3. We cannot accept respondent's contention that, even though § 287(a)(3) does not mention probable cause, its legislative history establishes that Congress implicitly conditioned immigration officers' authority to board and search vehicles on probable cause to believe that they contained aliens. The legislative history simply does not support this contention.

OK
L70
May 28, 1975

RE: Nos. 73-2050 United States v. Ortiz
    74-114 United States v. Brignoni-Ponce
    73-6848 Bowen v. United States

Dear Lewis:

If your proposed memoranda in the border search case become opinions for the Court, I vote as follows:

I join No. 73-2050, United States v. Ortiz. I join Parts I and III of No. 74-114, United States v. Brignoni-Ponce and also Part II if you will delete n. 3 at p. 4. That note seems inconsistent with the view of Section 287(a)(3) that I expressed in my dissent in Peltier. I cannot join No. 73-6848, Bowen v. United States in light of my dissent in Peltier. I would appreciate your adding at the foot of your Bowen, "Mr. Justice Brennan dissents and would reverse substantially for the reasons expressed in his dissent in No. 73-2000, United States v. Peltier."

Sincerely,

Mr. Justice Powell

cc: The Conference
May 28, 1975

No. 74-114, U. S. v. Brignoni-Ponce

Dear Lewis,

I agree with your memorandum in this case and would join it as an opinion of the Court.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
Re: No. 74-114, U.S. v. Brignoni-Ponce

Dear Lewis:

I agree with your memorandum in this case and would join it as an opinion of the Court.

Sincerely,

Mr. Justice Powell

cc: The Conference
RE: No. 74-114 United States v. Brignoni-Ponce

Dear Lewis:

After our discussion please note me as joining you in full your opinion in the above.

Sincerely,

[Signature]

Mr. Justice Powell

cc: The Conference
Dear Lewis:

RE: UNITED STATES V. ORTIZ, 73-2050
UNITED STATES V. BRIGNONI-PONCE, 74-114
BOWEN V. UNITED STATES, 73-6848

If your memoranda in these cases become opinions for the Court, I vote as follows:

In UNITED STATES V. ORTIZ, 73-2050, please join me.
In UNITED STATES V. BRIGNONI-PONCE, 74-114, I shall file a separate statement concurring in the result.
In BOWEN V. UNITED STATES, 73-6848, I shall dissent for reasons stated in my dissent in UNITED STATES V. PELTIER, 73-2000.

William O. Douglas

Mr. Justice Powell

cc: The Conference
June 5, 1975

Dear Lewis:

RE: United States v. Brignoni-Ponce, 74-114

If your memorandum in this case becomes an opinion of the Court I shall file the enclosed statement concurring in the judgment.

WILLIAM O. DOUGLAS

Mr. Justice Powell

cc: The Conference
June 6, 1975

Re: 74-114 - United States v. Brignoni-Ponce
73-2050 - United States v. Ortiz
73-6848 - Bowen v. United States

Dear Lewis:

To keep you informed, my present view is that 73-6848, Bowen v. United States, should be affirmed.

As to 74-114, United States v. Brignoni-Ponce, and 73-2050, United States v. Ortiz, I am not yet persuaded to affirm.

I am glad you now avoid the "area search warrant" approach but I fear we may not have found the key I need to resolve this problem.

As of now, in the latter two cases, I am close to where I was at Conference.

Regards,

Mr. Justice Powell

Copies to the Conference
PERSONAL

Border Search Cases

Dear Chief:

Although I am grateful for the vote in Bowen, I am quite disappointed that you think we have not "found the key" to the proper resolution of Brignoni-Ponce and Ortiz.

I write primarily to suggest that we are unlikely to find five votes for any "key" more to your liking. This is a judgment (with which you may disagree entirely) based on my having devoted more time to the study of these cases than to any other assignment you have given me this year.

The drafts which I have circulated are in accord on principle with Fourth Amendment precedents, the most recent of which is Almeida-Sanchez. In one respect, however, it can be said that I have departed somewhat from precedent. In Brignoni-Ponce, I proposed a "reasonable suspicion" standard for random stopping and questioning of occupants of vehicles by roving patrols. This affords more leeway to law enforcement officers than any prior Fourth Amendment case with which I am familiar, although I drew heavily on Terry and Adams.*

I do not believe that the "reasonable suspicion" standard will unduly handicap officers on roving patrol.

