COMMENTS

EXTENDED BORDER SEARCHES AND PROBABLE CAUSE

Almeida-Sanchez v. United States, 413 U.S. 266 (1973)

Petitioner challenged the constitutionality of the warrantless stop and search of his automobile, without probable cause or consent, by a roving border patrol of the United States Immigration and Naturalization Service.[1] The search, conducted twenty-five air miles north of the Mexican border[2] ostensibly for the purpose of locating illegally imported aliens, disclosed a large quantity of marijuana[3] which was used

1. The Immigration and Naturalization Service conducts three types of surveillance along inland roadways for the purpose of detecting the illegal importation of aliens: (1) permanent checkpoints, (2) temporary checkpoints, and (3) roving patrols. Permanent sites are usually located at a point beyond the convergence of several roads leading from the border. To avoid repeated checking of commuter and suburban traffic, the sites are removed from urban areas. Of the 13 sites in the Mexican border area, all but one are located more than 25, but less than 100, air miles from the border. Temporary sites are usually located on less heavily travelled roads if safety standards can be observed and if the terrain permits some element of surprise. Roving patrols generally operate on lightly travelled roads and stop vehicles on a random basis. In all three types of surveillance, officers conduct a limited inspection which includes inspecting trunks of some of the vehicles stopped, either at random or on the basis of suspicion. Brief for the United States at 23-25, Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

The Government asserted that authority for all three types of surveillance is found in 8 U.S.C. § 1357(a) (1970) and 8 C.F.R. § 287.1(a)(2) (1973). Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973). *See* notes 6 & 7 *infra*.

2. The stop and search occurred on California State Highway 78, at a point approximately fifty road miles north of the border. United States v. Almeida-Sanchez, 452 F.2d 459, 460 (9th Cir. 1971). The road is an east-west highway running partly through an undeveloped region, but nowhere reaching the Mexican border. 413 U.S. at 267-68.

3. The officers, having received information that aliens sometimes concealed themselves behind the rear seat of an automobile with their legs doubled up under the cushion, looked under the rear seat and discovered packages which they believed to contain marijuana. A search of other parts of the vehicle revealed many other packages of marijuana. United States v. Almeida-Sanchez, 452 F.2d 459, 460 (9th Cir. 1971). The Government did not contend that there was probable cause of any kind to initiate the search, but relied solely on the authority contained in 8 U.S.C. § 1357 (a) (1970). 413 U.S. at 268.

The vehicle search authority of immigration officers is limited to searching for aliens. 8 U.S.C. § 1225(a) (1970). Officers may search any part of the vehicle large

to convict petitioner of a federal crime.[4] Affirming the conviction,[5] the Ninth Circuit Court of Appeals held the search to be valid under a federal statute[6] and regulation.[7] The Supreme Court reversed and *held*: The warrantless search of petitioner's automobile, without probable cause or consent, violated petitioner's fourth amendment rights.[8]

The fourth amendment prohibits unreasonable searches and sei-

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enough to conceal aliens. United States v. Lujan-Romero, 469 F.2d 683 (9th Cir. 1972); Valenzuela-Garcia v. United States, 425 F.2d 1170 (9th Cir. 1970); Roa-Rodriquez v. United States, 410 F.2d 1206 (10th Cir. 1969). Only customs agents are empowered to search vehicles for illegally imported contraband. 19 U.S.C. § 482 (1970). However, all immigration officers have been designated as acting customs agents by a series of delegations of authority held proper in United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973). For cases upholding the right of immigration officers to act simultaneously as customs agents, see United States v. Wright, 476 F.2d 1027 (5th Cir.), *cert. denied*, 414 U.S. 821 (1973); United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); United States v. Bird, 456 F.2d 1023 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); United States v. Maggard, 451 F.2d 502 (5th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972).

4. Petitioner was convicted of knowingly receiving, concealing, and facilitating the transportation of illegally imported marijuana. Act of July 18, 1956, ch. 629, tit. I, § 106, 70 Stat. 570.

5. United States v. Almeida-Sanchez, 452 F.2d 459 (9th Cir. 1971).

6. 8 U.S.C. § 1357 (1970) provides:

> (a) Any officer or employee of the service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any . . . vehicle . . . for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.

