will be more stringent as the oppressiveness or the arbitrariness of the intrusion increases. Although increasing the strictness of the standard in proportion to the extent of intrusion suggests the potential for endless classification,\textsuperscript{119} it appears that warrantless searches and seizures could easily be limited by the courts to three categories.

The first category includes searches and seizures which, absent exigent circumstances, would require a warrant. An example

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\textsuperscript{116} A search or seizure that is unreasonable per se would be one that "shocks the conscience" of the court. Rochin v. California, 342 U.S. 165, 172 (1952) (administration of an emetic to recover swallowed capsules).

\textsuperscript{117} Since the precise nature of an individual's right is not explicit in the language of the amendment, it must be divined by the Court. Any concrete characterization of the right guaranteed by the fourth amendment is therefore fraught with peril. But this has not been and should not be an insurmountable barrier. If the definition becomes inadequate to fully protect individual rights, it can be rectified by the Court through a more careful delineation of the standard.

\textsuperscript{118} See notes 103-04 and accompanying text supra.

\textsuperscript{119} See note 64 and accompanying text supra.
is the stop and search of a moving vehicle. Such intrusions should be strictly held to the probable cause requirement to protect individual fourth amendment rights. The second category of searches and seizures, represented by the brief detention and frisk in *Terry* or the roving patrol stop for questioning in *Brignoni-Ponce*, is of sufficiently limited intrusiveness that the reasonable suspicion standard would prevent arbitrary and oppressive intrusions. The third category involves searches or seizures of yet more limited intrusiveness such that those limitations on intrusiveness, combined with controls on the circumstances under which the search or seizure is permitted, are sufficient to preclude arbitrariness and oppressiveness. In this third category, individualized suspicion would not be required. Under this analysis, law enforcement interests are given greater effect than under an inflexible requirement of individualized suspicion in every warrantless situation. New categories should be acknowledged only upon establishing a very substantial distinction between the safeguards available and the oppressive or arbitrary nature of the search or seizure.

Applying this analysis to the instant case results in greater protection of individual rights than was afforded by the Court's analysis. The reasonableness of authorizing the seizure without a warrant has been established by statute and accepted by the Court. Thus, law enforcement interests have been recognized and accommodated in the proper context. The next question is whether or not the procedural safeguards are adequate. The seizures in the instant case were not oppressive, since they did not involve an arrest or search of the person, or a search or seizure of his possessions. They merely constituted a brief detention for questioning. Controls on arbitrariness, however, differ between the two checkpoints. Since all cars are stopped at the Sarita checkpoint, the arbitrariness of selective referral is not present. That seizure is therefore reasonable without further safeguards.


121. The Court decisions beginning with *Almeida-Sanchez* have never questioned the statutory authorization to search or seize without a warrant.

122. It could be argued that the officer's view into the car was a search. But this is not sufficiently intrusive to be oppressive. Such a search occurs wherever a law enforcement officer is authorized to be, thus discretion is controlled by checkpoint location. The holding in *Brignoni-Ponce* precludes this type of search for officers on roving patrol absent the justification of founded suspicion.
The potential for abuse of discretion in the referral system at San Clemente, however, violates freedom from arbitrary intrusions. Such discretionary selection would be constitutionally sound only when more adequate safeguards, such as reasonable suspicion, are provided.

Requiring reasonable suspicion would in all likelihood render the San Clemente checkpoint inoperable.\textsuperscript{123} This is a serious consequence in view of the legitimate law enforcement interest in controlling illegal aliens. On the other hand, the precedent of permitting law enforcement interests to result in the abrogation of constitutional rights could have far reaching repercussions. The Court should not reach to such lengths to protect law enforcement interests.\textsuperscript{124}

\begin{itemize}
    \item \textsuperscript{123} In fact the San Clemente checkpoint ceased operation when the Ninth Circuit imposed the founded suspicion requirement. See note 96 supra. Even under a founded suspicion requirement, however, the checkpoint may still be able to function by allowing founded suspicion to develop as cars roll-through or make a fleeting stop. See note 94 and accompanying text supra.
    \item \textsuperscript{124} These law enforcement interests are more appropriately protected by legislation that provides alternative law enforcement measures. The fourth amendment creates difficulties with current enforcement measures only when they are performed away from the border or its functional equivalents, because those crossing the border have different rights as compared to those within the country. In Carroll v. United States, 267 U.S. 132 (1925), the Court said cars could be arbitrarily stopped "in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." \textit{Id.} at 154 (emphasis added). This power at the border was reaffirmed in United States v. Brignoni-Ponce, 422 U.S. 873, 883-84 (1975), and Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). Thus Congress could deal with the illegal alien problem by eliminating or reducing the need for checkpoints away from the border.
    \item There are two reasons for checkpoints away from the borders: First, many aliens enter at unpatrolled locations, and second, the border pass system is abused. If these reasons for removed checkpoints were obviated, then law enforcement interests would not suffer unduly by eliminating permanent checkpoints.
    \item Two possible alternatives exist that might remove that rationale for permanent, removed checkpoints. First, increased patrolling might be a solution to the illegal alien problem. Effective patrolling of the 2000 mile border is, however, a physical impossibility. Increased patrols have not proven productive in the past. See United States v. Baca, 368 F. Supp. 398, 405 (S.D. Cal. 1973). Moreover, such patrolling may be prohibitively expensive (the Ninth Circuit took judicial notice of this fact in the instant case, 514 F.2d at 318). Second, concerted efforts could be made to reduce the abuses of the border pass system. While border passes, authorized by INS regulations, 8 C.F.R. § 212.6 (1977), could be granted in fewer cases or discontinued altogether, there are serious diplomatic and economic drawbacks to such a proposal.
    \item Since better employment is a primary reason for illegal alien entry, an alternative law enforcement technique could focus on reducing that incentive. One method would be to impose criminal penalties on employers of illegal aliens. See Cal. Labor Code § 2805(a) (West Supp. 1976) (this statute was upheld by the United States Supreme Court in DeCanas v. Bica, 424 U.S. 351 (1976), rev'd 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974)). Current federal law specifically excludes employment from the punishable offenses consti-
V. Conclusion

The Court made significant strides in fourth amendment jurisprudence by its break with the tradition that reasonableness in a warrantless situation requires elements of probable cause. This advancement, however, is not without its perils, the most significant of which is the balancing of public interests against individual interests to determine which searches and seizures are reasonable. The proposed alternative analytical framework, with its emphasis on the individual's fourth amendment right to be free from arbitrary and oppressive intrusions, suggests a method of averting misuse of the precedent.


In any event, legislative action is the appropriate channel for vindication of law enforcement interests in the present context.

The United States Attorney General brought suit for the United States (the government) against Maryland officials to enjoin certain practices and policies in the administration of the state’s program of care and training for the institutionalized mentally retarded. The government claimed that these practices and policies resulted in widespread deprivation of rights guaranteed to the hospital’s residents by the eighth, thirteenth, and fourteenth amendments.1

The Maryland officials moved to dismiss, contending that the Attorney General had no standing to initiate the suit. The United States claimed statutory authority to sue under 28 U.S.C. sections 516 and 518,2 under the “take Care” clause of the Constitution,3 and under a nonstatutory governmental right to sue arising when state actions result in widespread deprivation of constitutional rights.4 The United States District Court for the District of Maryland held that without a specific statutory grant of authority the Attorney General’s power did not rise to the bringing of a suit on behalf of the United States under the fourteenth amendment. Accordingly, the defendant’s motion to dismiss was granted.

I. BACKGROUND

A. Statutory Authority

In 1870, Congress enacted a law creating the Department of Justice.5 Section 5 of this act included the basic language cur-

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3. U.S. Const. art. II, § 3: “[The President] shall take Care that the Laws be faithfully executed . . . .”
4. See notes 24-29 and accompanying text infra.
rently embodied in 28 U.S.C. sections 516 and 518(b). These sections provide that the Attorney General shall direct litigation in which the United States is "a party, or is interested," and that when the United States is "interested," the Attorney General may conduct any case in federal court when he "considers it in the interests of the United States."

Clearly, sections 516 and 518(b) provide the Attorney General with both the authority and the responsibility to protect the interests of the United States in suits in which the United States is a defendant. While the Attorney General's access to the courts is not so apparent when he seeks to initiate suits as a plaintiff to protect alleged government interests, it seems clear, nonetheless, that when there is actually a legitimate interest of the United States that needs protection, sections 516 and 518(b) authorize the Attorney General to sue.7

The statutory language can be interpreted as a simple declaration that when the United States has a legitimate interest to protect (as defined by statute or traditional standing requirements) the Attorney General shall be the United States' representative in court. The language may also be interpreted as a more comprehensive declaration that the Attorney General is himself vested with the power to determine when the United


"[E]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."


"When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or an officer of the Department of Justice to do so."

In the instant case, the Attorney General contended that in §§ 516 and 518(b) Congress has given the executive broad powers to sue to protect the interests of the United States. See Memorandum of the United States in Opposition to Defendants' Motion to Dismiss at 4-5, United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976), appeal docketed, No. 76-2184 (4th Cir. Sept. 3, 1976).

7. The Supreme Court has viewed the predecessors of §§ 516 and 518 as giving the Attorney General authority to protect government interests. Speaking of the statutes, the Court said: "[N]o Act of Congress has amended the statutes which impose on the Attorney General the authority and duty to protect the Government's interests through the courts." United States v. California, 332 U.S. 19, 27-28 (1947).
States has such an interest to protect. The former interpretation gives the Attorney General authority to conduct litigation for the United States provided that the government has a demonstrable interest to protect that is sufficient to satisfy the requirements of standing. The latter interpretation gives the Attorney General the authority to determine when the United States is "interested" and in effect allows the Attorney General to determine his own standing.

Specific statutory standing has been given the Attorney General in certain limited areas. There is, however, no comprehensive description embodied in statute that identifies the requisite interest which allows the Attorney General to sue. Thus, it is necessary to examine case law to determine when and why the Attorney General has been given authority to sue in the absence of a statutory grant.

B. Nonstatutory Right to Sue

The first judicially created authority for the Attorney General to sue arose in cases involving his right to bring suit to protect the proprietary and contractual interests of the United States.

8. This expanded interpretation was rejected by one federal district court that said that § 516 "does not explicitly provide that officers of the Department of Justice may conduct any litigation in which they believe the government has any interest; it merely provides that if any is conducted, it shall be done by the Department of Justice." United States v. Daniel, Urbahn, Seelye, & Fuller, 357 F. Supp. 853, 858 (N.D. Ill. 1973).

A similar expanded interpretation, however, was applied in People ex rel. Well v. Graber, 394 Ill. 362, 68 N.E.2d 750 (1946), in applying what is now 28 U.S.C. § 517 (1970). Section 517 states the following:

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

The court in Graber stated:

While the Attorney General may not maintain an action solely for the vindication of private rights or redress of private grievances in which the public has no interest and may not appear in any litigation upon behalf of a defendant except for the interests of the United States, we think it must be conceded that the above section authorizes the Attorney General to direct the appearance of a United States Attorney in any civil suit between private persons in which the interests of the United States are involved and vests the Attorney General with discretionary power to determine when the interests of the United States are actually involved in the litigation and require attention and protection.

394 Ill. at 370, 68 N.E.2d at 755 (emphasis added).

9. See notes 52-60 and accompanying text infra.
10. See, e.g., note 49 infra.
Later, government access to the courts was allowed when the Attorney General sought to set aside a land patent obtained from the government by fraud. "[T]hat the United States should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual," reasoned the Supreme Court, "is hardly open to argument." In United States v. American Bell Telephone, this rule was extended to give the government standing to protect itself against fraud in the obtaining of patents for inventions.

The language of the Court in Bell Telephone marked an expansion of the Attorney General's nonstatutory right to sue, since the Court emphasized the right of the government to sue to prevent a "grievous wrong upon the general public" rather than its right to protect the government's proprietary and contractual interests. Thus, the Court began to show a willingness to allow the Attorney General standing to sue to protect not only the rights of the government as an entity but the rights of large groups of private citizens.

In re Debs was the next major extension of the Attorney General's nonstatutory power to sue. Debs involved a government suit to enjoin union activities that obstructed interstate commerce during the Pullman strike of 1894. Although the Court could have granted the Attorney General authorization to sue the United States could sue to protect its interests the court said: "In all cases of contract with the United States, they must have a right to enforce the performance of such contract, or to recover damages for their violation . . . . It would be strange to deny to them a right which is secured to every citizen of the United States." Id. at 181 (emphasis added). See United States v. Oregon, 295 U.S. 1 (1935); Kern River Co. v. United States, 257 U.S. 147 (1921); Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1851); United States v. Tingey, 30 U.S. (5 Pet.) 114 (1831). 15

The argument asserts that the practice of a gross fraud upon the United States, concerning matters of immense pecuniary value, and affecting a very large part of its population, is not a proper question of judicial cognizance. It would be a strange anomaly in a government . . . . to hold that . . . . there should be no remedy for such a wrong.

14. Id. at 357-58:
[I]t will be observed that this broad assertion [that the Attorney General has no standing] admits that a party may practice an intentional fraud upon the officers of the government . . . . and that he may by means of that fraud perpetrate a grievous wrong upon the general public . . . . [T]he argument asserts that the practice of a gross fraud upon the United States, concerning matters of immense pecuniary value, and affecting a very large part of its population, is not a proper question of judicial cognizance. It would be a strange anomaly in a government . . . . to hold that . . . . there should be no remedy for such a wrong.
15. 158 U.S. 564 (1895).
because of the government's proprietary interest in the mails, a much broader basis of standing was declared:

We do not care to place our decision upon this ground alone [i.e., proprietary interest in the mails] . . . . The obligations which [the government] is under to promote the interest of all, and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in the court. . . .

. . . [W]henever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties. 18

Relying on this broad language, courts have upheld the Attorney General when he has brought actions to protect alleged government interests. Thus, it has been generally recognized that the Attorney General has nonstatutory standing to maintain actions to relieve widespread burdens on interstate commerce, 19 to remove obstructions to navigable waters within the boundaries of the United States, 20 to protect the government's policies concerning national defense, 21 to protect the government's policies concerning national defense, 21 to enforce conditions of federal grants, 22

17. See Searight v. Stokes, 44 U.S. (3 How.) 151 (1845) (holding that the mails are property of the United States while in transit).
18. 158 U.S. at 584-86.
20. In Sanitary Dist. v. United States, 266 U.S. 405 (1925), the United States sued to enjoin an agency of Illinois from continuing practices that resulted in the lowering of the water level of Lake Michigan thereby obstructing commerce. The United States Supreme Court stated:
The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce . . . but also to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned, and, it may be, also on the footing of an ultimate sovereign interest in the Lakes. The Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize this suit.
Id. at 425-26.
21. In United States v. Arlington County, 326 F.2d 929, 923-33 (4th Cir. 1964), the court held that the government had a nonstatutory right to sue to protect members of the naval forces from being subjected to state personal property tax in violation of the Sailors' Civil Relief Act of 1940. Accord, Sullivan v. United States, 395 U.S. 169 (1969).
and to enjoin deprivation of civil rights if there is an accompanying burden on interstate commerce.\footnote{22} Although basing their holdings on other grounds, some courts have suggested that the Attorney General has "authority to sue to remedy widespread and severe deprivations of constitutional rights."\footnote{23}

The 1970 federal district court case of \textit{United States v. Brand Jewelers, Inc.}\footnote{23} marked the broadest judicial interpretation to date of the Attorney General's nonstatutory right to sue. In \textit{Brand} the Attorney General sued to enjoin a systematic practice of "sewer" service of process that resulted in numerous default judgments and subsequent garnishments of wages against ghetto dwellers.\footnote{24} The court held that the Attorney General had standing to sue due to the alleged burden on interstate commerce caused by the large-scale garnishment of wages.\footnote{25} The court also held...