*In those cases, as you will recall, the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. This is a considerably higher requirement than the "reasonable suspicion" which I propose in Brignoni-Ponce.
I invite your attention particularly to Part IV of my Brignoni-Ponce opinion (p. 10-12) for the "factors [that] may be taken into account in deciding whether there is a reasonable suspicion to stop a car in the border area". With this portion of my opinion in mind, I further invite you to read Bill Douglas' concurrence, circulated June 5, in which he attacks the "reasonable suspicion" proposal.

It is thus evident that, so long as the composition of the Court remains as it is now, the resolution I propose is likely to be the closest to your tentative views. Putting it differently, we have the same 5 to 4 split that decided Almeida-Sanchez, except that Bill Douglas would require an even higher standard than I propose. Absent a change in the personnel of the Court, it is unrealistic to think that the result will be different at any future Term - unless Justices Brennan or Marshall retreat from my position to that of Bill Douglas.

It is also entirely speculative whether a change in Court composition will create a new majority.* We hope there will be no change for many years; we have no idea which Justice will be the first to leave; and we certainly have no idea as to the views of the Justice who might fill a vacancy.

Of course, we do not have to agree on a Court opinion. But examples that come to mind (e.g., Metromedia) have hardly been satisfactory to the bench or bar. The Border Search Cases present an especially pressing problem, with courts and U.S. Attorneys in four states awaiting definitive guidance. I am sure we all would regret further delay or a fractured Court.

As you know, we also have pending here cases which present the validity of random stops for questioning at established checkpoints. These are perhaps the most important of all of these cases. I confirm what I said at Friday's Conference, namely, that I have carefully considered the

*I do not imply that the possibility of a future change affects any of our judgments. I am merely exploring whether it is realistic to think the present situation will change.
issue, and will vote to affirm the right of the border patrol officers to make such stops - without requiring reasonable suspicion - at the established checkpoint. Potter expressed the same view at Conference, and has confirmed it to me personally. I think there is a vast difference between the circumstances of the regularized stops at established checkpoints (which are quite analogous to stopping vehicles for license checks), and the random stops by roving patrols at any time of day or night on any road or highway within a hundred miles of the border.

You may recall Bill Rehnquist's statement that he might consider joining me if I made clear that we were implying no view with respect to stops by state and local officers for such purposes as checking driver's licenses, auto registration, weighing trucks or enforcing agricultural quarantines. I attach a proposed new footnote to be added to Brignoni-Ponce. I do not know whether this will satisfy Bill.

Sincerely,

[Signature]

The Chief Justice

1fp/ss
8. Our decision is based on an assessment of the Border Patrol's function, its statutory authority for stopping vehicles, and the character of stops for questioning in the border areas. We imply no view as to issues that may arise with respect to state and local law enforcement practices of stopping vehicles for such purposes as checking driver's licenses and auto registration, weighing trucks, or enforcing agricultural quarantines.
These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both *Terry* and *Adams v. Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime. In this case as well, because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in *Terry*, the stop and inquiry must be "reasonably related in scope to the justification for their initiation." 392 U.S., at 29. The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause. We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.7 We conclude that in the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the government. Roads near the border carry not only

7 Because the stop in this case was made without a warrant and the officers made no effort to obtain one, we have no occasion to decide whether a warrant could be issued to stop cars in a designated...
aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.3 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that a large majority of traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to interference with their use of the highways, solely at the discretion of Border Patrol officers who seek to enforce laws having nothing to do with the regulation of highway use. The only formal limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in § 287(a)(3) to mean within 100 air miles from the border. 8 CFR § 287.1 (1974). That, however, is not enough at least in these circumstances.