A similar provision was first enacted in 1946. Act of Aug. 7, 1946, ch. 768, 60 Stat. 865. The legislative history of this statute is sparse. It appears that the statute was enacted in response to a request from the Attorney General for such authority in order to effectively enforce the immigration laws. H.R. REP. No. 186, 79th Cong., 2d Sess. (1946). The provision was subsequently incorporated into § 287(a)(3) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1357(a)(3) (1970).

7. 8 C.F.R. § 287.1(a)(2) (1973) provides:

> Reasonable distance. The term 'reasonable distance' as used in . . . the Act [8 U.S.C. § 1357(a)(3) (1970)] means within 100 air miles from any external boundary of the United States . . . .

Under 8 U.S.C. § 1103 (1970), the Attorney General is authorized to prescribe regulations he deems necessary for enforcement of the immigration laws.

If 8 U.S.C. § 1357(a)(3) (1970) were interpreted as blanket authority to search vehicles for aliens without cause, an interpretation given to it by the four dissenting Justices in *Almeida-Sanchez*, 413 U.S. at 291, a substantial proportion of persons living in the United States, including most inhabitants of Los Angeles, San Francisco, and New York, would be subject to such searches under the statute and regulation.

8. Petitioner's motion to suppress the introduction of the marijuana as evidence was improperly denied. Evidence obtained in violation of the fourth amendment may not be used at trial. Weeks v. United States, 232 U.S. 383 (1914).

zures.[9] Generally, a search of private property is unreasonable unless it has been authorized by a valid search warrant[10] issued by a neutral magistrate[11] upon probable cause to believe that the item specified will be found in the place to be searched.[12] There are, however, a number of carefully defined exceptions to the necessity for a warrant and the requirement of probable cause in the traditional sense.[13] Customs

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9. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); Elkins v. United States, 364 U.S. 206 (1960).

10. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967); Stoner v. California, 376 U.S. 483 (1964); Jones v. United States, 357 U.S. 493 (1958); United States v. Jeffers, 342 U.S. 48 (1951); McDonald v. United States, 335 U.S. 451 (1948).

11. Shadwick v. City of Tampa, 407 U.S. 345 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Giordenello v. United States, 357 U.S. 480 (1958); Johnson v. United States, 333 U.S. 10 (1948).

12. Spinelli v. United States, 393 U.S. 410 (1969); United States v. Ventresca, 380 U.S. 102 (1965); Aguilar v. Texas, 378 U.S. 108 (1964); Rugendorf v. United States, 376 U.S. 528 (1964); Jones v. United States, 362 U.S. 257 (1960); Giordenello v. United States, 357 U.S. 480 (1958).

13. Examples of areas in which something less than probable cause is required are administrative inspections, United States v. Biswell, 406 U.S. 311 (1972) (implied consent in a regulated business), and housing code inspections, Camara v. Municipal Court, 387 U.S. 523 (1967) (probable cause to believe that a particular area includes buildings with code violations, not specific buildings). Some of the major exceptions to the requirement of a warrant are auto searches, Coolidge v. New Hampshire, 403 U.S. 443 (1971), exigent circumstances, Terry v. Ohio, 392 U.S. 1 (1968) (warrantless stop and frisk held valid where police officer reasonably believed his safety to be in danger), hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967) (pursuit of suspected armed felon), and searches incident to lawful arrest, Chimel v. California, 395 U.S. 752, 763 (1969); Preston v. United States, 376 U.S. 364 (1964) (and cases cited therein). For a general discussion of these and other exceptions, see 68 AM. JUR. 2d *Searches and Seizures* §§ 37-59 (1973).

The Court rejected the Government's contention that the search of petitioner's automobile was constitutional under the auto search and administrative inspection exceptions. 413 U.S. at 269-72. Search of an automobile without a warrant has been held not to violate the fourth amendment where: (1) the officer has probable cause to believe that the auto contains contraband; and (2) the vehicle is readily movable so that it is not reasonably practicable to secure a search warrant. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Brinegar v. United States, 338 U.S. 160 (1949); Husty v. United States, 282 U.S. 694 (1931); Carroll v. United States, 267 U.S. 132 (1925). The Court in *Almeida-Sanchez* held that the existence of a movable automobile may dispense with the necessity for a warrant, but probable cause is still required. *See generally* Aitken & Murray, *Constitutional Limitations on Automobile Searches*, 3 LOYOLA U.L. REV. (L.A.) 95 (1970); Note, *Automobile Searches and the Fourth Amendment*, 47 CHI.-KENT L. REV. 232 (1970).