Aside from the contractual aspects of the relationship between the United States and the State of Alabama concerning these grants, there is no necessity for specific statutory authority in order to permit the United States to bring this action... [It has been determined upon numerous occasions by the courts of our land that the Attorney General may sue on behalf of the United States by virtue of his office if the United States has an interest to protect. 28 U.S.C. §§ 516-519.


26. The defendants in \textit{Brand} had developed a system whereby merchandise was sold to ghetto dwellers on easy terms. When the buyers failed to keep up the payments, process servers prepared affidavits evidencing service of process without ever having delivered the documents to the person to be served. Default judgments were entered and subsequently the ghetto dwellers' wages were garnished to pay the debt; the garnishment of wages was usually the first notice that these alleged debtors received. The Attorney General not only sought an injunction against the participating companies and process servers, but also sought damages for deprivation of property without due process of law. 318 F. Supp. at 1294.

27. Congressional findings show that commerce might be obstructed as a result of garnishment practices since they often result in loss of employment for the debtor that in turn results in disruption of employment, production, etc. Consumer Credit Protection Act of 1968, 15 U.S.C. § 1671(a)(2) (1970).

The trend has been to relax the requirement of a burden on interstate commerce. In \textit{Debs}, decided in 1895, the burden on commerce was nationwide and the emergency nature of the situation required executive intervention through court action. In \textit{Brand}, decided in 1970, the Attorney General was considered to have standing when the only link with interstate commerce was whatever burden on interstate commerce might arise from the...}
that the United States "has standing to sue to end widespread
deprivations (i.e., deprivations affecting many people) of prop-
erty through 'state action' without due process of law,"28 This
latter holding apparently constituted an extension that allowed
the Attorney General to protect citizens' fourteenth amendment
rights independent of interstate commerce considerations.29
The cases, then, demonstrate that the government's interest
in interstate commerce has often given the Attorney General
standing in the courts when mainly individual constitutional
rights were being enforced.30 Some of those cases could be inter-
preted as granting the Attorney General standing to vindicate
constitutional rights independent of interstate commerce consid-
erations. Alternative grounds of statutory authority or, following
Debs, burdening interstate commerce existed, however, in every
case.

II. INSTANT CASE

In Solomon the court began from the premise that the execu-
tive has no power unless it can be found in express congressional
authorization or explicitly or implicitly in the Constitution. The
court noted that sections 516 and 518
tell us nothing about the nature of "interest" which will activate
the Attorney General's discretion to act. These sections, there-
fore, constitute no authority on which to base a conclusion that
Congress has explicitly authorized the executive to bring suits
generally under the thirteenth and fourteenth amendments.31
Similarly, the court, noting that "the executive's burden of show-
ing the need for an independent authority to act is most severe"
in areas of protection of fourteenth amendment rights and develop-
ment of interstate commerce policy, stated that the "take Care"
clause was an insufficient rationale to justify allowing the
Attorney General to maintain the action.32

28. 318 F. Supp. at 1299.
29. Traditionally, only natural persons have been allowed to sue to protect fourteenth
amendment rights. Hague v. C.I.O., 307 U.S. 496, 514 (1939). Some courts have held that
the United States is not a "person" within the meaning of the fourteenth amendment and
is therefore unable to sue to protect fourteenth amendment rights. United States v. Biloxi
Mun. School Dist., 219 F. Supp. 691, 693-94 (S.D. Miss. 1963), aff'd on other grounds,
30. See cases cited in notes 24-25 supra.
31. 419 F. Supp. at 362-63 (emphasis added).
32. Id. at 372. The Constitution directs that the President shall take an oath to
After tracing the development of nonstatutory standing of the Attorney General to its farthest reaches in the interstate commerce context as represented by Debs and Brand, the court noted that "[t]he extension of the Debs principle toward the outer limits of the definition of 'burdens' on interstate commerce works a subtle reorganization of the balance of power between the executive and legislative branches of the federal government." Furthermore, such an extension would upset the system of federalism in that it would expose nearly all state policies and programs to executive attack. The court stated that the same principles of balance of powers and federalism "which militate against extending Debs to the limits of the notion of burdens on interstate commerce also dictate against . . . [extension of the Debs principle] into the area of thirteenth or fourteenth amendment enforcement." The court also pointed out that Congress has specifically considered giving the Attorney General broad powers to sue under the fourteenth amendment and has rejected

"preserve, protect, and defend the Constitution of the United States," U.S. Const. art. II, § 1, cl. 7, and that he "shall take Care that the Laws be faithfully executed." Id. § 3. The Attorney General can be considered "the hand of the President in taking care that the laws of the United States in protection of the interests of the United States . . . be faithfully executed." Ponzi v. Fessenden, 258 U.S. 254, 262 (1922). Such reasoning could be used to argue that the Attorney General therefore has authority to bring suit to "take Care" that constitutional rights not be violated.

There is no question that Congress may give the Attorney General the power to enforce laws by criminal prosecution or civil suit. United States v. Solomon, 419 F. Supp. at 362. See, e.g., United States v. Raines, 362 U.S. 17, 27 (1960). Absent statutory authority, however, it is not clear that the Attorney General may sue civilly to enforce the constitutional rights of others. In relation to private parties seeking standing, the courts have frequently stated that "one may not claim standing . . . to vindicate the constitutional rights of some third party." See, e.g., Barrows v. Jackson, 346 U.S. 238, 256 (1953).

The courts have generally applied a narrow interpretation of the "take Care" clause. The court in the instant case declared that the clause is "subject to . . . circumspection." 419 F. Supp. at 372. Justice Frankfurter has expressed a similar view. Youngstown Sheet & Tube Co. v. Sawyer, 346 U.S. 579, 610 (1953) (concurring opinion) (quoting Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting)).


34. 419 F. Supp. at 366.

35. Id.

36. Id. at 367.
all such proposals, whereas Congress was silent as to the Attorney General’s standing in the interstate commerce area.

Thus, the court “respectfully decline[d]” to follow Brand’s “imaginative unfolding” of the Debs principle into the area of fourteenth amendment enforcement and dismissed the Attorney General’s suit.

III. Analysis

The instant case is distinguishable from other cases concerning the Attorney General’s standing because it did not contain recognized alternative grounds on which to base such standing. Here the Attorney General did not sue under any statute, nor did he sue to remove burdens from interstate commerce or to protect proprietary, contractual, or national defense interests. Rather, he claimed standing to sue directly and solely under the fourteenth amendment. Thus, an analysis of the issues in the instant case requires more than reliance on and citation of prior case law.

This analysis will first discuss the applicability of balance of powers and federalism principles to the instant case and to the fourteenth amendment context and demonstrate how these principles should operate to deny nonstatutory standing to the Attorney General. Second, the analysis will show that traditional standing criteria could have been applied by the court to reach the same result.


38. The court further distinguished Debs by saying:

It is one thing to give the executive an independent role when there is an emergency threat to interstate commerce to which only the executive branch of government has the capacity to respond with appropriate alacrity, but is quite another thing to give the executive an independent role where the “emergency” is debatable and all that may be at stake is the development of policy concerning interstate commerce. The commerce clause clearly anticipated that policy development is to be left to Congress.

419 F. Supp. at 366.

39. Id. at 368.

40. For a general treatment of the balance of powers concept, see A. Vanderbilt, The Doctrine of the Separation of Powers and Its Present-Day Significance (1953).
A. Constitutional and Policy Considerations

Liberal grants of standing to the Attorney General in the interstate commerce context have shifted some constitutional power in this area away from Congress. The court in the instant case refused to follow suit in the context of the fourteenth amendment. The court, analyzing the effects of the government's claimed right to sue on the balance of powers between the executive and the legislative branches, stated that the same considerations that dictate against extending the government's standing in the interstate commerce context also militate against granting standing to the Attorney General when suing under the fourteenth amendment. In effect, the court acknowledged that non-statutory standing has been improperly granted in marginal interstate commerce contexts, and refused to extend nonstatutory standing to the fourteenth amendment context. The court's analysis emphasizes the similarities in considerations governing the Attorney General's standing in interstate commerce cases and in fourteenth amendment cases. The court could have been much more persuasive, however, by illustrating the differences between these two classes of cases, thereby demonstrating that the Attorney General arguably should have standing in the interstate commerce context but not in the fourteenth amendment context.

41. When dealing with policy considerations, a weighing process inevitably takes place in order for a decision to be made. Hence, to conclude that a certain action would adversely affect the balance of powers in the national government is not dispositive of the issue. Arguably, the government is flexible enough to tolerate some degree of imbalance in the power structure. The issue in the instant case is whether the sacrifice in the balance of powers is worth the good that might accrue by allowing the Attorney General to sue on the behalf of the mentally retarded.

42. See note 36 and accompanying text supra. It is not clear, however, that such is the case. The commerce clause is contained in the main body of the Constitution which distinguishes between the powers of the several branches of the national government. That portion of the Constitution was meant to establish and separate the powers of the three branches of the federal government. There is no doubt that the commerce clause was meant to give Congress, not the executive, the power to regulate commerce. Since Congress is given such plenary power concerning interstate commerce, any independent action on the part of the executive to regulate interstate commerce could be classified as an encroachment on the legislative power.

The fourteenth amendment, however, may not be subject to the same balance-of-powers analysis because it is an amendment and is not found within the constitutional articles that separate the powers of the governmental branches. Nevertheless, § 5 of the amendment states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This may indicate that enforcement of fourteenth amendment rights is given to Congress rather than to the executive or judiciary. But see Memorandum of the United States in Opposition to Defendants' Motion to Dismiss at 18-22, United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976).
When commerce is significantly burdened, the economy of the United States arguably is injured. It follows, then, that the Attorney General represents the real party in interest, the United States, when he sues under the nonstatutory burden-on-commerce theory. In contrast, it can be persuasively argued that the fourteenth amendment was not meant to give the government a right that it could protect; rather, it was meant to endow citizens with power to enforce rights against the states. When constitutional rights are violated the real party in interest is the person who has suffered the injury. Moreover, there is no need for the Attorney General to sue to protect the rights of individuals who, under the fourteenth amendment, are given the opportunity to protect their own rights. Indeed, some courts have held that in the absence of congressional authorization, the Attorney General cannot enforce the constitutional rights of individuals.  

The issue of balance of powers between Congress and the Attorney General also exists because of the language of the fourteenth amendment. Section 5 of the amendment gives Congress "the power to enforce, by appropriate legislation, the provisions of this article." This language apparently means that Congress has the power to specify how fourteenth amendment rights are to be enforced. In fact, Congress has so specified by enacting various civil rights provisions. By "appropriate legislation," Congress has thus defined the circumstances under which the Attorney General may prosecute, intervene, or sue to protect constitutional rights. Since Congress has exercised the power to define in whose favor and under what circumstances an action will lie for violation of constitutional rights, it is an encroachment on that power to endow the executive branch with a nonstatutory power to sue under the fourteenth amendment.  


45. See note 50 infra. In addition, individuals may sue directly under the fourteenth amendment.  

46. The court implied that to allow the Attorney General to sue in the instant case would allow the executive branch to encroach on the power of Congress by exercising an independent role in making law and policy. See 419 F. Supp. at 386. This position relies on the assumption that the Attorney General by suing is directly or unilaterally making law or policy. No executive order is being issued; no law is being declared. The Attorney
Another important constitutional question arising from the instant case—and one not discussed by the court—concerns federalism policies. The question is whether the fourteenth amendment should be enforced against the states by the Attorney General, or whether it should be enforced by providing individuals with a cause of action against states that violate their rights.

Since state action depriving individuals of constitutional rights is intolerable under the Constitution, unilateral executive action would arguably be justifiable to enjoin such state action. If, however, the executive were granted standing under the fourteenth amendment, the litigation would inevitably be directed at state officials, thereby increasing the tension between national and state governments and dealing a serious blow to federalism.

General is merely suing in the courts to enforce a law proposed by Congress and ratified by the states. Any law or policy that might be developed by allowing the Attorney General to sue would be made jointly by the executive and judicial branches. This is not meant to suggest that a majority rules among the branches of the federal government. One branch should not be able to augment its powers or upset the balance of powers by simply gaining the approval of another branch; our system of government recognizes that each branch can operate as a check on any other branch. Nevertheless, it is possible that the executive and judicial branches combined can do what the executive alone cannot. Such was the case when the executive was granted standing to sue to remedy burdens on interstate commerce. Of course Congress could legislate to negate such executive and judiciary action, and thus operate as a check on the combined efforts of those branches. The fact that such legislation has not been enacted supports at least a possible inference that Congress approved of giving the executive such standing. As the court in Solomon properly notes, this inference is not particularly strong:

Action by Congress is usually time-consuming and quite arduous. To place a burden of response on the legislative process would undoubtedly result in the development of ambiguous policy situations in which, for whatever reasons, the legislature has been unable to grind out either an explicit approval or disapproval of the policy brought into being by an executive lawsuit.

Id. To grant standing to the executive to sue in the fourteenth amendment context and let Congress decide whether to legislate otherwise may not be a satisfactory approach. See Note, Nonstatutory Executive Authority to Bring Suit, 85 HARv. L. REV. 1566, 1574-75 (1972).

47. The resolution of the balance of powers question bears heavily on the consideration of federalism. Indeed, it seems impossible in the present context to completely separate the two. If it were decided, for instance, that the executive has nonstatutory power under the fourteenth amendment to sue the states for alleged violations of citizens' rights, a direct confrontation of federal and state power comes into play. If, on the other hand, the executive were allowed to sue the states for violation of fourteenth amendment rights pursuant only to congressional authorization, a softening influence is imposed between executive power and states' rights.

48. Executive court action helped to remedy the widespread discrimination prevalent in the South during the early 1960's. Such action in the courts might also expedite the process of securing to the mentally retarded their rights. Discussion of the extent of the rights of the mentally retarded and the application of constitutional rights to the institutionalized, however, is beyond the scope of this case note.
Allowing individuals to enforce their own rights against the states through the Constitution, on the other hand, does little if any harm to federalism policies.

Neither federal nor individual action is the exclusive method of enforcing the fourteenth amendment. Congress has established a blend of federal and individual enforcement of fourteenth amendment rights. That blend has been altered from time to time to meet current problems in our society.

The challenge of striking an acceptable balance between federal and state powers while at the same time adjusting the balance between federal and individual enforcement of constitutional rights to meet current needs is a task that can best be performed by the national legislature. Of the three branches of the federal government, Congress, through its representatives

49. In establishing the scheme of enforcement of constitutional rights, Congress has given broad powers to individuals whose rights have been violated to bring suit to enforce those rights. See 42 U.S.C. §§ 1983, 1985 (1970). On the other hand, Congress has been careful to limit the power of the Attorney General to enforce such rights. The Attorney General may bring civil suit only in the areas of voting rights, 42 U.S.C. § 1971(c) (1970); public accommodation, 42 U.S.C. §§ 2000a-3, 2000a-5 (1970); public facilities, 42 U.S.C. § 2000b (1970); school desegregation, 42 U.S.C. § 2000c-6 (1970); and housing, 42 U.S.C. § 3613 (1970). Even in these areas the Attorney General's powers are limited. For example, in actions under § 2000c the Attorney General must receive a meritorious complaint from the victim of discrimination and certify that the person is unable to "initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education . . . ." 42 U.S.C. § 2000c-6(a) (1970).