If we approved the Government’s position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law. Yet the cases in which border area stops have been considered establish that bases for reasonable suspicion are available to Border Patrol officers. As we discuss in Part IV, infra, the nature of the violations which are here involved naturally generate articulable grounds for differentiating between violators and nonviolators. Even though the intrusion involved in Border Patrol stops is admittedly modest, we do not think it "reasonable" under the Fourth Amendment to make such stops on a random basis when means are available to protect law-abiding residents from indiscriminate official interference.
Our decision in this case is based on an assessment of the Border Patrol's function, the importance of the governmental interests served by its stops, the character of its stops, and, as discussed below, the availability of alternatives to indiscriminate stops unsupported by reasonable suspicion. The decision is also one which concerns stops having nothing to do with an inquiry whether highway users and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local law enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, agricultural quarantines and similar matters.
Cases Held for No. 74-114 U.S. v. Brignoni-Ponce

MEMORANDUM TO THE CONFERENCE:

No. 74-993 Janney v. United States
No. 74-6150 Coffey and Sparks v. United States

These two cases are exactly like No. 74-6016, Arnold v. United States, and the petition of Bylund and Dixon in No. 74-6014, discussed in the memo of cases held for United States v. Ortiz. In each case, the petitioner was stopped at the Sierra Blanca checkpoint and, in the course of questioning, Border Patrol officers discovered evidence that provided probable cause for a search. In each case CA5 relied on its decision in Hart. If the Court wants to review the functional equivalency issue, in hopes of reaching the stop question, these cases should be held. If the Court vacates and remands in the other cases, I think these petitioners should receive the same treatment. I might add that these Sierra Blanca cases are the only petitions presently before us that potentially present the issue of stops for questioning at checkpoints. I was in error in my memorandum of May 23, in suggesting that several pending petitions presented this issue. Our options, if we want to settle this remaining issue, are to grant one of these petitions despite the "functional-equivalency" hurdle, or to wait for a petition that presents the issue cleanly. My current inclination is to vacate and remand these petitions and wait.

No. 74-5062 Quiroz-Reyna v. United States
No. 74-5307 Baca v. United States

These petitions involve stops conducted prior to the date of decision in Almeida-Sanchez. None of the present
cases will decide whether the principles of Brignoni-Ponce should be applied retroactively. I believe, however, that the rationale of Peltier and the lower-court decisions prior to Almeida-Sanchez would lead to a conclusion that the Government reasonably could have continued making such stops at least until the date of decision in Almeida-Sanchez. Because we are not deciding the retroactivity question, it would seem appropriate to vacate these judgments and remand to the courts of appeals in light of Peltier, Bowen and Brignoni-Ponce, but I could also vote to deny the petitions if that is the consensus.

The remaining cases represent stops for questioning upheld by the courts of appeals on "reasonable suspicion." In light of the decision in Brignoni-Ponce, the only issues raised by these petitions will be the application of that standard to the facts of each case. For your convenience, I will outline the facts in each case, and indicate how I intend to vote.

No. 74-5422 Madueno-Astorga and Lopez-Saenz v. United States

This petition challenges two separate incidents. In the first (Madueno-Astorga), Border Patrol agents saw Petitioner's car on an Interstate Highway 10 miles from the border, at 6:50 a.m. They said that the car had a large trunk and a heavy-duty suspension system, and appeared to "drift" on curves. They concluded that it must be heavily loaded, so they stopped it. There were no other suspicious circumstances preceding the stop. Vacate and remand under Brignoni-Ponce.

The second incident (Lopez-Saenz) occurred in the early morning hours less than half a mile from the Mexican border, in an area "heavily used by alien and narcotic smugglers." The officer tried to stop a Ranchero pick-up (not Petitioner's vehicle). It tried to run him off the road, but he finally stopped it. The driver jumped out and fled, leaving the pick-up in a ditch. Within 2 to 4 minutes (and before the officer discovered that the pick-up contained marijuana), another Ranchero pick-up came by. The driver (Petitioner) appeared to be Mexican. The officer stopped the pick-up
suspecting it might be associated with the first vehicle, and found marijuana in plain view. Petitioner does not claim standing to challenge the stop of the first pick-up, but contends that there was no reasonable basis for the officer to suspect that he was associated with it. Deny.