The Supreme Court has upheld housing code inspections made without probable cause to believe that a particular building is the site of a specific violation. The inspector,

and immigration inspections pursuant to a border crossing, commonly known as border searches, constitute one such exception.[14] The fourth amendment, as applied to border searches, requires only that the search in question be reasonable.[15] Courts have agreed that routine searches

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however, must obtain a warrant supported by particular physical and demographic characteristics of the general area in which the building to be inspected is located. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967). The Court has also sanctioned warrantless inspections of traditionally regulated businesses, without probable cause, where Congress has authorized such inspections. United States v. Biswell, 406 U.S. 311 (1972) (sale of firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (manufacture and sale of liquor). The Court in *Almeida-Sanchez* found *Camara* and *See* to be inapplicable because they required warrants in order to circumscribe the discretion of the inspector in the field. 413 U.S. at 270. The search of petitioner's automobile in *Almeida-Sanchez* was conducted in the unfettered discretion of border patrol officers. *Biswell* and *Colonnade* were also held inapposite because the businessman in a regulated industry in effect consents to the restrictions placed upon him. There was no basis for a finding of implied consent on the part of petitioner. *Id.* at 271.

14. Border searches are not governed by the warrant and probable cause provisions of the fourth amendment. United States v. Warner, 441 F.2d 821 (5th Cir.), *cert. denied*, 404 U.S. 829 (1971); United States v. Weil, 432 F.2d 1320 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); United States v. Glaziou, 402 F.2d 8 (2d Cir.), *cert. denied*, 393 U.S. 1121 (1969); Valadez v. United States, 358 F.2d 721 (5th Cir. 1966); Taylor v. United States, 352 F.2d 328 (9th Cir. 1965); Mansfield v. United States, 308 F.2d 221 (5th Cir. 1962). The rationale for this exception is set forth in Carroll v. United States, 267 U.S. 132, 154 (1925):

> Travellers may be so 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.

See also Boyd v. United States, 116 U.S. 616, 623 (1886):

> As this act [the first statute authorizing customs inspections at the border, Act of July 31, 1789, ch. 5, 1 Stat. 43] was passed by the same Congress which proposed for adoption the original Amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the Amendment.

See generally Note, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457 (1968); Note, *Search and Seizure at the Border—the Border Search*, 21 RUTGERS L. REV. 513 (1967); Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968).

15. Carroll v. United States, 267 U.S. 132 (1925); Boyd v. United States, 116 U.S. 616 (1886); United States v. Wright, 476 F.2d 1027 (5th Cir.), *cert. denied*, 414 U.S. 821 (1973); United States v. Hill, 430 F.2d 129 (5th Cir. 1970); Walker v. United States, 404 F.2d 900 (5th Cir. 1968); United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); Morales v. United States, 378 F.2d 187 (5th Cir. 1967); Thomas v. United States, 372 F.2d 252 (5th Cir. 1967); Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966); Marsh v. United States, 344 F.2d 317 (5th Cir. 1965); King v. United States, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939 (1959). These cases deal primarily with the ques-

conducted at the border itself are reasonable per se.[16] A more difficult problem has been determining when a search conducted away from the border should qualify as an extended border search and thus be sanctioned under relaxed fourth amendment standards.[17]

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tion of when it is reasonable to initiate a search. However, in addition to that requirement, the scope of the search must also be reasonable. *See* Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) ("clear indication" of smuggling required for search of body cavity).

16. United States v. Halprin, 450 F.2d 322 (9th Cir. 1971), *cert. denied*, 405 U.S. 994 (1972); United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966); Mansfield v. United States, 308 F.2d 221 (5th Cir. 1962); Murgia v. United States, 285 F.2d 14 (9th Cir. 1960); Landau v. United States Att'y, 82 F.2d 285 (2d Cir.), *cert. denied*, 298 U.S. 665 (1936).