Under 18 U.S.C. §§ 241-242 (1970), the Attorney General may prosecute for conspiracy against the rights of citizens or deprivation of rights under color of law. Section 242 states: "[w]hoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined . . . ." If the Attorney General can prosecute when a party deprives another of constitutional rights under color of law, it seems logical that he should be able to sue civilly to enjoin a party from such actions. An analogous line of reasoning was applied in In re Debs, 158 U.S. 564 (1895). There the Court reasoned that if the executive could have called out the military to remedy the burden on interstate commerce caused by the Pullman Strike of 1894, it would be anomalous to block the executive's effort to solve peacefully the problem by suing for an injunction in the courts. It appears, however, that to apply this reasoning in the fourteenth amendment context would establish a different standard of proof than was intended by §§ 241 and 242. Because §§ 241 and 242 are criminal statutes, convictions would have to be based on proof beyond a reasonable doubt. If the executive were allowed standing to sue civilly, the standard applied to civil suits (proof by a preponderance of the evidence) would allow the Attorney General to accomplish enforcement of constitutional rights in situations where it formerly was not possible.

50. For example, the Attorney General was given temporary powers to sue under 42 U.S.C. § 2000e-6 (Supp. V 1975) to expedite the securing of employment rights to minorities.
from every state, can be most sensitive to the effect that expansion of government powers in the area of fourteenth amendment enforcement would have on the federal system. It seems fitting, therefore, that Congress should continue to strike that balance between individual and federal enforcement through statutory enactments. For the courts to allow the Attorney General to enforce constitutional rights against the states without statutory authorization, especially in the face of congressional disapproval,\textsuperscript{51} would not only smack of judicial legislation but would impair Congress' ability to balance federalism considerations.

B. Standing

Although the issue presented to the court by the defendants' motion to dismiss was primarily a question of standing, the court in reaching its decision placed little emphasis on elements of standing. The main thrust of the opinion concerns federalism and balance of powers arguments. Although, as will be shown below, the court reached a sound result as to the standing issue, it would have been more persuasive had the court utilized the established criteria of standing\textsuperscript{52} in reaching its decision.

The question of standing involves both constitutional and prudential limitations\textsuperscript{53} on the exercise of federal jurisdiction. The constitutional limitation consists of meeting the "threshold question" in every case by determining if the plaintiff has made out a case or controversy within the meaning of Article III.\textsuperscript{54} In its constitutional sense, standing is a question of whether the

\textsuperscript{51} See note 37 and accompanying text supra.

\textsuperscript{52} Admittedly, the law of standing is in a state of confusion. See Warth v. Seldin, 422 U.S. 490 (1975) (compare Justice Brennan's dissent with Justice Powell's majority opinion); Note, Standing To Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974); see generally G. GUNther, Cases and Materials on Constitutional Law 1947-81 (9th ed. 1975). The confusion is further complicated by recent decisions concerning the criteria applied to determine standing. See, e.g., Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 46 (1976) (Brennan, J., concurring); Warth v. Seldin, 422 U.S. 490 (1975); 42 Brooklyn L. Rev. 390, 407 (1975). In addition, it is not clear that the standing tests enumerated in the leading cases apply to all types of plaintiffs. For example, in Warth the Court held that "a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the courts' intervention." 422 U.S. 490, 508 (1975) (emphasis added). This test may not apply to all plaintiffs. Nevertheless, an examination of the case law reveals that certain tests of standing recur.

\textsuperscript{53} In addition to constitutional limitations, the courts have imposed limitations on federal jurisdiction as a matter of judicial self-governance. These latter are called prudential limitations.

\textsuperscript{54} Warth v. Seldin, 422 U.S. 490, 498 (1975).
plaintiff has alleged a personal stake in the controversy sufficient to assure the "concrete adverseness" upon which courts depend for "illumination of difficult constitutional questions." Furthermore, plaintiffs in federal courts must allege some "threatened or actual injury" before a court may obtain jurisdiction. Congress, of course, cannot abrogate the constitutional standing requirements derived from Article III.

Unlike the constitutional limitations, the judicially imposed prudential limitations can be abrogated by statute. Significant prudential requirements of standing include the need for the actual injury to be a particularized injury rather than a "generalized grievance." Also, prudential limitations require that the plaintiffs assert their own legal rights and interests, and not rest their claims to relief on the rights or interests of third parties. Another prudential requirement of standing is that the statutory or constitutional provision upon which plaintiffs' claims are based must be understood to grant persons in plaintiffs' positions a right to relief.

In the instant case, Congress had not expressly given the Attorney General standing; therefore, both constitutional and prudential standing rules were applicable. By claiming particularized injury of the type warranting judicial relief, the government in the instant case might have asserted that three separate interests were substantial enough to give the Attorney General standing. These interests are briefly evaluated below.

1. Federal legislation

The existence of federal appropriations and legislation to benefit the mentally retarded arguably demonstrates that the government has a sufficient interest in enforcing the rights of the mentally retarded to give the Attorney General standing to bring suit. Standing, however, is not achieved by an intense concern,

58. Id. at 499; see, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226-27 (1974); United States v. Richardson, 418 U.S. 166, 176-80 (1974); Ex parte Levitt, 302 U.S. 633, 634 (1937) (per curiam).
but only by a personal stake in the outcome of litigation such as will guarantee sufficient adversity to create a "case or controversy" between the parties.61

By acting for the benefit of the mentally retarded, Congress has indeed shown a concern for the problems of a disadvantaged minority. It is difficult, however, to imagine that this interest is a personal stake in the outcome sufficient to assure "concrete adverseness." Any harm to the United States that might arise from such a general interest could scarcely be termed a "particularized injury." Moreover, one would be hard put to discover any aspect of life that has not received the attention of legislation and that would be immune from government suit should interest measured merely by congressional "concern" be deemed to satisfy standing requirements.62

2. Integrity of funding programs

Since the Maryland state hospital involved in the instant case has received a substantial amount of funds from government coffers,63 the federal government arguably has standing to ensure

61. Note 54 supra.

62. In the instant case, even if the United States could show some "threatened or actual injury" to itself, the Attorney General could not sue to protect the constitutional rights of the institutionalized because of the doctrine of jus tertii. "One may not claim standing . . . to vindicate the constitutional rights of some third party." Barrows v. Jackson, 346 U.S. 249, 255 (1953).

One legal writer has noted the following:

In those cases permitting the assertion of constitutional jus tertii, the Court has noted the presence of a variety of factors that allegedly justified a departure from its articulated rule. Three considerations . . . seem to recur: first, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders' asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of jus tertii not permitted.

Note, Standing To Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 425 (1975). The present case does not qualify under any of the three above-stated exceptions.

63. On appeal one of the litigants noted:

Submissions to the district court reflect that Rosewood has received over 13 million dollars over the last three years . . . through the Medicaid program. Statutes provide that funds such as this may be expended if the primary purpose of the institution in question is "to provide health or rehabilitative services," it meets standards "prescribed by the Secretary [of Health, Education and Welfare]" and the individuals for whom payment is sought are "receiving active treatment." 42 U.S.C. § 1396d(d).


The Secretary of Health, Education and Welfare has established standards for "intermediate care facilities." 45 C.F.R. § 249.12 (1976). The effect of these regulations
that no constitutional rights are violated in the administration of the funded programs. In some cases the Attorney General has been deemed to have standing to enforce the conditions of federal grants. In such cases, however, the government was not suing under the fourteenth amendment but rather under contract theory or statute. Undeniably the government could cut off funds or sue under a contract theory if conditions of federal grants were violated. The Attorney General did not proceed under such a theory in the instant case, but instead sued under the fourteenth amendment. To allow the Attorney General broad powers of enforcement under the fourteenth amendment because of the government's interest in its funding programs would effectively destroy all limitations on government suits; it is difficult to find state programs that have not had the benefit of some federal dollars.

Furthermore, the government often seeks to further its policies by attaching conditions to federal grants. Such funding programs can readily be protected by cutting off funds to organizations that refuse or fail to comply with the conditions of the grants. Giving the government a broad power to sue under the fourteenth amendment because it attached conditions to the receipt of federal funds, however, would in effect allow the federal government to purchase an otherwise unavailable right to sue.

In sum, the government's interest in its funding programs might provide a "stake in the outcome" sufficient to satisfy constitutional standing to sue under some legal theories. But such an interest, in the absence of statutory authorization, does not give the United States standing to vindicate the constitutional rights of individuals under the fourteenth amendment.

and of 42 U.S.C. § 1396d(d) (Supp. V 1975) cited above is not an appropriate subject for decision in the instant case. It may be that the Attorney General could establish standing to sue under these regulations to enforce conditions attached to Medicaid funds received by the hospital. The Attorney General in the instant case, however, sued under the fourteenth amendment; therefore, whether he would have standing to sue under the regulations and statutes is not relevant to this case.


66. 419 F. Supp. at 361.

67. See note 43 and accompanying text supra.
3. Parens patriae

In Solomon the government claimed an interest in remedying widespread deprivations of constitutional rights. Under this theory the government would be acting as a sort of parens patriae. Such a theory, although available to state governments in certain situations, has not frequently been applied to the federal government.

Even if the federal government could make general use of the parens patriae doctrine in the instant case, the government would not meet the three requirements of the doctrine. First, the parens patriae must assert a minimal proprietary interest of its own. The Attorney General in the instant case might be able to satisfy this requirement by asserting the interest of the United States in federal funds allegedly misused by the defendants. Second, the threatened injury must affect a “considerable portion” of the country’s citizens. Here, the federal government would not be able to satisfy the requirement. The 1600 persons confined at the Maryland institution clearly are not a “considerable portion” of the nation’s citizenry. And third, suit by the parens patriae cannot be for the benefit of particular individuals. The Attorney General’s action for particular institutionalized individuals in the instant case prevents the fulfillment of this requirement as well. Thus, it is apparent that the Attorney General has no grounds to sue under parens patriae theory in addition to being unable to satisfy other standing criteria.

IV. Conclusion

Although some courts would happily have entangled themselves in the emotional issues concerning the rights of the men-

68. 419 F. Supp. at 361.
70. At times it may seem that the federal government acts as parens patriae in protecting the rights of individuals, e.g., when the government sues under 42 U.S.C. § 2000c (1970) to enforce school desegregation. Such a suit, however, is specifically authorized by statute and does not rely on a parens patriae theory to satisfy standing requirements.
tally retarded, the court in the instant case carefully refused to view this case as deciding anything about the rights of the institutionalized. 4 Although the decision may affect the rights of the institutionalized, 5 the court’s approach reaches a result that would not create a dangerous precedent for allowing the Attorney General nonstatutory authority to sue under the fourteenth amendment.

Granting the Attorney General standing in the instant case would leave very few limitations on the Attorney General’s power to sue. In response to a query by Congress as to the result of giving the Attorney General power to sue under the fourteenth amendment, Attorney General Robert F. Kennedy said that such a provision would enable the Department of Justice to initiate or intervene in suits concerning

- state criminal proceedings or in book or movie censorship;
- disputes involving church-state relations; economic questions such as allegedly confiscatory ratemaking or the constitutional requirement of just compensation in land acquisition cases; the propriety of incarceration in a mental hospital; searches and seizures; and controversies involving freedom of worship, or speech, or of the press. 6

In effect, to allow the Attorney General a general power to sue under the fourteenth amendment would allow him to step into the shoes of any private citizen and become the self-appointed protector of all private rights in order that remote government interests be protected. By dismissing the Attorney General’s claim in the instant case the court avoided establishing a precedent that could have been misused to allow executive interference in disputes involving private rights. Although allowing the Attorney General to sue when state actions deprive the developmentally disabled of their constitutional rights would be one means of protecting those rights, such power should be given, if at all, by Congress to insure that the rule and its limitations can be carefully prescribed. The significance of the instant case is the attempt by the court to limit a power dangerous not necessarily in its present use, but in its potentialities. 7

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74. 419 F. Supp. at 361.
75. The decision at least effects a delay as to when the institutionalized may enjoy their rights, if in fact they are deprived, i.e., until Congress can act (assuming it chooses to grant statutory authority to the Attorney General to sue).
77. Note, Growing Executive Power and the Constitution, 4 Syracuse L. Rev. 109, 117 (1952).
The plaintiffs in this case sought recovery from the defendants for allegedly slanderous radio broadcasts. The district court ordered the defendants to disclose the names of all their claimed confidential informants and to produce, or make available to plaintiffs, all information defendants claimed to have received from those informants. The defendants appealed the order pursuant to a provision of the New Mexico newsman's privilege statute. The plaintiffs filed a motion to dismiss the appeal upon the grounds that the statutory provision under which the appeal was taken was unconstitutional. At the request of the district court, the question of the constitutionality of the appellate procedure and the broader question of the constitutionality of the newsman's privilege itself were briefed for review. The supreme court dismissed the appeal, holding that the privilege in general was invalid in judicial proceedings and that the statute's appeal provision was largely invalid.

I. Background

A. General Overview

Although hotly debated a few decades ago, the question of
whether the judiciary has or should be given power to make rules of procedure has long been resolved, generally in the courts’ favor. The methods or doctrines, however, used to support or implement this result have varied from state to state. Generally, courts have claimed rulemaking authority upon one of three bases: (1) an historically existing, inherent judicial power to promulgate procedural rules; (2) an enabling act passed by the legislature authorizing the courts to make rules of procedure; or (3) a constitutional provision specifically delegating to the supreme court the right to create procedural rules for judicial proceedings.

1. Rulemaking as an inherent power of the courts

Dean Roscoe Pound, an early twentieth century champion of the theory that courts have inherent rulemaking power, outlined three rationales in support of the theory. First, Pound maintained that at the time the American Constitution was adopted, the King’s Court in England had power to make general rules of procedure, and American courts inherited this power, although it remained dormant for many years. During this period of dormancy, the rulemaking power was exercised by legislatures as they enacted codes and practice acts. This period of judicial apathy, however, did not negate the courts’ inherent power. Second, Pound reasoned that in making its own procedural rules a court can formulate and discard rules as it deems necessary. Because of the particularized way it reacts to each case, a court is better suited than a legislature to deal with procedural matters. Courts need this inherent flexibility in order to effectively perform their duties. Third, Dean Pound observed that the rules governing the operation of a governmental branch ought to be made by that branch. The judiciary knows best what rules are necessary and appropriate for the judicial process and thus is best suited to formulate those rules.


5. Stein, supra note 4, at 645.
6. See People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934); Little v. State, 90 Ind. 338, 339 (1883).
10. Id. at 601-02; see Curd, supra note 4, at 38-39.
11. Pound, supra note 4, at 602-03.
12. Id.
2. Rulemaking as a statutory power

Legislative acts, delegating to the jurisdiction's highest court the power to regulate procedure in its own and all lower court proceedings, are a second basis for judicial rulemaking authority. Such an enabling act may indicate that the authority is to be exercised exclusively by the court\textsuperscript{13} or concurrently with the legislature.\textsuperscript{14} It may also prescribe the status of former statutory rules of procedure.\textsuperscript{15}

3. Rulemaking as a constitutional power

An express mandate in the form of a state constitutional provision is another ground upon which some courts have been able to claim rulemaking power.\textsuperscript{16} When rulemaking authority is based on a constitutional provision, arguments against vesting the authority in the judiciary, such as judicial usurpation of a legislative function and the unconstitutional delegation of legislative authority, lose their cogency.\textsuperscript{17} Occasionally, when an express constitutional mandate for rulemaking is absent, courts have bolstered assertions of implied constitutional power with arguments of inherent power.\textsuperscript{18}

\textsuperscript{13} E.g., W. VA. CODE §§ 51-1-4 to 4a (1966):

\begin{quote}
The supreme court of appeals may, from time to time make and promulgate general rules and regulations governing pleading, practice and procedure in such court and in all other courts of record of this State. All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified, suspended or annulled by rules promulgated pursuant to the provisions of this section.
\end{quote}

\textsuperscript{14} See, e.g., N.M. STAT. ANN. § 21-3-2 (1953).