No. 74-6003 Alvarez-Garcia v. United States

Petitioner and a codefendant were traveling, about 5:15 a.m., in closely-following cars near the border. They were traveling slowly, and the trailing car did not take opportunities to pass the lead car. Petitioner was driving the lead car. Border Patrol officers followed them and noticed that the trailing car was riding low, despite new shock absorbers. It also appeared to have control problems on curves, leading the officers to believe it was heavily loaded. The officers stopped the rear car and found marijuana, then stopped Petitioner's car, which also had new shock absorbers but was not riding low. Deny.

No. 74-6061 Rocha-Lopez v. United States

Border Patrol officers saw Petitioner (a Mexican-American) at 6:40 a.m. on a road 1-1/2 miles from the border in an area "notorious for smuggling." The officers testified that normal traffic at that hour is light and that they can identify most drivers as local residents. They did not recognize Petitioner. When Petitioner saw the agents, he jammed on his brakes, reducing his speed to 10 mph. On these facts he was stopped. Vacate and Remand.

No. 74-6086 Gonzalez-Diaz v. United States

Border Patrol officers were on patrol in a "notorious smuggling area" 7-1/2 miles from the border at 2:30 a.m. They stopped to investigate an unusually-placed rock beside the road and saw footprints, leading them to believe that aliens had been picked up there. Petitioner then drove by in a Pontiac sedan of a sort often used for smuggling aliens. He was Mexican, a stranger to the officers, and he was traveling 20 mph in a 55 mph zone. They followed him for a short distance and stopped him. Vacate and remand.
A Border Patrol officer was on patrol at 5:20 a.m. 1-1/2 miles from the border on a road that parallels the Rio Grande. The area between the highway and the river is sparsely populated and is often used by smugglers. The officer saw Petitioner's truck top a levee, coming from the border, and turn its headlights on. The officer became suspicious and signaled the vehicle to stop. Petitioner tried to run him off the road, but the officer finally succeeded in stopping the truck. Deny.
June 9, 1975

PERSONAL

Re: Nos. 73-2050 - United States v. Ortiz
74-114 - United States v. Brignoni-Ponce
73-6848 - Bowen v. United States

Dear Lewis:

I'm sorry to "let you down" on the Border Search cases. There is, of course, no Court opinion resolving these troublesome issues. And the vexing aspect of the plurality opinion in Almeida-Sanchez is that it has been followed by an unemployment figure exceeded only by the number of illegal aliens reliably estimated to be in the United States.

I argue for no nexus between the two except that they coincide. I add to that what I said in some dissenting opinions over the past 20 years, that we are becoming an "impotent society." With a shocking rise in crime, both in prosperity and recession, we are constantly -- and blandly -- telling the society we serve "you can't get there from here."

Here, as elsewhere, the key lies in the irrational, monolithic, mechanical application of the Suppression Doctrine, fulfilling Cardozo's prophecy on it once a month if not more.

You have my vote on the Border cases if you link it with a sane, selective use of exclusion -- as in England, Israel, and every other civilized country in the world save ours?

Regards,

Mr. Justice Powell
June 9, 1975

Re: No. 73-2050 - United States v. Ortiz
No. 74-114 - United States v. Brignoni-Ponce

Dear Lewis:

I am still unable to join your proposed opinions for these cases. I remain where I was at the time of our conference.

Sincerely,

Mr. Justice Powell

cc: The Conference
June 10, 1975

Re: No. 74-114 - United States v. Brignoni-Ponce

Dear Fellow Losers:

At this stage of the Term, it seems to be the common understanding that we have two choices in this case and in Ortiz, both of which represent extensions of Almeida-Sanchez in which we dissented. The first choice is to continue our votes to reverse the Court of Appeals, and thereby under Conference practice during the past few months to require the cases to go over for reargument next fall. The other choice is to try to persuade Lewis to make some modifications in his draft opinion in exchange for the four of us concurring either in the opinion or in the result.

I think the second choice has much to be said for it for at least two reasons. First is that if we follow the first option we are apt in the long run to find that it will become a Court opinion in spite of our disagreement with it, and as presently drafted it has a good deal of potential for spill-over into areas quite different from Border Patrol searches. The basic conception of the opinion, as I now read it, is that even though the governmental interest is significant, and the intrusion produced by a stop is minor, the interest of innocent citizens in using the highway is such that even this
minor intrusion will not be permitted under the Fourth Amendment. I am hopeful that Lewis may be amenable to changing some of the language in his opinion so as to shift its emphasis in a way that would confine the result more to the particular situation of the Border Patrol, and leave open not merely in form but in substance the question of the propriety of stops where the stop is related to inquiring as to whether conditions imposed by law for operating a vehicle on a public highway have been met.