17. 8 U.S.C. § 1357(a)(3) (1970), which governs immigration searches, requires no suspicion of any kind on the part of the searching official. *See* note 6 *supra*. 8 C.F.R. § 287.1(a)(2) (1973) fixes the geographic limits of this authority as within 100 air miles of any external boundary. *See* note 7 *supra*. Thus, some cases seem to have held that routine searches for immigrants at any point within 100 air miles from a border are reasonable per se. United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973); Mienke v. United States, 452 F.2d 1076 (9th Cir. 1971); Duprez v. United States, 435 F.2d 1276, 1277 (9th Cir. 1970); Fumagalli v. United States, 429 F.2d 1011, 1013 (9th Cir. 1970); United States v. Avey, 428 F.2d 1159, 1164 (9th Cir.), *cert. denied*, 400 U.S. 903 (1970); United States v. Miranda, 426 F.2d 283, 284 (9th Cir. 1970); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963). *But cf.* United States v. Wright, 476 F.2d 1027 (5th Cir.), *cert denied*, 414 U.S. 821 (1973) (mere presence within 100 miles of border does not, without more, justify all searches by immigration officers); United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973) (once national frontier has been crossed, search in question must be reasonable upon all of its facts, only one of which is proximity to border); United States v. DeLeon, 462 F.2d 170 (5th Cir. 1972) (search must be reasonable under circumstances of particular case); United States v. Maggard, 451 F.2d 502 (5th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972) (searching officer must have reasonable suspicion).

The law of customs searches at points removed from the border is also somewhat unclear. 19 U.S.C. § 482 (1970) authorizes customs agents to search vehicles for contraband if "they shall suspect" that the customs laws are being violated. Although no precise geographic limitations have been defined for customs searches, it has been held that the nation's borders are expandable for that purpose. United States v. Hill, 430 F.2d 129 (5th Cir. 1970); Thomas v. United States, 372 F.2d 252 (5th Cir. 1967). Many cases have held that a search made away from the border need only be reasonable under the circumstances in order to qualify as an extended border search. United States v. Hill, 430 F.2d 129 (5th Cir. 1970); Thomas v. United States, 372 F.2d 252 (5th Cir. 1967); Murgia v. United States, 285 F.2d 14 (9th Cir. 1960); King v. United States, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939 (1959). Courts have not always agreed, however, on what is reasonable. *See* United States v. Weil, 432 F.2d 1320 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971) (officer must be reasonably certain that vehicle is being used for illegal importation of contraband); United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969)

In holding that the search of petitioner's automobile violated the fourth amendment, the Court in *Almeida-Sanchez* rejected the Government's contention that the search was constitutional as a statutory extension of the border search doctrine.[18] The Court considered both the interests asserted by the Government to justify the official intrusion, and the constitutionally protected rights of the individual. While recognizing the Government's interest in combatting illegal immigration[19] and the difficulty involved in policing our national boundaries,[20] the Court observed that those lawfully within the country have a right to free passage, without interruption, unless there is probable cause to believe that they are committing an illegal act.[21] The Court did not question the constitutionality of routine inspections of individuals or conveyances seeking to cross national borders. But the search of petitioner's automobile, when there was no reason to believe that petitioner had even crossed the border, much less that he was guilty of any offense, violated the constitutional rights of one lawfully within the coun-

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(when individual has direct contact with border area, or his movements are reasonably related to it, he is member of class of persons whom suspicious customs officer may stop and search while individual is still in border area); Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966) (officer must be reasonably certain that contraband was aboard vehicle at time of entry into United States). *See also* 8 SAN DIEGO L. REV. 435 (1971).

18. 413 U.S. at 272-73. 8 U.S.C. § 1357(a)(3) (1970) represents Congress' view of the procedures necessary to pursue its policy of immigration control. Brief for the United States at 21.

The Court reached the constitutional question without considering an alternative construction of the statute that would have avoided it. For the view that the statute merely grants authority to be exercised in accordance with the traditional constitutional limitation of probable cause, see United States v. Almeida-Sanchez, 452 F.2d 459, 461 (9th Cir. 1971) (dissenting opinion).