\textsuperscript{15} E.g., Mich. CONST. art. VI, § 5: “The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.” See note 8 supra.


\textsuperscript{17} E.g., State ex rel. Anaya v. McBride, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975).
B. Rulemaking in New Mexico

In 1933 the New Mexico legislature passed an enabling act declaring that New Mexico’s Supreme Court had the power to regulate the rules of pleading, practice, and procedure in judicial proceedings of all the courts of New Mexico.\(^9\) Section 2 of this act specified that previous statutory procedural rules and subsequent legislative acts would become rules of the court unless suspended or modified by the court.

In *State v. Roy*,\(^2\) the supreme court first interpreted the enabling act. The court stated that the act was not a grant of power to the court, but rather a legislative declaration of abdication from the field of procedural rulemaking.\(^2\) Following *Roy*, the court reaffirmed its position that it had inherent and implied constitutional power to promulgate procedural rules.\(^2\) Finally, in *Anaya v. McBride*,\(^2\) the court held that the power to prescribe procedural rules was vested exclusively in the judiciary and that any statutory attempt to enact such rules would not be binding.\(^2\)

The court pointed to its constitutional, supervisory authority over inferior courts\(^2\) and reasoned that the grant carried with it the inherent power to make procedural rules.\(^2\) Thus, in light of the


The Supreme Court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

... .

All statutes relating to pleading, practice and procedure, now existing, shall, from and after the passage of this act, have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto.

\(^2\) 40 N.M. 397, 60 P.2d 646 (1936).

\(^2\) Id. at 419, 60 P.2d at 660. The court concluded that "[w]hen the legislature enacted chapter 84, it merely withdrew from a field wherein it had functioned as a coordinate branch of our government with the court in the promulgation of rules of pleading, practice, and procedure." Id. Finding that the New Mexico Constitution's grant of supervisory authority over lower courts meant that it must have rulemaking power, the court asserted that it had both constitutional and inherent power to promulgate procedural rules. Id. at 421-22, 60 P.2d at 661-62.


\(^2\) 88 N.M. 244, 539 P.2d 1006 (1975).

\(^2\) Id. at 246, 539 P.2d at 1008.

\(^2\) N.M. Const. art. 6, § 3: "The Supreme Court ... shall have a superintending control over all inferior courts . . . ."

\(^2\) 88 N.M. at 246, 539 P.2d at 1008.
1933 enabling act, Roy, its progeny, and McBride, it seems clear that the New Mexico Supreme Court has rulemaking power and that this power may be exclusive.\textsuperscript{27}

C. Rulemaking and the Substance-Procedure Dichotomy

Even though it may have exclusive power to make procedural rules, a state supreme court has no rulemaking authority with respect to substantive matters. It is therefore critical to a discussion of rulemaking power to distinguish between procedural and substantive matters. Although the line between substance and procedure is difficult to draw,\textsuperscript{28} the distinction has been made in some contexts.\textsuperscript{29}

The distinction is important in differentiating between legislative and judicial responsibilities.\textsuperscript{30} In this context, the legislature is viewed as being empowered to create the substantive rights of individuals and the judiciary is considered as having the power to enforce those rights by means of rules promulgated to that end. Thus, the legislature is to enact laws "which have for their purpose to determine the rights and duties of the individual and to regulate his conduct and relation with the government and other individuals," and the judiciary is to formulate rules "which have for their purpose merely to prescribe machinery and methods to be employed in enforcing these positive provisions."\textsuperscript{31}

The substance-procedure dichotomy and the resulting division between legislative and judicial responsibilities and powers is particularly confusing in the area of the law of evidence. Although rules governing the admission or exclusion of evidence seem to be procedural in nature, certain evidentiary rules are substantive declarations of policy because of their inextricable involvement with legal rights and duties. Such rules are probably beyond a court's rulemaking power.\textsuperscript{32}

\textsuperscript{27}See Curd, supra note 4, at 36.


\textsuperscript{29}The distinction between substance and procedure has perhaps been most important in the area of choice of laws. The determination whether a given rule is substantive or procedural is vital to a decision whether to apply federal or state law in a federal diversity action. See, e.g., Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).


Of various evidentiary rules, privileges appear to be more substantive than procedural. Because they represent both considerations of public policy that are extrinsic to judicial concerns of evidence preservation and policy determinations that the fostering of certain relationships is preferable to the orderly dispatching of litigation, privileges are substantive declarations of certain individual's rights, vesting in these persons rights not otherwise possessed. As has been noted:

While framed as rules of evidence, privileges are not based upon policies concerned with the reliability or relevance of proof or the orderly dispatch of judicial business. Rather they are concerned with the interests to be served by encouraging uninhibited action within the particular situation or relationship. The advancement of the privileged interest is declared more important that the availability of one item of proof in the course of litigation.35

II. INSTANT CASE

In the instant case, the New Mexico Supreme Court reasoned that the statute enacting the newsmen's privilege "did nothing more nor less than attempt to create a rule of evidence, comparable to other privileges."36 Citing Professor Edmund Morgan's rationale for categorizing privileges as evidentiary rules within the court's rulemaking power,37 the court asserted that there was "no

and Hawkins refer specifically to the parol evidence rule and the Statute of Frauds as examples of rules that appear to be procedural and evidentiary while actually being substantive in nature. For example, the parol evidence rule operates as a substantive rule of contract law marking the bounds of what constitutes a contract between parties and defining their duties and rights. See Restatement (Second) of Contracts § 239, Comment a (1973); Green, supra note 28, at 484. Although having procedural aspects similar to the parol evidence rule in that it operates to exclude evidence, the Statute of Frauds is also substantive in nature because it guides people in the formation of contracts and defines certain essential contractual elements.

33. Burden of proof requirements, true evidentiary rules, may also be more substantive than procedural. These requirements provide a method of assuring the orderly presentation of evidence at trial. See Clapp, Privilege Against Self-Incrimination, 10 Rutgers L. Rev. 541, 572 & n.123 (1956); Green, supra note 28, at 484. In the sense that judicial action cannot be taken unless the proof rises to a certain level, however, a substantive right and duty are constituted by burden of proof rules.

34. 3 J. HONIGMAN & C. HAWKINS, supra note 32, at 403-04; Joiner & Miller, supra note 30, at 651; Riedl, supra note 31, at 694. But see Clapp, supra note 33, at 569-71; Morgan, supra note 17, at 483-84; Stein, supra note 4, at 646. See generally Levin & Amsterdam, Legislative Control Over Judicial Rule-making: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 1, 22-24 (1958).

35. 3 J. HONIGMAN & C. HAWKINS, supra note 32, at 403-04.
37. Id. at 1357.
real question about rules of privilege being rules of evidence." While cautioning that the line between procedural and substantive matters was elusive, the court concluded that the rules of evidence are "very largely, if not entirely, procedural" because of their function in the judicial process. Pointing to the adoption of the New Mexico Rules of Evidence, the court declared that the Rules must be procedural because the court had power only to promulgate procedural rules.

Having decided that the privilege was procedural, the court turned to the question of which governmental branch had the authority to prescribe procedural rules. Reviewing the line of cases beginning with Roy, the court concluded that the exclusive power to prescribe procedural rules was vested in the judiciary. Observing that the New Mexico Rules of Evidence specifically exclude any privilege not expressly granted therein, the court held that the legislatively enacted newsman's privilege was invalid in judicial proceedings because no legislative enactment could conflict with the judicially promulgated procedural rules.

III. Analysis

A. Privileges—Substantive or Procedural?

Essential to the court's conclusion in the instant case was the reasoning that all rules of evidence are procedural. Clearly, the court was correct in characterizing privileges, including the newsman's privilege, as rules of evidence. Less supportable, however, is the court's assertion that rules of evidence are procedural. In light of scholarly views noting the substantive nature of some rules of evidence, including privileges, it would have been proper for the court in the instant case to have entertained some doubt as to whether the newsman's privilege was a procedural rule. The court, however, never questioned its general determina-

38. Id. at 1356.
39. Id. at 1357. Quoting from McCarthy v. Arndstein, 266 U.S. 34, 41 (1924), the court stated that "rules of evidence do no more than regulate the method of proceeding by which substantive duties are determined."
40. 551 P.2d at 1357.
41. The question of the statute's validity with respect to legislative, executive, or administrative proceedings was not before the court. Id. at 1359.
42. Id. at 1357-60.
tion that the privilege, as a rule of evidence, must be procedural. Failing to discuss the possibility that substantive rights had been vested in newsmen by the statute, the court bluntly and summarily concluded that all privileges are procedural.

The authorities cited by the court to support its reasoning are not conclusive. Only one, Judge Alfred C. Clapp writing in 1956, unconditionally takes the position that all privileges are procedural.44 In citing Professor Morgan for the proposition that privileges are within the court’s rulemaking authority, the court failed to consider his caveat. According to Morgan, a court may not abrogate a legislatively enacted common law privilege even though it was originally created by court decision.45

Moreover, the previous New Mexico case law does not support the result reached by the court in the instant case. For example, in *Kreigh v. State Bank*,46 the court indicated that certain legislation modifying burden of proof requirements was valid. Although the court’s reasoning in *Kreigh* is unclear, it is difficult to reconcile the case with the disparate result in the instant case. If the *Kreigh* court refused to disturb the legislatively enacted burden of proof, which it termed a rule of evidence,47 because it was a substantive matter, then the result in the instant case is disturbing. Because burden of proof requirements are more clearly associated with the orderly dispatch of justice, normally the touchstone in distinguishing between substance and procedure, than are privileges,48 *Kreigh* would indicate that privileges are substantive matters within the legislature’s power to adopt or modify. If, however, the *Kreigh* court decided that the burden of proof was a procedural matter, then the case must stand for the

44. Clapp, *supra* note 33, at 570-71. Clapp pointed to Justice Brandeis’ dicta in *McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924), that the privilege against self-incrimination “relates to the adjective law.” Thus, reasoned Clapp, “if this privilege against self-incrimination is procedural, then there can be no doubt as to other privileges, and indeed all rules of evidence, are also procedural.” Clapp, *supra* note 33, at 570-71.

Clapp’s line of argument fails to note that the fifth amendment privilege is founded on different policies than are other privileges. The privilege against self-incrimination governs an individual’s relationship with the courts, not with other individuals. A newsman’s privilege, however, fosters a nonjudicial relationship—the uninhibited flow of information between a newsman and his sources. See Carter, *The Journalist, His Informant and Testimonial Privilege*, 35 N.Y.U.L. Rev. 1111 (1960).

45. Morgan states that the “so-called common law privileges of witnesses were created by judicial decision . . . and in the absence of statute, can be disregarded or abolished by judicial decision.” Morgan, *supra* note 17, at 483 (emphasis added).

46. 37 N.M. 360, 23 P.2d 1085 (1933).
47. *Id.* at 367, 23 P.2d at 1089.
48. See note 33 *supra*. 
proposition that the New Mexico legislature has concurrent authority with the court even as to procedural matters.\textsuperscript{49} Thus, if the legislature could properly modify a burden of proof requirement, it could also add to the privileges granted to witnesses.

A later New Mexico case cited by the court, \textit{State v. Arnold},\textsuperscript{50} also does not support the result reached in the instant case. \textit{Arnold} was cited for the proposition that legislatively enacted procedural rules that conflict with judicially promulgated rules must yield to the latter. In \textit{Arnold}, the court was faced with a statute that directly conflicted with a court rule limiting the appeal time in civil actions.\textsuperscript{51} The instant case, however, did not involve inconsistent procedural rules. The only possible conflict of the newsmen’s privilege is with Rule 501 of the New Mexico evidentiary rules, which provides that no privileges are to be recognized except as required by the constitution, the other rules of evidence, or rules adopted by the supreme court.\textsuperscript{52} Because it conflicts with no other privilege in the Rules, the newsmen’s privilege conflicts with Rule 501 only by negative implication, if at all.\textsuperscript{53} Because a legislative enactment of a substantive nature does not upset other positive rules established by the court, there may in fact be no conflict with Rule 501.

Finally, by referring to the adoption of the New Mexico Rules of Evidence for support of the conclusion that the newsmen’s privilege was procedural and therefore within its exclusive power, the court resorted to circular reasoning based upon labelling. Since it had properly promulgated the Rules, the court argued, then those Rules, including privileges, must be procedural. Thus, the court declared, the newsmen’s privilege was a procedural rule within the court’s sole adoptive power. Again the court’s reasoning is clearly faulty, for, as noted above, not all rules of evidence are procedural.

If the controverted newsmen’s privilege is substantive rather than procedural, the New Mexico Supreme Court should have

\begin{itemize}
  \item\textsuperscript{49} This would directly contradict the holding in Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).
  \item\textsuperscript{50} 51 N.M. 311, 183 P.2d 845 (1947).
  \item\textsuperscript{51} \textit{id.} at 314-15, 183 P.2d at 846-47.
  \item\textsuperscript{52} N.M. Stat. Ann. § 20-4-501 (Supp. 1975): “Except as otherwise required by constitution, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to: (1) Refuse to be a witness; or (2) Refuse to disclose any matter; or (3) Refuse to produce any object or writing . . . .”
  \item\textsuperscript{53} The conflict exists, the court apparently believed, because the Rules are comprehensive. \textit{See} 551 P.2d at 1359.
\end{itemize}
recognized that the legislative enactment was constitutionally authorized. The court instead used a mechanical approach to label all privileges as rules of evidence and to define all rules of evidence as being procedural. The court simply used the terms "procedural" and "substantive" to give a result, not a reason.

B. Rulemaking and the Balance of Legislative and Judicial Power

1. Rules in the "twilight zone" between substance and procedure

The court in the instant case recognized that the line between substance and procedure is an elusive one. The court, however, failed to discuss the question of which governmental branch—the legislature or the judiciary—should appropriately make the determination.

The New Mexico Supreme Court had earlier addressed the question. In Southwest Underwriters v. Montoya, Chief Justice Noble, writing for the court, stated:

The distinction between substantive law and those rules of pleading, practice and procedure which are essential to the performance of the constitutional duties imposed upon the courts is not always clearly defined. There may be areas in which procedural matters so closely border upon substantive rights and remedies that legislative enactments with respect thereto would be proper.

If not clearly substantive rules, privileges certainly qualify as rules that border closely upon substantive rights. Indeed, because it establishes and attempts to foster a nonjudicial relationship of confidentiality between a newsman and his sources, the newsman's privilege in question borders closely upon substantive rights. Thus, under Noble's formulation, the privilege would be proper for legislative enactment.

Charles Anthony Riedl has also explained the reason for empowering the legislature to deal with substance-procedure determinations:

As to those rules which may fall in the "twilight zone," the doubt is to be resolved in favor of the legislature, because all

54. Id. at 1357.
56. Id. at 109, 452 P.2d at 178 (dicta).
power not essential to the independent exercise of its constitutional function by one of the three departments of government is vested in the legislature by virtue of it being the law making department.\(^5\)

Application of Riedl's formulation yields the same result as does application of Noble's language—the conclusion that the newsmen's privilege was appropriate for legislative enactment. Because it can hardly be asserted that the exclusive power to enact a newsmen's privilege is necessary for the court in order to exercise its constitutional supervisory power over lower courts, the legislature could properly enact the questioned privilege, since, under Riedl's test, it fell within the "twilight zone." Thus, under either formulation, the legislature could enact the privilege in question because it clearly borders on substantive rights and does not involve matters necessary for the fulfillment of the court's constitutional functions.\(^5\)

2. Public policy decisions as the legislative domain

As a test for determining whether an evidentiary rule should be created by the court or by the legislature, one commentator has suggested the following:

The test we propose is whether a given rule of evidence is a device with which to promote the adequate, simple, prompt and inexpensive administration of justice in the conduct of a trial or whether the rule, having nothing to do with procedure, is grounded upon a declaration of a general public policy.