The second reason why I think it wise to pursue the second alternative is that it does seem to me that we all have institutional responsibility for getting these cases decided this Term. I don't think any of those who have voted to join Lewis are about to change, and so the changes will have to come from us. If it were a case of a numerically evenly divided Court, it could well be argued that there is no more reason for us to alter our views than for those on the other side to alter theirs, but here there is a five man majority in support of Lewis' present position.

Feeling as I do, I want to take this opportunity to sound out each of the three of you on the proposed changes in the draft opinion which are attached to this memorandum. I include a partial rewrite of pages 8 and 9 of the May 24th circulation, together with a typed footnote "7a" following revised page 9, and an insertion on page 11 of the phrase "give rise" to the present word "add" in the eighth line on that page.

I have no idea whether these changes would be satisfactory to Lewis, and I am quite sure they might produce some objections on the part of others who have joined his present draft. But here we do have some bargaining strength. Lewis has proposed to me a somewhat pro forma footnote which would go on page 9 of the present draft and read as follows:
"Our decision is based on an assessment of the Border Patrol's function, its statutory authority for stopping vehicles, and the character of stops for questioning in the border areas. We imply no view as to issues that may arise with respect to state and local law enforcement practices of stopping vehicles for such purposes as checking driver's licenses and auto registration, weighing trucks, or enforcing agricultural quarantines."

While this adequately reserves these issues in form, I do not regard it as being nearly as satisfactory as the proposed changes in language which I have incorporated in the attachments to this memorandum. I have heard enough discussions in three and a half years of Conference to realize that a simple footnote in a case saying, "We do not decide this question," is not always thought by everybody who joins the opinion to mean exactly what it says, and I would like to make sure that the opinion itself is structured in such a way as to genuinely reserve these issues.

If that is done, I would propose something very generally along the following as a concurring statement for as many of the four of us as agree with it, probably to be issued in the name of the Chief Justice, as our senior and mentor, or in Byron's name, if he were willing, since he authored the dissent in Almeida-Sanchez:

"We dissented from the Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), and we are of the view that the Court's decision in this case represents a still further extension of departures taken in that case. Nonetheless, because a majority of the Court adheres
to Almeida, and believes that this case should be similarly resolved, we [join in the Court's opinion] [concur in the result].

"We think it quite important to point out, however, that the Court's opinion and reasoning deal only with the type of stop involved in this case. We think that just as travelers entering the country may be stopped and searched without probable cause and without founded suspicion 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,' Carroll v. United States, 267 U.S. 132, 154 (1925), a strong case may be made for those charged with the enforcement of laws conditioning the right of vehicular use of a highway to likewise stop motorists using highways in order to determine whether they have met the qualifications prescribed by applicable law for such use. See Cady v. Dombrowski, 413 U.S. 433, 440-441 (1973); United States v. Biswell, 406 U.S. 311 (1972). We regard these and similar situations, such as agricultural inspections and highway roadblocks to apprehend known fugitives, as not in any way constitutionally suspect by reason of today's decision."

I would appreciate receiving your reaction to this very rough and tentative proposal.

Sincerely,

The Chief Justice
Mr. Justice White
Mr. Justice Blackmun
Dear Bill, Potter and Thurgood:

You may recall that at our Conference on June 6, (when these cases were discussed) Bill Rehnquist indicated that if the opinions were clarified in certain respects, he might reconsider his position.

I followed up with Bill and he identified two particular concerns: (i) that our opinions would not apply to state regulation of highway use, such as enforcement of laws with respect to driver's licenses, truck weights and the like; and (ii) that we not foreclose a different decision with respect to stops for questioning at established checkpoints.

In my view, the draft opinions as circulated left open both of these issues, as neither was addressed. Bill, however, has a different view, and he rejected as inadequate some minor language changes I suggested. He then submitted counter-proposals that were quite lengthy.