19. The Government has the power to exclude aliens. Chae Chan Ping v. United States, 130 U.S. 581 (1889). Sovereignty carries with it an inherent right to protect territorial integrity against the intrusion of unauthorized persons or things. Carroll v. United States, 267 U.S. 132 (1925); United States v. Weil, 432 F.2d 1320 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963); Witt v. United States, 287 F.2d 389 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961).

20. *See* United States v. Glaziou, 452 F.2d 8 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); Morales v. United States, 378 F.2d 187 (5th Cir. 1967); King v. United States, 348 F.2d 814 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965).

21. 413 U.S. at 274-75. *See* Carroll v. United States, 267 U.S. 132 (1925). *See also* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (stop and search of vehicle on open highway is major interference with lives of occupants).

try.[22] The Court concluded that the broad search authority embodied in the statute[23] can be justified only in searches at the border itself or its *functional equivalent*.[24] Only in these instances is there reasonable assurance that there has in fact been a border crossing, thus making it reasonable to subject persons to searches under relaxed fourth amendment standards. As to roving immigration searches removed from the border, probable cause is required.[25]

The full impact of the Court's ruling is not clear. One immediate effect is to impose a probable cause standard for immigration searches which is at least as stringent as the reasonable suspicion standard required for customs searches.[26] Thus the decision should curb the practice of conducting customs searches on grounds disclosed during the course of an immigration search initiated under circumstances which would not initially have warranted a customs search. This practice, employed in *Almeida-Sanchez*[27] as well as other cases,[28] had the effect of rendering the reasonable suspicion requirement of the customs statute meaningless where both customs and immigration search powers were vested in the same officer.[29]

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22. Lower courts have deferred to Congress' judgment, as manifested in 8 U.S.C. § 1357(a)(3) (1970), that broad search authority is necessary to effectively police our borders. *See, e.g.*, Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963). The Supreme Court, however, expressing high regard for fourth amendment safeguards, found such a degree of deference unwarranted. 413 U.S. at 273.

23. 8 U.S.C. § 1357(a)(3) (1970). *See* note 6 *supra*.

24. Examples of a functional equivalent are: (1) an established checkpoint near the border at the confluence of two or more roads extending from the border; and (2) a search of passengers and cargo of an airplane arriving at a United States airport after a non-stop international flight. 413 U.S. at 272-73.

25. Since the search falls within the auto search exception, no warrant is required. *See* note 14 *supra*.

Justice Powell, concurring, proposed an alternative procedure which would not dispense with the warrant requirement. He would require an "area warrant"—limited in both time and area—issued on the basis of probable cause to believe that there is a high incidence of illegal immigration in a particular area, rather than specific knowledge about a particular automobile. 413 U.S. at 275 (Powell, J., concurring). The Justices joining the majority opinion were divided on the question of the constitutionality of this type of area warrant. *Id.* at 270 n.3.

26. *Compare* 8 U.S.C. § 1357(a)(3) (1970) *with* 19 U.S.C. § 482 (1970). *See* note 17 *supra*.

27. *See* note 3 *supra*.

28. United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973); United States v. DeLeon, 462 F.2d 170 (5th Cir. 1972); Mienke v. United States, 452 F.2d 1076 (9th Cir. 1971); Duprez v. United States, 435 F.2d 1276 (9th Cir. 1970); Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970); United States v. Avey, 428 F.2d 1159

Whether the Court will extend the *Almeida-Sanchez* requirement of probable cause to customs searches[30] conducted away from the border, and immigration searches[31] at checkpoints not located at the border itself or a functional equivalent, remains to be seen. Justice Powell, in his concurrence,[32] viewed the decision as applicable only to roving immigration searches. The opinion of the Court, however, is open to broader interpretation.

(9th Cir.), *cert. denied*, 400 U.S. 903 (1970); United States v. Miranda, 426 F.2d 283 (9th Cir. 1970); Roa-Rodriquez v. United States, 410 F.2d 1206 (10th Cir. 1969); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963); United States v. Winer, 294 F. Supp. 731 (W.D. Tex. 1969).

29. *See* note 3 *supra*.

30. *See* note 17 *supra* (customs searches).

31. *See* note 1 *supra* (immigration searches).

32. 413 U.S. at 275.