... If the rule is an expression of general public policy, then it can be prescribed only by the legislature.\(^5\)

A reading of the New Mexico statute reveals that the legislature made a policy decision in favor of the newsmen-informant relationship and the uninhibited gathering of news. The statute calls for a policy of nondisclosure on the part of the newsmen as

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\(^5\) Riedl, supra note 31, at 604 (emphasis added).
to their sources and their unpublished information collected in the newsgathering process. Furthermore, an earlier version of the statute itself indicated that it represented a policy decision by the legislature.

Even one of the authorities cited by the court recognized that the privilege represents a policy decision. P.B. Carter, in arguing against the newsmen’s privilege, states that any justification for the privilege must be found in policy. Carter characterizes the usual policies supporting the privilege as encouragement of the free flow of news and respect for the “conscience” of the journalist-confidant. Indeed, Carter points out that the privilege inhibits the administration of court business because it blocks the search for truth. Surely the decision to favor nondisclosure at the expense of finding truth involves a public policy decision. If, as Carter suggests, the privilege inhibits the search for truth, then it cannot be a rule to promote the “adequate . . . and inexpensive administration of justice.” Thus, the privilege is clearly a statute declaring public policy and not one aimed at the orderly dispatch of judicial business.

New Mexico statutes creating privileged communications have existed since 1880. The right of the state legislature to enact witnesses’ privileges has gone unchallenged until the instant case. In fact, no other case has been discovered where a court has invalidated a legislatively created newsmen’s privilege. Apparently, the New Mexico Supreme Court is alone in asserting that the power to create such a privilege is exclusively vested in the judiciary. In view of the fact that at least twenty-four other states have newsmen’s privilege statutes, the court’s position in the instant case is suspect. Because the creation of the privilege involved a determination of public policy, the legislative enact-

60. There is, however, a stipulation that disclosure may be required if it is essential to prevent injustice. N.M. STAT. ANN. § 20-1-12.1(A) (Supp. 1975).
   It is hereby declared to be the public policy of New Mexico that no reporter shall be required to disclose before any proceeding or by any authority the source of information procured by him in the course of his employment as a reporter for a news media unless disclosure be essential to prevent injustice.
63. Id.
64. Riedl, supra note 31, at 604; Joiner & Miller, supra note 30, at 635.
66. Id.
67. Id. at 9, 17-19. See Wells, supra note 58, at 323-28.
ment should have been upheld. In invalidating the statute, the court violated a long-standing maxim that the judiciary should not strike down a statute unless the court was completely satisfied that the legislature had acted beyond its constitutional limits.

IV. CONCLUSION

In reaching the conclusion that the legislatively enacted newsman's privilege was an unconstitutional infringement on its power to promulgate procedural rules, the New Mexico Supreme Court used a mechanical lockstep approach. While correctly categorizing the privilege as an evidentiary rule, the court incorrectly decided that all rules of evidence are procedural and thus within the court's exclusive power to promulgate. In so doing, the court failed to consider substantive aspects of the privilege that made it appropriate for legislative enactment.

68. Typical of the language of courts which have dealt with the issue is this from an Alabama federal district court:

It is not a matter of judicial concern that the Legislature of Alabama was either prudent or unwise in clothing the sources of a journalist's information with secrecy. So far as this is concerned, the public policy of the State of Alabama in this regard was crystallized by enactment of the statute involved.

Ex parte Sparrow, 14 F.R.D. 351, 353 (N.D. Ala. 1953).


Mark David Oliphant, a non-Indian, was arrested on August 19, 1973, by Suquamish tribal police on the Port Madison Indian Reservation in the State of Washington. He was charged with assaulting an officer and resisting arrest, and then incarcerated. Before trial, Oliphant filed a petition for writ of habeas corpus in the United States District Court, Western District of Washington, claiming that Indian tribal courts have no criminal jurisdiction over non-Indians. The district court denied the petition, and Oliphant appealed. The United States Court of Appeals for

1. The criminal acts with which Oliphant was charged were committed on lands located within Indian country but leased by the Suquamish Tribe to a Washington State corporation. The concept of Indian country was discussed by the district court and will not be treated in this case note. Oliphant v. Schlie, No. 511-73C2 (W.D. Wash. Apr. 5, 1974), aff'd, 544 F.2d 1007 (9th Cir. 1976), cert. granted sub nom. Oliphant v. Suquamish Indian Tribe, 97 S. Ct. 2919 (1977). For a general discussion of what constitutes Indian country, see F. Cohen, Felix S. Cohen’s Handbook of Federal Indian Law 5-8 (1971).

2. The tribe claimed that the authority to try Oliphant before the tribal court was derived from its Law and Order Code. The code provides:

   The Tribal Court of the Port Madison Reservation shall have original jurisdiction over . . . [a]ll crimes committed within the territorial jurisdiction of the Port Madison Reservation and all other Tribally owned lands, . . . except the major crimes as defined by the Act of March 3, 1885 (23 Stat. 362) as amended which are within the jurisdiction of the Federal Government.

   Suquamish Indian Tribe Law & Order Code, ch. 1, art. III, § 3 (1973). The Suquamish Law and Order Code allows for a trial de novo to a tribal court of appeals except as to those issues decided by a jury at the tribal court level. Id. art. II, § 2.

   On the other hand, Oliphant could have been charged in federal court for assaulting the tribal police officer under "one or several of the following federal statutes:" 18 U.S.C. §§ 111, 113, 1114, 1152 (1970). Oliphant v. Schlie, 544 F.2d 1007, 1014 n.2 (9th Cir. 1976) (Kennedy, J., dissenting); see Stone v. United States, 506 F.2d 561 (8th Cir. 1974), cert. denied, 420 U.S. 978 (1975).

3. Pursuant to a previously existing agreement with the Bureau of Indian Affairs, the city of Bremerton provided jail facilities for holding tribal prisoners. Oliphant v. Schlie, No. 511-73C2, slip op. at 2 (W.D. Wash. Apr. 5, 1974).


the Ninth Circuit affirmed, holding that non-Indians are subject to Indian tribal court jurisdiction since Congress has never expressly taken this jurisdiction away from Indians. The United States Supreme Court has since granted Oliphant's petition for certiorari.

I. BACKGROUND

Indian law is a complex potpourri of federal, state, and tribal law. In criminal matters, the applicable law can be determined only after identifying the person who committed the act, the nature of the criminal act, and the location of the crime. Continual changes in congressional policies and federal and tribal laws further complicate the criminal jurisdiction issue.

To lay the foundation for an analysis of the instant case, this section will examine the doctrine of original tribal sovereignty and explore its meaning and scope, discuss the disputed matter of statutory jurisdiction over non-Indians committing crimes upon Indians within Indian country, and present a brief overview of the concept of Indian self-government as modified by congressional policy from the early 1800’s to the present.

A. Tribal Self-Government Under the Doctrine of Residual Sovereignty

Prior to the colonization of America, Indian tribes possessed full sovereignty over their land and members. Following conquest, Indians became subject to congressional regulation as provided by the Constitution, and the tribes' external powers of sovereignty ceased. The tribes' internal powers of sovereignty, however, remained. Subsequent treaties, statutes, and federal

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6. 544 F.2d 1007 (9th Cir. 1976).
8. The term "residual sovereignty" is used to convey the concept of original Indian sovereignty that has been limited through subsequent action by the United States. See note 14 and accompanying text infra.
9. Although the President of the United States is authorized to make treaties, U.S. Const. art. 2, § 2, treaty making with Indians has now ceased. Notes 11, 51 and accompanying text infra. Responsibility for governing Indians is vested in the Congress of the United States by constitutional provision: "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. Const. art. 1, § 8.
10. For an explanation of the terms "external" and "internal" powers, see F. COHEN, supra note 1, at 122-26, 273-77.
11. For a discussion of the history and legal force of Indian treaties, see OFFICE OF THE SOLICITOR, UNITED STATES DEP’T OF THE INTERIOR, FEDERAL INDIAN LAW 138-214 (1958) [hereinafter cited as FEDERAL INDIAN LAW].
administrative regulations further diminished Indian sovereignty by limiting the internal powers of the Indian tribes. Presently, Indian tribes are considered wards of the federal government and retain only residual sovereignty.

The concept of tribal residual sovereignty is derived from two nineteenth century Supreme Court cases. In Cherokee Nation v. Georgia, Chief Justice Marshall clarified the special position given Indian tribes in the United States. Quoting the Constitution, Marshall asserted that Indian tribes are distinct from both "foreign Nations" and the individual states: "They may, more correctly, perhaps, be denominated domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." In Worcester v. Georgia, Marshall refined his earlier pronouncement on the status of Indian tribes, likening them to conquered nations: "The Indian nations had always been considered as distinct, independent political communities . . . [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger [nation] . . . ."

These passages and cases have generally been accepted to stand for the proposition that Indian tribes, within the limits imposed by the federal government, have the right to govern

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12. The authority of Congress to pass legislation affecting Indians is inferred from Congress' constitutional charge to regulate the commerce of the Indian tribes. See note 9 and accompanying text supra. Titles 18 and 25 of the United States Code embody the majority of the statutes affecting Indians and Indian tribes. For a general discussion of this topic, see F. COHEN, supra note 1, at 89-100.


14. FEDERAL INDIAN LAW, supra note 11, at 398 (footnote omitted):

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign State. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government.


16. Id. at 17.

17. 31 U.S. (6 Pet.) 515 (1832).

18. Id. at 559-61.
themselves free from encroachment on internal tribal powers by state governments. Thus, Indian tribes may form their own governments, pass and enforce their own ordinances, exclude non-members of the tribe and trespassers from their reservations, regulate business transacted on the reservation, create tribal courts, and exercise civil and criminal jurisdiction over their members.

More recently, however, the Supreme Court has limited the application of the doctrine of residual sovereignty. In *McClanahan v. Arizona State Tax Commission*, the Court observed that "modern cases... tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable

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22. Quechan Tribe v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976).

23. Id.; Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975).


25. Colliflower v. Garland, 342 F.2d 369, 376 (9th Cir. 1965). Tribal courts operate on some Indian reservations under the authority of the Indian tribe. Powers held by the tribal courts are derived from the sovereignty of the tribe itself. The Eighth Circuit aptly explained this derivation of authority from the tribe in *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 91 (8th Cir. 1956):

The plaintiffs would argue that there is found no provision in the Federal Constitution for Indian courts. None is necessary... [T]he Constitution, by authorizing Congress to regulate commerce with the Indian tribes and by authorizing the making of treaties with them, while not in and of itself establishing the sovereignty of the tribes, nevertheless does recognize their sovereignty. As interpreted by the United States Supreme Court, that sovereignty is absolute excepting only as to such rights as are taken away by the paramount government, the United States. Under this view, not even a Congressional Act would be necessary to establish the legality of the Oglala Sioux Tribal Courts. However, regulatory powers over these judicial establishments have been exercised to promote uniformity, gradual assimilation and other ends.

In contrast, other Indian reservations have Courts of Indian Offenses, created by the authority given the Secretary of the Department of Interior by Congress. M. PRICE, LAW AND THE AMERICAN INDIAN 129 (1973). The Commissioner of Indian Affairs is specifically authorized to promulgate regulations with regard to Courts of Indian Offenses. 25 U.S.C. § 2 (1970). The Suquamish court that exercised jurisdiction over Oliphant was an Indian tribal court. 544 F.2d at 1009.

26. 25 U.S.C. § 1302 (1970); 25 C.F.R. § 11.1-.87NH (1976); see Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975); Colliflower v. Garland, 342 F.2d 369, 376 (9th Cir. 1965).

treaties and statutes." Thus, while the doctrine of residual sovereignty has been invoked to justify many powers of self-government, jurisdiction over non-Indians who commit criminal offenses upon Indians has been permitted heretofore only when specifically authorized by treaty.

B. Federal Jurisdiction over Non-Indians Committing Crimes on Reservations

Under a number of early treaties between the federal government and Indian tribes, the tribes were allowed jurisdiction over non-Indians committing crimes within Indian country. Treaties with the Suquamish Tribe, however, are silent on this subject.

In addition to treaties, federal statutes affect the criminal jurisdiction of tribal courts. One of the earliest of these statutes, the Trade and Intercourse Act of 1790, designated the method of handling non-Indians who committed crimes against Indians within Indian country. The act provided that such crimes and offenses were to be tried in the federal courts. Subsequent revisions of the act retained the provision for federal criminal jurisdiction over non-Indians. On the other hand, the revisions did not provide for jurisdiction over Indians who committed crimes against other Indians within Indian country. Thus, for such

28. Id. at 172. In McClanahan, the Court, citing an 1868 treaty with the Navajo tribe, invoked the doctrine of residual sovereignty to prevent the State of Arizona from levying an income tax on Indians earning income on the reservation.

The McClanahan standard was met in the recent case of United States v. Mazurie, 419 U.S. 544 (1975). There, the Court referred to 18 U.S.C. § 1161 (1970) for authority that Indian tribes are permitted to regulate the sale of liquor on the reservation, even if sold by non-Indians doing business on lands held by non-Indians within the limits of the reservation.

29. F. COHEN, supra note 1, at 6 & n.48.

30. 544 F.2d at 1010.

31. Ch. 33, 1 Stat. 137 (1790).

32. Id. § 5:

[I]f any citizen or inhabitant of the United States . . . shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian . . . [the offender] shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or [territorial] district to which he . . . may belong, against a citizen or white inhabitant thereof.

33. Id. § 6.

34. For a brief history of subsequent revisions of the 1790 Trade and Intercourse Act, see FEDERAL INDIAN LAW, supra note 11, at 323-24.

35. The Trade and Intercourse Act of 1817, the second permanent Trade and Intercourse Act, contained this provision:
crimes Indian tribes were allowed exclusive jurisdiction over their members.\textsuperscript{36}

This unqualified tribal jurisdiction was limited by the Appropriations Act of 1885.\textsuperscript{37} This act granted federal courts exclusive jurisdiction over Indians who committed any of seven major offenses against other Indians.\textsuperscript{38} The current version of this provision extends federal jurisdiction to fourteen major crimes.\textsuperscript{39}

The current relevant versions of the 1790 Act and the 1885 Act,\textsuperscript{40} however, do not expressly grant federal courts exclusive jurisdiction over non-Indians committing crimes against Indians within Indian country.\textsuperscript{41} Nevertheless, federal and state courts,

\begin{quote}
[S]uperior courts . . . and circuit courts and other courts of the United States, of similar jurisdiction in criminal causes . . . shall have . . . full power and authority to hear, try, and punish, all crimes . . . against this act . . .: Provided, That nothing in this act shall be so construed . . . to extend to any offence committed by one Indian against another, within any Indian boundary.
\end{quote}

Ch. 42, § 2, 3 Stat. 383 (1817).

\textsuperscript{36} This pronouncement of jurisdiction over crimes by Indians against Indians was seen by Cohen as recognition of tribal "self government." F. Cohen, supra note 1, at 362.