As the result of negotiations, I submitted the changes which are now reflected in the pages of Brignoni-Ponce and Ortiz which I enclose herewith for each of you. Without committing himself, Bill has indicated an inclination to join us if we adopt these changes. Prior to seeing my counter-proposals Bill had conferred with the Chief Justice, Byron and Harry with inconclusive results. I do not think my proposals have been seen by these gentlemen, as Bill thought it best to know first whether we would submit them to the Conference.

I am willing to make these changes in the draft opinions. They certainly do not affect the result of the holdings or change the basic rationale. I expect all of us would come out at about the same place on the right of the states.
reasonably to govern highway usage. There may be differences between us as to mere stops at established checkpoints. Although Byron expressed the view that our decision in Brignoni-Ponce would necessarily foreshadow a similar holding with respect to all other stops, I do not agree with him. In any event, the changes which are necessary to satisfy Bill will still leave each of us free to decide the fixed checkpoint stop issue as we deem proper.

In sum, I think we have a chance now to bring these cases down. We will have settled conclusively the "search" issue at fixed checkpoints as well as by roving patrols; and we also will have settled the "stop" issue with respect to roving patrols. These decisions will go far toward resolving the doubt which now overhangs the entire Border Patrol operations.

In view of time constraints as well as the importance of a resolution, I suggest that the four of us meet to discuss the situation. If agreeable, perhaps we could convene in Bill Brennan's office at say 11:00 a.m. today if this is convenient. If Mary Fowler will let Sally Smith know, she will advise Thurgood and Potter.

Sincerely,

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall

lfp/ss
Enc.
June 23, 1975

Re: No. 74-114 - United States v. Brignoni-Ponce

Dear Bill:

Please show me as joining your concurrence but I may join only the judgment, thereby limiting my concurrence.

I will act as soon as Lewis' "whole package" is clear to me.

Regards,

Mr. Justice Rehnquist

Copies to the Conference
June 25, 1975

Re: No. 74-114 - United States v. Brignoni-Ponce

Dear Bill:

I am writing separately in the above and I think it better to have that stand alone, so please withdraw my "join" of June 23.

Regards,

Mr. Justice Rehnquist

Copies to the Conference
Cases Held for No. 74-114 U.S. v. Brignoni-Ponce

MEMORANDUM TO THE CONFERENCE:

No. 74-993 Janney v. United States
No. 74-6150 Coffey and Sparks v. United States

These two cases are exactly like No. 74-6016, Arnold v. United States, and the petition of Bylund and Dixon in No. 74-6014, discussed in the memo of cases held for United States v. Ortiz. In each case the petitioner was stopped at the Sierra Blanca checkpoint and, in the course of questioning, Border Patrol officers discovered evidence that provided probable cause for a search. In each case CAS relied on its decision in Hart. If the Court wants to review the functional equivalency issue, in hopes of reaching the stop question, these cases should be held. If the Court vacates and remands in the other cases, I think these petitioners should receive the same treatment. I might add that these Sierra Blanca cases are the only petitions presently before us that potentially present the issue of stops for questioning at checkpoints. I was in error in my memorandum of May 23, in suggesting that several pending petitions presented this issue. Our options, if we want to settle this remaining issue and to grant one of these petitions despite the "functional-equivalency" hurdle, or to wait for a petition that presents the issue cleanly. My current inclination is to vacate and remand these petitions and wait.

No. 74-5062 Quiroz-Reyna v. United States
No. 74-5307 Baca v. United States

These petitions involve stops conducted prior to the date of decision in Almeida-Sanchez. None of the present
cases will decide whether the principles of Brignoni-Ponce should be applied retroactively. I believe, however, that the rationale of Peltier and the lower-court decisions prior to Almeida-Sanchez would lead to a conclusion that the Government reasonably could have continued making such stops at least until the date of decision in Almeida-Sanchez. Because we are not deciding the retroactivity question, it would seem appropriate to vacate these judgments and remand to the courts of appeals in light of Peltier, Bowes and Brignoni-Ponce, but I could also vote to deny the petitions if that is the consensus.

The remaining cases represent stops for questioning upheld by the courts of appeals on "reasonable suspicion." In light of the decision in Brignoni-Ponce, the only issues raised by these petitions will be the application of that standard to the facts of each case. For your convenience, I will outline the facts in each case, and indicate how I intend to vote.

No. 74-5422 Maduenas-Astorga and Lopez-Saenz v. United States

This petition challenges two separate incidents. In the first (Madueno-Astorga), Border Patrol agents saw Petitioner's car on an Interstate Highway 10 miles from the border, at 6:50 a.m. They said that the car had a large trunk and a heavy-duty suspension system, and appeared to "drift" on curves. They concluded that it must be heavily loaded, so they stopped it. There were no other suspicious circumstances preceding the stop. Vacate and remand under Brignoni-Ponce.

The second incident (Lopez-Saenz) occurred in the early morning hours less than half a mile from the Mexican border, in an area "heavily used by alien and narcotic smugglers." The officer tried to stop a Ranchero pick-up (not Petitioner's vehicle). It tried to run him off the road, but he finally stopped it. The driver jumped out and fled, leaving the pick-up in a ditch. Within 2 to 4 minutes (and before the officer discovered that the pick-up contained marijuana), another Ranchero pick-up came by. The driver (Petitioner) appeared to be Mexican. The officer stopped the pick-up
suspecting it might be associated with the first vehicle, and found marijuana in plain view. Petitioner does not claim standing to challenge the stop of the first pick-up, but contends that there was no reasonable basis for the officer to suspect that he was associated with it. Deny.

No. 74-6003 Alvarez-Garcia v. United States

Petitioner and a codefendant were traveling, about 5:15 a.m., in closely-following cars near the border. They were traveling slowly, and the trailing car did not take opportunities to pass the lead car. Petitioner was driving the lead car. Border Patrol officers followed them and noticed that the trailing car was riding low, despite new shock absorbers. It also appeared to have control problems on curves, leading the officers to believe it was heavily loaded. The officers stopped the rear car and found marijuana, then stopped Petitioner's car, which also had new shock absorbers but was not riding low. Deny.

No. 74-6061 Rocha-Lopez v. United States

Border Patrol officers saw Petitioner (a Mexican-American) at 6:40 a.m. on a road 1-1/2 miles from the border in an area "notorious for smuggling." The officers testified that normal traffic at that hour is light and that they can identify most drivers as local residents. They did not recognize Petitioner. When Petitioner saw the agents, he jammed on his brakes, reducing his speed to 10 mph. On these facts he was stopped. Vacate and Remand.

No. 74-6086 Gonzalez-Diaz v. United States

Border Patrol officers were on patrol in a "notorious smuggling area" 7-1/2 miles from the border at 2:30 a.m. They stopped to investigate an unusually-placed rock beside the road and saw footprints, leading them to believe that aliens had been picked up there. Petitioner then drove by in a Pontiac sedan of a sort often used for smuggling aliens. He was Mexican, a stranger to the officers, and he was traveling 20 mph in a 55 mph zone. They followed him for a short distance and stopped him. Vacate and remand.
A Border Patrol officer was on patrol at 5:20 a.m. 1-1/2 miles from the border on a road that parallels the Rio Grande. The area between the highway and the river is sparsely populated and is often used by smugglers. The officer saw Petitioner's truck top a levee, coming from the border, and turn its headlights on. The officer became suspicious and signaled the vehicle to stop. Petitioner tried to run him off the road, but the officer finally succeeded in stopping the truck. Deny.

L.F.P., Jr.
Brignoni-Bonce holds

74-993 - Focsy, kept step + plain smell - Post A-S
"functional equivalent" holding - relies on Hart

74-5062 - Stop at, kept - (pre A-S) - 70 mi from border

tmp - leading to cause for search

74-5307 - Pre A-S kept step + search, conv. aff'd

74-5422 - Steps + developed suspicion

"5" doctrine - Aff'd by CA4

74-6003 - Step upheld on CA4 "found suspicion" doctrine

74-6061 - Step Aff on "found suspicion" - upheld by CA9

74-6086 - Step upheld on "found suspicion"

74-6150 - Stop at kep post A-S; susp. for search

Sierra Blanca - cite to Hart

74-6254 - Stop on suspicion - CA5 (no opn) - "has suspicion"