\textsuperscript{37} Ch. 341, § 9, 23 Stat. 385 (1885). This act was passed in response to the Supreme Court decision in Ex parte Crow Dog, 109 U.S. 556 (1883), which held that the courts of the United States were without criminal jurisdiction over a Sioux Indian who had murdered another Indian on an Indian reservation. The Court stated that such jurisdiction had not been conferred upon the lower federal courts by Congress. Id. at 572.

\textsuperscript{38} Ch. 341, § 9, 23 Stat. 385 (1885). The seven offenses were murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.


Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

\textsuperscript{40} 18 U.S.C. § 1152 (1970):

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

\textsuperscript{41} Note 39 supra.

\textsuperscript{42} This fact was emphasized by the majority in the instant case. 544 F.2d at 1010-11; note 61 and accompanying text infra.

Though unmentioned in the statutes, crimes committed against non-Indians on reservations, whether by Indians or non-Indians, have historically been punishable in federal
with the exception of the district court and the Ninth Circuit in
the instant case, have consistently read such a grant into the
statutes. In Ex parte Kenyon, the court directly addressed the
question of whether a federal court or an Indian tribal court was
empowered to exercise jurisdiction over a non-Indian who had
allegedly committed larceny within Indian country. Citing ear-
lier versions of the current statutes for authority, the court
stated that for an Indian court to have jurisdiction, the "offender
must be an Indian, and the one against whom the offence is
committed must also be an Indian." Similarly, in Donnelly v.
United States, the Supreme Court declared that a non-Indian
who had shot an Indian on the reservation was subject to federal
rather than state jurisdiction. Other courts have reached the
same conclusions as the Kenyon and Donnelly courts.

and state courts respectively. See Apapas v. United States, 233 U.S. 587 (1914) (Indian
against non-Indian); Draper v. United States, 164 U.S. 240 (1896) (non-Indian against
non-Indian); Alberty v. United States, 162 U.S. 499 (1896) (non-Indian tribal member
against non-Indian); United States v. McBratney, 104 U.S. 621 (1881) (non-Indian against
non-Indian). See also Federal Indian Law, supra note 11, at 320-22, 324-25.

Several tribal codes, including the Suquamish Law and Order Code, supra note 2,
claim tribal jurisdiction over non-Indians committing crimes within Indian country.

43. Notes 44-49 and accompanying text infra. The Assimilative Crimes Act, 18
U.S.C. § 13 (1970), incorporates "the criminal laws of the several States into the laws of
the United States so that violations will be prosecuted as Federal offenses." Federal
Indian Law, supra note 11, at 308. Therefore, even actions which are criminal under state
law and not under federal statute are tried by federal courts. The sole exception to this is
where the state has assumed complete jurisdiction over all civil and criminal Indian cases
588. The State of Washington does not retain this power. 544 F.2d at 1012.

44. 14 F. Cas. 363 (C.C.W.D. Ark. 1878) (No. 7,720).

45. The court in Kenyon questioned whether a crime was indeed committed and, if
so, whether it was within Indian country. The court left unresolved the first question but
concluded that whatever questionable act did take place was transacted "beyond the
place over which the Indian court had jurisdiction." Id. at 355. This indicates that not
only are the person and act important factors in determining whether Indian courts have
jurisdiction, but also that location must be considered. See F. Cohen, supra note 1, at 358.

46. 14 F. Cas. at 355.

47. Id.

48. 228 U.S. 243 (1913).

49. See, e.g., Williams v. Lee, 358 U.S. 217, 220 n.5 (1959); Williams v. United States,
327 U.S. 711, 714 (1946); United States v. Chavez, 290 U.S. 357, 363-65 (1933); United
(1914); In re Wilson, 140 U.S. 575, 577-79 (1891); Ex parte Crow Dog, 109 U.S. 566, 571-
72 (1883); State v. Kuntz, 66 N.W.2d 531 (N.D. 1954).

Recently, however, and prior to the instant case, the Ninth Circuit had described the
issue of tribal criminal jurisdiction over non-Indians as "an unanswered question." Que-
chan Tribe v. Rowe, 531 F.2d 408, 411 n.4 (9th Cir. 1976).
C. Government Policy and Indian Self-Government

The concept of tribal self-government has generally been accepted.\textsuperscript{50} Actions taken by Congress, however, have only sporadically supported this notion; during the past two centuries, congressional policies have ranged from termination of Indian tribal units to preservation of the same.\textsuperscript{51} More recently, Congress has sought to assimilate Indians while on the reservation and to preserve the concept of self-government.\textsuperscript{52} This policy of assimilation has been followed to the present with few exceptions.\textsuperscript{53}

The Indian Civil Rights Act of 1968\textsuperscript{54} illustrates the congressional policy of assimilation by the tribes.

Specifically, the permitting of treaty-making by the tribes ended with passage of the Indian Appropriation Act of 1871. The act provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Ch. 120, § 1, 16 Stat. 566 (1871) (current version at 25 U.S.C. § 71 (1970)).

\textsuperscript{50} See generally Federal Indian Law, supra note 11, at 395-464.

\textsuperscript{51} Government dealings with the Indians under the line of 19th century congressional policies included removal and placement on reservations, implementation of programs for educating and civilizing the Indians, withdrawal from the tribes of the right to make treaties, and the allotment of tribal lands to individual Indians with a view to terminating the tribal units and preparing the Indians for citizenship. For an historical look at these governmental actions, see S. Tyler, A History of Indian Policy 5-6, 54-91 (1973); Bureau of Indian Affairs, U.S. Dept of the Interior, Federal Indian Policies from the Colonial Period Through the Early 1970's 6-7 (1974); Martone, American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?, 51 Notre Dame Law 600 (1976).


No Indian tribe in exercising powers of self-government shall —

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public
sional intent to assimilate the Indians. That act incorporated into federal Indian law a modified version of the safeguards furnished in the United States Bill of Rights which had been held by the Supreme Court to be inapplicable to Indian tribal governments. Thus, the Indian Civil Rights Act provides an important set of tools for adopting Indians into American culture without terminating their tribal organization.

Resolution of the jurisdictional issue in the instant case requires consideration not only of federal Indian policy but also of the doctrine of residual sovereignty and the historical exclusivity of federal jurisdiction in non-Indian cases. These considerations will be examined in the analysis in an attempt to settle the criminal jurisdiction question in the instant case.

II. Instant Case

In affirming the denial of Oliphant’s petition for a writ of habeas corpus, the United States Court of Appeals for the Ninth Circuit rejected the argument that Indian tribunals lack criminal jurisdiction over non-Indians. Oliphant claimed that the current relevant portion of the 1790 Act, 18 U.S.C. section 1152, effectively strips Indian courts of jurisdiction over all except Indians. The court acknowledged that section 1152 extends federal criminal jurisdiction to Indian country, but indicated that the provision does not extinguish tribal jurisdiction nor declare federal jurisdiction over such cases.

trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

For a comparison of the United States Bill of Rights with the rights provided in this act, see note 93 infra.

55. See note 93 infra.
56. Talton v. Mayes, 163 U.S. 376, 384 (1896); accord, Oliphant v. Schlie, 544 F.2d 1007, 1011 (9th Cir. 1976); Comment, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 HARV. L. REV. 1343, 1344 & n.6 (1969).
58. 544 F.2d at 1010.
Moreover, rather than limiting tribal jurisdiction, the court asserted that the history of section 1152 evinces an intention to prevent Indians from being subject to the double jeopardy of both tribal discipline and federal court rule. The court reasoned that, according to the principle of residual sovereignty, Indian tribes continued to hold unimpaired their right to exercise jurisdiction over offenders entering their boundaries because Congress had not expressly declared federal jurisdiction to be exclusive.

The majority asserted that "practical considerations," based on historical animosity existing between Indians and nearby state residents, supported granting jurisdiction to Indian tribes because crimes committed on reservations by non-Indians might well go other wise unredressed. The court also stated that the policies of the United States would not be frustrated by such a holding. Since the federal government has encouraged Indian tribes to adopt law and order codes, set up tribal courts, and exercise authority over reservation lands, allowing the tribal court jurisdiction over non-Indian offenders for criminal actions as limited by the Indian Bill of Rights is a "small but necessary part of this policy."

Oliphant's second argument, that a fair trial before the tribal court would be impossible since non-Indians would be excluded from the jury venire, was summarily dismissed by the court as premature.

In his dissenting opinion, Judge Kennedy contended that the congressional intent never was to give Indian courts criminal jurisdiction over non-Indians. Disagreeing with the majority's reading of concurrent jurisdiction into section 1152, the dissent stated that "[i]t seems extremely anomalous that Congress would provide for exclusive jurisdiction in the federal courts for major offenses committed by Indians, but permit tribal courts to try non-Indians for these same major offenses." The more rea-

59. Id. at 1010-11.
60. Id. at 1010-11 & 1010 n.3.
61. Id. at 1009 & n.1.
62. Id. at 1013.
63. Id. at 1012-13.
64. Id. at 1013.
65. Id. at 1011-12.
66. To substantiate this conclusion, the dissent relied on the history of 18 U.S.C. §§ 1152-1153 (1970) and administrative declarations of a lack of tribal jurisdiction over non-Indians. Id. at 1014-19 (Kennedy, J., dissenting).
67. Id. at 1018 (Kennedy, J., dissenting).
sonable inference, the dissent argued, is that Congress intended tribal court jurisdiction to extend no further than to Indian offenders.68 Moreover, the doctrine of residual sovereignty should be inapplicable to the question of criminal jurisdiction, the dissent stated, since such a notion has been relied upon only in cases of state encroachment into areas of tribal self-government.69 Similarly, because even as to Indians the tribal courts have jurisdiction only over minor offenses, Judge Kennedy found the exercise of tribal criminal jurisdiction over nonmembers to be nonessential "to the tribe's identity or its self-governing status."70

III. ANALYSIS

The Ninth Circuit resolved the jurisdictional issue of the instant case by invoking the doctrine of residual sovereignty and relying on a reading of section 1152 as providing for concurrent federal and tribal court jurisdiction.71 This analysis will examine the merit of the court's rationale and then focus on underlying policy considerations that support the conclusion reached but do so on grounds other than those principally relied upon by the Ninth Circuit.

A. Inapplicability of the Residual Sovereignty Concept

The majority's residual sovereignty argument rests on congressional silence. Since no express statutory limitation on the criminal jurisdiction of Indian courts over non-Indians exists, the Ninth Circuit found that there had been no curtailment of the original criminal jurisdiction enjoyed by Indian nations.72

The doctrine of original sovereignty was first introduced as a check on state encroachment of tribal government, and application of the concept has previously been limited to cases involving state infringement on tribal rights and to cases justifying Indian governments' regulation of business on reservations.73 According to the limited application standard announced by the Supreme Court in McClanahan,74 residual sovereignty should be viewed as

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68. Id.
69. Id. at 1015 (Kennedy, J., dissenting).
70. Id.
72. Note 61 and accompanying text supra.
73. Notes 15-19 and accompanying text supra.
74. Notes 27-28 and accompanying text supra.
merely a backdrop against which pertinent treaties and federal statutes should be examined when determining issues of state infringement. Since neither state encroachment nor regulation of business on the reservation is at issue here, the applicability of the doctrine of residual sovereignty is questionable.

The concept of residual sovereignty has never been extended to include criminal jurisdiction over non-Indians. Federal cases since Ex parte Kenyon have uniformly held that federal courts have exclusive jurisdiction over non-Indians committing crimes against Indians. Since 1834, administrative agencies empowered with responsibility over Indians and Indian affairs have also followed a pattern consistent with the disallowance of tribal criminal jurisdiction. Moreover, Congress has not acted to change this interpretation of federal law. In addition, the current Law and Order Code promulgated by the Department of Interior for the regulation of courts of Indian offenses provides that these courts have jurisdiction over only Indians for criminal matters and over non-Indians only with their consent for civil matters. Until recently, some tribal judges themselves have stated that

75. Text accompanying note 28 supra.
76. It appears that the earliest pronouncement of the lack of tribal jurisdiction over non-Indians committing crimes within Indian country was in an opinion by the Attorney General:

77. 544 F.2d at 1016 n.7 (Kennedy, J., dissenting). For a brief explanation of the potential exception to exclusive federal jurisdiction, see note 43 supra.
78. For a discussion of these courts, see note 25 supra.
79. Relevant portions of the Law and Order Code provide:

A Court of Indian Offenses shall have jurisdiction over all [criminal offenses enumerated in the Law and Order Code], when committed by any Indian, within the reservation or reservations for which the court is established.

The Courts of Indian Offenses shall have jurisdiction of all [civil suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other [civil suits between members and nonmembers which are brought before the courts by stipulation of both parties.

80. Note 42 supra (discussing the current trend of Indian tribal codes to include
tribal courts have had no jurisdiction over non-Indians. Finally, even commentators favoring the grant of jurisdiction over non-Indians to tribal courts have unanimously recognized that those courts presently lack such jurisdiction.

It appears, therefore, that to extend residual sovereignty to include criminal jurisdiction over non-Indians would be, as the dissent claims, a "novel and unusual" application of the doctrine and inconsistent with prior practice. In the face of statements by administrative agencies, decisions of federal courts, and commentaries by leading scholars all affirming exclusive federal jurisdiction, congressional silence on the subject most likely evidences approval of the accepted interpretation.

B. Statutory and Constitutional Considerations

1. Reevaluation of federal statutes

The court in the instant case claimed that the purpose of section 1152 was not to prohibit Indian tribes from prosecuting non-Indians but rather was to protect Indians from double jeopardy. The court maintained that the failure of section 1152 to "protect non-Indians against double jeopardy does not indicate that only Indians were susceptible to federal and tribal discipline." The court stated that the statutory protection of only Indians from double jeopardy might be explained by the fact that the only person to have suffered double punishment before the enactment of the provision was an Indian. More likely, however, the reason that express protection for non-Indians from double jeopardy was not drafted into section 1152 was because the double jeopardy threat was not applicable to non-Indians since they were not subject to tribal jurisdiction in the first place.

The court also maintained that the extension of federal criminal laws to Indian country by section 1152 was not a declaration of exclusive federal jurisdiction. The cessation of granting crimi-
nal jurisdiction over non-Indians by treaty, the numerous pronouncements by federal courts and administrative agencies, and the provisions of the Law and Order Code, however, all indicate that federal jurisdiction is exclusive.

The Ninth Circuit's reading of section 1152 as not granting exclusive federal jurisdiction falters on yet another ground. Section 1152 declares federal jurisdiction over crimes committed in Indian country against Indians except when committed by other Indians. The following section, the current relevant portion of the 1885 Act, however, empowers federal courts exclusively to try even those cases which involve only Indians when the offense committed is one of the specified major crimes. Section 1153, it is important to note, makes no mention of federal jurisdiction over non-Indians committing these major crimes. Thus, if jurisdiction over non-Indians is not vested exclusively in federal courts, as the majority contends, then Indian tribal courts could arguably assume jurisdiction over even major crimes committed by non-Indians against Indians within Indian country. Such a result is manifestly untenable and inconsistent with the apparent intent and purpose of sections 1152 and 1153.

2. Examination of constitutional considerations

In dismissing as premature Oliphant's argument that a fair trial would be impossible, the Ninth Circuit skirted a constitutional issue of major import. Since numerous basic rights afforded defendants in federal and state courts are not required in tribal courts, it may be violative of the Constitution to subject non-Indian United States citizens to the criminal jurisdiction of tribal

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88. Note 29 and accompanying text supra. Cohen reports only two treaties made after July 22, 1790, that allowed Indian tribes to subject non-Indians within Indian territory to the laws of the Indians. F. COHEN, supra note 1, at 6 n.48.
89. Notes 44-49, 76 and accompanying text supra.
90. Notes 78-79 and accompanying text supra.
91. Notes 31-43 and accompanying text supra.
92. 544 F.2d at 1011-12.
93. Among the rights not expressly mentioned in the Indian Civil Rights Act, 25 U.S.C. § 1302 (1970), are the following: (1) the right of the people to keep and bear arms; (2) the right to be free from having to quarter soldiers in one's house without consent; (3) the provision that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury; (4) the right to an impartial jury and to have the trial in the area wherein the crime was committed; (5) the right to a jury trial for civil matters at common law involving $20 or more, and the right to be free from having a fact, previously tried by a jury, reexamined by any court of the United States except as provided by common law; (6) the right to counsel; and (7) the rights enumerated in the Ninth and Tenth Amendments.
courts. When viewed in this light, the past refusal of federal courts to relinquish jurisdiction over non-Indians may be partially due to a feeling that non-Indian citizens should not be subject to courts that are fundamentally distinguishable in composition and orientation from federal and state courts.

Among the rights not guaranteed Oliphant in the tribal court was the right to an impartial jury. Since the Suquamish constitution provides no opportunity for non-Indians to participate in any form of tribal government even though non-Indians far outnumber Indians on reservation lands, Oliphant may be subjected to an unfair trial. Other basic rights subject to modification in tribal courts include those guaranteed by the equal protection and due process clauses of the Constitution. Several federal courts have held that the corresponding clauses in the Indian Civil Rights Act are not to be given the same meaning as the clauses in the Constitution.

Additional legal and cultural distinctions accentuate the differences between tribal courts and state or federal courts. Tribal judges are not required to be attorneys nor to have studied law. Some tribes allow defendants appearing before tribal courts to be represented only by "non-attorney representatives as counsel." Due to cultural differences between Indians and non-Indians, the common law often is inapplicable to interpret Indian tribal ordinances or laws to which non-Indians may be subject. Finally,

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94. Brief for Appellant at 20, Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976).
96. Recent Supreme Court decisions have held that the "concept of the jury trial contemplates a jury drawn from a fair cross section of the community." Taylor v. Louisiana, 419 U.S. 522, 527 (1975) (appeal challenged a state jury selection system that excluded most women from service); Peters v. Kiff, 407 U.S. 493 (1972) (non-Negro's successful challenge of practice of excluding Blacks from grand and petit jury service). Under the Peters holding, not only could Oliphant have challenged the Suquamish policy of excluding non-Indians from jury service, but defendant members of the Suquamish Tribe could likely also challenge the procedure.
98. 25 C.F.R. § 11.3(d) (1976); Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343, 1357 (1969); Note, The Indian: The Forgotten American, 81 Harv. L. Rev. 1818, 1832-33 (1968). Efforts to improve the quality of Indian courts, however, are being made. See generally A. GES & C. RICHARDS, INDIAN JUSTICE A GUIDE TO PLANNING.
100. E.g., Ex parte Tiger, 47 S.W. 304, 305 (Indian Terr. Ct. App. 1898).
the maximum sentence that can be imposed by an Indian tribal court is limited to a fine and six months in jail.\textsuperscript{101}

When the differences in rights afforded Oliphant in federal and tribal court are considered, strong reason appears why the appellant in the instant case should not be subjected to the criminal jurisdiction of the tribal court. It would be incongruous to cause a citizen of a "conquering" nation\textsuperscript{102} to be subject to courts of the "conquered" nation, especially when the conquered nation's guarantees of fairness are limited when compared with those of the conquering nation.

Although they are not required to provide every constitutional safeguard, some Indian courts may in fact provide or be capable of providing these rights to all parties before them. If this is the case, there remains little reason to deny these courts some degree of criminal jurisdiction over non-Indians. The assessment of constitutional quality of tribal courts, however, is more consistent with the activities of Congress than with those of the federal judiciary. Perhaps the time has come for Congress, charged with the duty of regulating Indian affairs,\textsuperscript{103} to conduct such an evaluation of individual Indian courts and to expressly grant criminal jurisdiction to qualifying tribunals. Until this occurs, however, the federal courts may be required to make the assessment.

C. Policy Considerations

The criminal jurisdiction of Indian tribes has been continually reduced since their conquest.\textsuperscript{104} Granting jurisdiction over non-Indians is inconsistent with this trend. Countervailing policies and pressures of modern society, however, cast doubt on the propriety of continually reducing tribal powers.

The strongest policy argument for reversing this trend and allowing Indian courts to exercise criminal jurisdiction over non-Indians is that such jurisdiction is a sine qua non of Indian self-

\textsuperscript{101} 25 U.S.C. § 1302(7) (1970). In this regard the Indian tribal courts resemble justice of the peace courts. Unlike a justice of the peace court, however, a tribal court must provide a jury upon request if imprisonment is a possible sentence. Id. § 1302(10). See Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343, 1356 (1969). Thus, the Supreme Court's decision that a defendant does not have a right to a jury trial for "petty offenses" which carry sentences of less than six months imprisonment, Codispoti v. Pennsylvania, 418 U.S. 506 (1974), does not apply to Indian courts because of the provision in 25 U.S.C. § 1302 (1970) requiring juries upon request.

\textsuperscript{102} See generally Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

\textsuperscript{103} Note 9 and accompanying text supra.

\textsuperscript{104} Notes 31-43 and accompanying text supra.
government. Indians on reservations suffer unjustly because non-Indians committing criminal offenses on reservations go unpunished in large measure since federal and state authorities have demonstrated a disinterest in actively prosecuting these cases. This hiatus in the legal process must be eliminated, and allowing Indians to prosecute matters occurring within their country seems to partially answer this need.

Even if criminal jurisdiction over non-Indians were not an elementary part of self-government, such a jurisdictional grant would be consistent with the present policy of assimilation. Such a grant would strengthen the self-regulating power of tribes and acknowledge the progress made by Indian nations in assimilating the American culture into reservation life.

Nevertheless, a grant of criminal jurisdiction over non-Indians may jeopardize some tribal independence by eliminating some cultural and legal dissimilarities. Presently, interpretation of the equal protection and due process clauses of the Indian Bill of Rights in the Indian Civil Rights Act takes into account the basic interests of the tribe and its cultural autonomy. Similarly, Indian ordinances may be interpreted other than by common law definitions. If constitutional safeguards are to be guaranteed to non-Indians brought before tribal courts, uniformity of legal systems must be achieved, requiring the abandonment of these individualistic interpretations. Once uniformity is achieved, much of the necessity and justification for retaining two identical systems of justice would dissolve. The possibility would then arise that at least some tribal courts would be eliminated.

The grant of criminal jurisdiction over non-Indians, however, likely will not unduly hasten the complete assimilation of Indian tribes. Yet, it must be recognized that a grant to Indian tribes of criminal jurisdiction over non-Indians in an attempt to pro-


107. Note 97 and accompanying text supra.

108. Note 100 and accompanying text supra.

109. Indeed, it has been suggested that federal policy is beginning to reflect a sensitivity to the unique concerns of Indians and "is slowly moving away from the approach of implementing programs based upon what the non-Indian considered to be in the best interests of the Indian." Article, The Allocation of Criminal Jurisdiction in Indian Country—Federal, State and Tribal Relationships, 8 U. Cal. D.L. Rev. 431, 451 (1976). Any such shift in policy would result in modification of the present policy of assimilation.
mote Indian self-government is also a step toward what appears to be an inevitable, and to some an undesirable, continuance of assimilation of Indian peoples into American culture.

IV. CONCLUSION

The Ninth Circuit declared the existence of tribal jurisdiction over non-Indians by invoking a "novel and unusual" application of the doctrine of residual sovereignty and a reading of concurrent federal/Indian jurisdiction in federal statutes. Historically, tribes have lacked such jurisdiction and courts and administrative agencies have uniformly supported this view. Given this historical precedent, the holding of the instant case cannot be reasonably justified by either the doctrine of residual sovereignty or the statute.

A departure from the past trend of restricting tribal jurisdiction should not be made without substantial justification. In light of the consistent indifference of federal and state authorities to prosecuting non-Indian committed crimes, however, an extension of limited authority to tribal courts to try non-Indians may be defensible. A grant of such jurisdiction would assist tribes to preserve order upon the reservations.

Congress should bear the responsibility to statutorily remedy this jurisdictional issue after evaluating the constitutional safeguards currently obtaining in Indian tribal court procedures and after appraising the impact that expanding tribal jurisdiction would have on broad national policies. Pending such congressional action, courts should exercise restraint before overturning the two-century pattern of denying Indians criminal jurisdiction over non-Indians.

Flying Diamond Corporation (Flying Diamond) held a lease for the oil and gas rights on the property of Anthon Rust. Flying Diamond attempted to commence development of the minerals on Rust’s property by constructing an access road and an oil and gas well site. With the aid of the sheriff, Rust prohibited the operations and ordered Flying Diamond from the property.

Thereafter Flying Diamond brought an action against Rust, seeking a preliminary injunction to restrain Rust from further interference with the mineral development, an order to show cause as to why a permanent injunction should not be issued, and damages.

The temporary injunction was issued, whereupon Flying Diamond proceeded with the construction. Rust then brought a counterclaim for damages, alleging trespass, a taking by eminent domain, and unreasonable and excessive use of the surface by Flying Diamond. The trial court dismissed Flying Diamond’s

1. Rust’s estate was actually held jointly with his wife. Both Flying Diamond and the Rusts obtained their severed interests from third parties. Brief of Appellant at 1-2, Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976).
3. Trial Record at 14, 16.
4. Flying Diamond sought damages of $1000 for defendant’s initial interference with operations and $2,500 per day for each day it was prohibited from entering the property. Plaintiff’s Complaint.
5. Rust’s third cause of action and prayer stated:

   In the event that the Court shall not award the defendants the foregoing relief, defendants pray that they be awarded reasonable compensation for the taking of their property under the Eminent Domain Statutes of the State of Utah in sum of $61,000.00, together with punitive damages in the sum of $30,000.00.

Defendant’s Answer & Counterclaim. Rust’s claim for compensation for the use of the surface by the mineral owner, alleged to be a taking under Utah’s eminent domain statutes, may have contributed to the confusion concerning the rights of the parties. Utah is one of the few states to designate mining as a use for which property may be taken under eminent domain powers. See Utah Code Ann. § 78-34-1 (Supp. 1976); Ferguson, Severed Surface and Mineral Estates—Right to Use, Damage or Destroy the Surface to Recover Minerals, 19 Rocky Mt. Min. L. Inst. 411, 431 (1974). The courts may have felt that the mineral owner should pay for any surface used as required in eminent domain. Eminent domain is, however, inapplicable when a party already has the right to use the surface.

6. Rust also claimed $30,000.00 in punitive damages, alleging that Flying Diamond
complaint, holding that the surface owner was entitled to two awards of damages. First, Rust was entitled to compensation based on a "growing crops" lease provision for the reasonable value of 5.88 acres of property taken in construction of the access road and well site. Second, Rust was entitled to compensation for the depreciated value of 15 acres, the irrigation of which had been disrupted by the placement of Flying Diamond's access road. The Utah Supreme Court affirmed the decision of the lower court.

I. Background

A. Dominance of the Mineral Estate

Mineral and surface estates may become separated in various ways; oil and gas rights, however, are usually severed from the fee by a lease between the mineral lessee and the holder of the fee estate. The lease form may vary considerably but usually acted maliciously and with a wanton disregard of his rights.

7. Memorandum Decision Civil No. 5035, District Court of Duchesne County, ¶ 4:

Defendant is entitled to compensation for the reasonable value of the 5.88 acres of land taken for the well site and road, under paragraph 10 of the lease dated April 6, 1964. The Court believes that the lands taken had thereon growing crops at the time within the meaning of that term in the lease, and that the lessee agreed in the lease to pay the lessor damages thereto. The use of the land taken by plaintiff for the well site and the road is effectively and permanently denied to the surface owner for any use theretofore made of the land, and the Court holds that such damage is the fair market value of the land at the time it was taken which is determined to be the sum of $900.00 per acre, totaling $5,292.00.

8. The trial court stated:

1. The location of the road where it was located was not reasonably necessary, and unreasonably interferes with the surface owners' preexisting use of the surface making it virtually impossible for him to irrigate a portion of his land.

2. Such unreasonable interference depreciated the value of approximately 15 acres of defendants' surface rights in the amount of $750.00 per acre, totaling $11,250.00.

Memorandum Decision Civil No. 5035, District Court of Duchesne County, ¶¶ 1-2.


10. Ownership of the mineral rights separate from the fee estate is not a recent concept. See Ferguson, supra note 5. Under common law the "royal mines," those containing gold and silver, belonged exclusively to the crown despite the surface ownership resting in a subject. 1 C. Lindley, A Treatise on the American Law Relating to Mines and Mineral Lands § 3, at 7-9 (3d ed. 1914). As early as 1900 Utah recognized that the minerals could be held by someone other than the surface owner. Smith v. Jones, 21 Utah 270, 278, 60 P. 1104, 1106 (1900).

11. The mineral estate may be severed from the fee estate by a federal mineral reservation, a state mineral reservation, or a private mineral grant or reservation. See Fleck, Severed Mineral Interests, 51 N.D. L. Rev. 389 (1974).
grants the lessee the right to explore and develop the oil and gas on the subject property for a specified time. If at the end of the specified time period either gas or oil is still being commercially produced, the lessee may continue operations until the minerals are exhausted. Of course, the lessor will continue to receive royalty payments for as long as the minerals are produced.\textsuperscript{12}

The estates of the lessee and lessor under oil and gas leases have been consistently characterized respectively as the dominant and servient estates.\textsuperscript{13} The lessee has an implied grant, absent an express provision for payment, to use so much of the leased premises as is reasonably necessary to effectuate the purposes of the lease without an obligation to pay for damages.\textsuperscript{14} Because the oil and gas lease grants extensive rights to the lessee, it has even been regarded as a grant of the land itself.\textsuperscript{15}

The dominance of the leasehold estate is based on the concept that “when a thing is granted, all the means to obtain it and all the fruits and effects of it are also granted.”\textsuperscript{16} Pursuant to these rights the lessee has been allowed to locate his wells where he desires,\textsuperscript{17} to build roads to the drill site,\textsuperscript{18} to construct and use storage and processing facilities for the oil and gas,\textsuperscript{19} to dig ditches for the removal of wastes,\textsuperscript{20} and to use fresh and salt water from the premises in secondary recovery operations,\textsuperscript{21} all without legal liability for damages to the servient surface estate.\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{12} See, e.g., 6 W. Summers, The Law of Oil and Gas § 1160 (1967).
  \item \textsuperscript{13} See, e.g., Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971); Flying Diamond Corp. v. Rust, 551 P.2d 509, 511 (Utah 1976); Davis, Selected Problems Regarding Lessee’s Rights and Obligations to the Surface Owner, 18 Rocky Mt. Min. L. Inst. 315, 316 (1963).
  \item \textsuperscript{15} Gray, A New Appraisal of the Rights of Lessees Under Oil and Gas Leases to Use and Occupy the Surface, 20 Rocky Mt. Min. L. Inst. 227, 256-57 (1976).
  \item \textsuperscript{16} 4 W. Summers, The Law of Oil and Gas § 652 (1958).
  \item \textsuperscript{17} Gulf Oil Corp. v. Marathon Oil Co., 137 Tex. 59, 82, 152 S.W.2d 711, 724 (1941); see Selmont Oil Corp. v. Pan Am. Petroleum Corp., 334 S.W.2d 449, 456 (Tex. Ct. App. 1960); Stephenson v. Glass, 278 S.W. 1110 (Tex. Ct. App. 1925); Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex. Ct. App. 1919) (finding the erection of an oil derrick on the same lot as a residential house, the placement of a slush pit next to the house, and the operation of the well so as to splash oil on one side of the house all to be reasonable).
  \item \textsuperscript{21} See Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865 (Tex. 1973); Sun Oil Co. v. Whittaker, 483 S.W.2d 808 (Tex. 1972).
  \item \textsuperscript{22} See Keeton & Jones, Tort Liability and the Oil and Gas Industry, 35 Tex. L. Rev. 1, 3 (1956).
\end{itemize}
B. Restraints on the Mineral Estate

The mineral lessee’s broad rights, however, are subject to the restraints of contract and tort liability.23

1. Liability in Tort

The courts have imposed a duty upon the mineral lessee to use only so much of the surface as is reasonably necessary, having due regard for the rights of the surface owner, to effectuate the purpose of the lease.24 Damages for breach of this duty have been upheld on a variety of tort theories.25 For example, damages have been awarded in nuisance where an oil and gas lessee failed to restore the surface of the land after abandoning a well site; such failure amounts to a taking of more surface than is reasonably necessary and therefore creates liability for the cost of clean up.26 Negligence has been a basis for damages where the lessee conducted operations during a wet period, resulting in substantial injury to the surface.27 Unreasonable location of a drill site has been recognized as a ground of recovery where the lessee constructed a well site upon the very location that the surface owner had selected for the building of his retirement home.28 Courts have allowed recoveries under a broad range of findings that the surface use or injury was not reasonably necessary or that the mineral lessee did not exercise his rights with due regard to the surface owner’s rights.29

25. See Keeton & Jones, supra note 22.
27. E.g., Illinois Basin Oil Ass’n v. Lynn, 425 S.W.2d 555 (Ky. 1968); see 4 W. SUMMERS, supra note 16, § 652.
29. The courts have awarded damages to the surface owner upon a finding that the mineral developer made unreasonable use of the surface in connection with waterflooding; disposal of wastes; exploratory operations on adjacent tracts; seismographic tests; location, construction, and maintenance of well sites, slush pits, ditches, storage tanks, reservoirs, pickup stations, buildings, pipelines, and roads; and the use of the surface for shutdown and removal operations. See Annot., 53 A.L.R.3d 16 (1973). These recoveries, based on a finding of unreasonable use, are indistinguishable from awards made upon conventional negligence, nuisance, and trespass theories, since these conventional torts are in fact based upon findings of unreasonable use of the surface.
2. **Liability in Contract**

An oil and gas lease is a contract, and as such determines the respective rights of the parties. The parties to the lease frequently include a clause requiring the lessee to pay for any damage caused to specific items such as land, livestock, growing crops, or improvements. Liability under such a contract arises upon the terms of the contract and is not dependent upon any proof of tort. The lessee agrees to pay the surface owner for injuries to his property “independent of breach of contract or liability for tort.” Therefore, if the item is identified in the lease, damages may be awarded. Problems of recovery under a lease clause do arise, however, in determining what items are included within the definition of a particular term.

The term “growing crops” in a mineral lease has frequently been the subject of litigation. It is generally agreed that growing crops includes wheat, corn, alfalfa, and other products of the soil that are raised and gathered annually. The jurisdictions differ, however, when considering natural products of the soil such as range and native grasses. The Utah Supreme Court has held that natural products of the soil are growing crops within the provisions of an oil and gas lease; other courts have concluded that natural products of the soil such as native grasses on uncultivated lands used for cattle grazing are not crops under a mineral lease.

Courts have consistently held that the use of a growing crops clause in a mineral lease cannot justify an award of damages for injury to land as contrasted with injury to crops growing on the

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31. For example: “Lessees shall be liable and agrees to pay for all damages to the land, livestock, growing crops, or improvements caused by lessee’s operations on said lands.” Frankfort Oil Co. v. Abrams, 159 Colo. 535, 539, 413 P.2d 190, 192 (1966) (state granted lease).


33. Meyer v. Cox, 252 S.W.2d 207, 208 (Tex. Ct. App. 1952). The statement by the court that liability arises independent of breach of contract is intended to be used in a very narrow sense. If the mineral owner refuses to pay for damages as required under the contract, the surface owner will sue on breach of contract. What is meant by liability independent of contract, however, is that liability for damages as provided for in the lease arises before any breach of contract occurs.

34. See, e.g., Davis, supra note 13, at 340-43 (defining the term “crops”).


land. In the recent decision of *Phillips Petroleum Co. v. Morris*, the Texas court of appeals considered an oil and gas lease provision that required payment by the lessee for any injury to crops. The lessee had used 4.23 acres of surface for the location of a well site and access road. After the lessee ceased operations, the surface owner attempted to produce crops on the abandoned surface. Because of the lessee's prior operations, however, the soil was unproductive and the crops failed. The surface owner brought an action against the lessee for damage to his crops, claiming that the lessee was contractually liable for the damage by reason of the lease provision under which the lessee agreed "to pay for the damage to crops." Although the appellate court recognized that damage to the fertility of the soil resulted in injury to future crops, it held that "lessee was not liable to lessors for the loss of anticipated future crops occasioned by damage to the soil" under the lease agreement and, therefore, the award for injury to the fertility of the soil was in error. Other courts considering the question have similarly concluded that a damage-to-crops clause in a lease is not a basis for an award for injury to the land or future crops.

One exception to the general rule discussed above arises when the damaged crops are trees. In these cases damages are determined by the use of the "depreciation in value" method. For example, in *Cities Service Gas Co. v. Christian*, the court allowed damages equal to the decreased value of the land when the lessee's operations destroyed pecan trees growing on the land.

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38. The applicable lease contained the following clause: "The Lessee agrees to pay for damages to crops or improvements caused by operations of Lessee." *Id.* at 445.
39. *Id.* at 444.
40. The Texas court of appeals explained the relationship in these terms: "Texas courts have made a clear distinction between damage to crops and damage to the fertility of the soil, which in turn, results in a failure to produce or a reduction in production of future crops." *Id.* at 446.
41. *Id.*
42. See Rohner v. Austral Oil Exploration Co., 104 So. 2d 253 (La. Ct. App. 1958) (award for crop damage upheld but award for injury to land reversed); cf. Transcontinental Gas Pipe Line Corp. v. Hill, 57 So. 2d 162 (Miss. 1952) (pipeline easement clause allowing payment for damages to fences, improvements, growing crops, and timber did not include payment for destruction of top soil where it was necessary to remove or destroy the same in the proper laying of a pipeline); Lone Star Gas Co. v. Baccus, 11 S.W.2d 355 (Tex. Ct. App. 1928) (arbitration award based on pipeline easement contract providing payment for damage to crops or fences in error if award includes injury sustained to land).
44. "The rule for measuring damages arising from injury or loss of trees is the value of the premises upon which the trees grew immediately prior to the destruction and the value immediately thereafter." *Id.* at 937 (citations omitted).
The court made clear, however, that it applied this rule only to trees. As to the other crops destroyed (grasses), the court allowed no recovery for future crops or for injury to productivity of the soil, and approved the procedure employed by the trial court wherein the award was based on expert testimony as to the actual value of the crops as they stood.

II. Instant Case

The trial court in the instant case based the award for the 5.88 acres taken for the road and drill site upon the growing crops lease provision that provided that the lessee would "pay for damage directly and immediately caused by its operations to growing crops theretofore planted on said land." The supreme court affirmed this award, but did not address the major issue raised by the appellant of whether the award was proper under the growing crops clause. Instead, the supreme court erroneously perceived the trial court's award of the value of the 5.88 acres to be based on a finding that the use of the land by the mineral lessee was unreasonable and upheld the award on that ground.

The supreme court also upheld the award for the diminished value of the 15 acres of irrigated land resulting from placement of the access road. Here, however, the court pointed to the growing crops clause of the lease as if it were the basis for the trial court's second award, although the trial court had based its award for the 15 acres on a finding that the access road had been unreasonably placed. The supreme court found that clover, al-

45. Id.
46. The Oklahoma Supreme Court affirmed a disallowance by the trial court of "[d]amages resulting from loss of future crops through land . . . being rendered non-productive for a number of years . . . ." Id. at 933.
47. Id. at 936-38.
48. 551 P.2d at 511.
49. See Brief of Appellant at 12-20.
50. The trial court expressly stated:

There is not sufficient evidence from which the court can find, with regard to the amount of land taken, that the 5.88 acres of surface "taken" for the well site and the road was in excess of that reasonably necessary, or that use of such amount by plaintiff is unreasonable to accomplish the purposes contemplated by the lease.

Findings of Fact and Conclusion of Law ¶ 7, at 3.
51. 551 P.2d at 511-12. The court referred to the growing crops provision as if Flying Diamond had contended it was incorrectly used in relation to the 15 acres. Flying Diamond's references were entirely made, however, in respect to the award for the 5.88 acres. See Brief of Appellant at 12-20.
52. See note 8 supra.
falfa, and natural grasses on defendant's land were crops within the meaning of the growing crops clause and that the trial court was justified in including the value of future crops in computing damages for the 15 acres injured by unreasonable placement of the roadway.53

III. Analysis

The instant case significantly extends the rights of surface owners; it appears to be the first instance allowing a surface owner to recover for the depreciated value of his land under a growing crops damage clause despite a finding that the mineral lessee's use was reasonable. This case note will first show that neither the trial court's award in respect to the 5.88 acres used as an access road and drill site nor the supreme court's affirmation in respect to the 15 acres of irrigated land were properly made under the growing crops damage clause of the lease. The case note will then examine the possibility that the awards could have been granted in tort.

A. Liability Under the Lease Provision for Damage to Growing Crops

If a court were to extend a growing crops lease provision to allow recovery for future crops, damages could be accurately measured by the decrease in present value of the land for agricultural production. The supreme court in the instant case evidently adopted this approach and allowed damages for future crops in the amount of the diminished present value of the land for agricultural purposes. This holding, however, is inconsistent with the treatment given this issue by other courts that have interpreted similar clauses. The uniform response of the courts is exemplified by Phillips, where the court disallowed an award for injury to the fertility of soil under a growing crops clause.

The Phillips holding is clearly preferable. The term "growing crops implies that it applies only to crops growing on the land at the time of injury. Most courts have interpreted this language literally and have concluded that the lessee under such a clause is liable only for actual damages to growing crops resulting from development operations and not for injury to the land.54 This interpretation is strengthened by the fact that the lessor has the

53. 551 P.2d at 511-12.
54. See notes 34-47 and accompanying text supra.
option of requiring that the lessee be liable for damage to land, making an award for the decrease in value appropriate.\textsuperscript{55} If the lessor fails to require a provision for payment for injury to land, the growing crops clause can hardly be stretched to achieve that result.

Moreover, the language of the lease in the instant case stated that the lessee would pay for damage to growing crops “therefore planted on said land.”\textsuperscript{58} The addition of the word theretofore demonstrates that the parties to the lease did not intend that the lessee be liable for crops that might later be grown on the land.

Although the respondent cited Cities Service in support of the trial court’s award of the entire depreciated value of the 5.88 acres,\textsuperscript{57} a close reading of that case indicates that the depreciation-in-value rule was applied only when the “crops” were trees.\textsuperscript{58} As to the other growing crops such as grasses, the Cities Service court allowed damages only for the actual value of the crops as they stood. Since the respondent in the instant case did not claim damage to trees, the court could not have properly relied upon Cities Service to award an amount equal to the diminished value of the land.

Consequently, based upon the clear meaning of the growing crops clause and the weight of authority holding that such a clause requires payment for the value of the crop as injured but not for any injury to the future productivity of the land, neither the supreme court’s award for the depreciated value of the 15 acres that resulted from location of the access road nor the trial court’s award for the value of the 5.88 acres used as a well site and access road can be upheld under the growing crops provision of the lease.

The Utah Supreme Court should have applied a rule of measurement that would have reflected accurately the value of the injured crops growing on Rust’s property and not the decreased value of the land for agricultural purposes. The clover, alfalfa, and natural grasses injured in the instant case were all perennials used for grazing.\textsuperscript{59} For determination of damages to similar perennial crops, an estimate by an expert with special knowledge

\textsuperscript{55} See note 31 supra (clause including damage to land).
\textsuperscript{56} 551 P.2d at 511 (emphasis added).
\textsuperscript{57} Brief of Respondent at 19-20.
\textsuperscript{58} See notes 43-47 and accompanying text supra.
\textsuperscript{59} 551 P.2d at 511.
concerning the value of the crops for pasturage has been used.\textsuperscript{60} The instant case should have been remanded for the taking of similar testimony of the value of the crops as they stood for grazing separate from the depreciated value of the land as used for future crop production.

\textbf{B. Alternative Grounds for Recovery in Tort}

Although the award for injury to the 15 acres could not have been properly justified under the lease provision, grounds for the award existed in tort. Since the trial court found the location of the access road to be unreasonable because it interfered with preexisting irrigation patterns, damages could appropriately have been awarded in tort for the actual amount that the land had depreciated in value.\textsuperscript{61} In attempting to justify the award in contract through a tortured definition of growing crops, the Utah Supreme Court failed to distinguish the two forms of liability and unnecessarily broadened the scope of contract liability.

Although there was an alternative ground for the award for the depreciated value of the 15 acres, no basis existed for awarding damages for the entire value of the 5.88 acres taken as a well site and access road. Since the trial court expressly stated that it did not find the well site to be unreasonable in its location, use, or amount of surface taken,\textsuperscript{62} there were no tort grounds upon which damages could have been based. Damages, if any, would have to be based upon the growing crops clause of the lease and, as discussed above,\textsuperscript{63} the only damages allowable would be for the actual value of the crops then growing on the land. The trial court did find that the access road was unreasonably located, but not unreasonable as to the amount of land used.\textsuperscript{64} Although an award might have been made for the difference in value between the land actually used for the access road and the land that should have been used, there was no legal basis for an award for the entire value of the land.

\begin{itemize}
  \item \textsuperscript{60} See, e.g., Cities Services Gas Co. v. Christian, 340 P.2d 929, 936 (Okla. 1959).
  \item \textsuperscript{61} See Diamond Shamrock Corp. v. Phillips, 256 Ark. 886, 511 S.W.2d 160 (1974); Union Producing Co. v. Pittman, 245 Miss. 427, 436, 146 So. 2d 553, 556 (1962) (diminution in value of real property is proper measurement for wrongful injury). A finding of unreasonable use is sufficient grounds for an award in tort. The plaintiff is not limited to the conventional theories of negligence, nuisance, or trespass. See note 29 supra.
  \item \textsuperscript{62} Note 8 supra.
  \item \textsuperscript{63} See notes 37-42, 54-58 and accompanying text supra.
  \item \textsuperscript{64} Notes 8 & 50 supra.
\end{itemize}
IV. Conclusion

The rules of law that govern the respective rights and duties of the owners of the surface and mineral estates reflect a carefully developed balance between two conflicting interests. The rules attempt to preserve the rights of the mineral owner to the use of so much of the surface land as is reasonably necessary to the development of his property. At the same time, however, the courts have allowed the parties to agree through contract on what actions will result in liability, and have also imposed liability when the mineral lessee has acted unreasonably.

Prior to this decision, a surface owner suing under a growing crops lease provision could recover only for the value of the crops which were destroyed. The instant case greatly expands the surface owner's rights to include recovery for the depreciation in value of the land resulting from the lessee's operations. This interpretation is unsupported by prior precedent, and contravenes the basic rules of construction. Moreover, it was probably unnecessary in this case since the court could have reached the same result—at least as to the 15 acres—if traditional tort theories had been correctly applied.