



ST. MARY'S
UNIVERSITY

The Scholar: St. Mary's Law Review on Race
and Social Justice

Volume 2 | Number 2

Article 18

1-1-2000

The Dangers of Unguarded Discretion: The Unconstitutional Stops of Buses by Roving Patrols

Norma Alicia Ortiz

Follow this and additional works at: <https://commons.stmarytx.edu/thescholar>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Norma A. Ortiz, *The Dangers of Unguarded Discretion: The Unconstitutional Stops of Buses by Roving Patrols*, 2 THE SCHOLAR 289 (2000).

Available at: <https://commons.stmarytx.edu/thescholar/vol2/iss2/18>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in The Scholar: St. Mary's Law Review on Race and Social Justice by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

**THE DANGERS OF UNGUARDED DISCRETION: THE
UNCONSTITUTIONAL STOPS OF BUSES BY ROVING PATROLS**

NORMA ORTIZ*

I. Introduction.....	290
II. Federal Authority to Regulate Immigration at the Border	292
A. Permanent Checkpoints and Temporary Checkpoints ..	293
B. Roving Patrols	294
1. Reasonable Suspicion	296
2. Application of Reasonable Suspicion Standards ...	298
III. The Seizures of <i>El Aguila</i>	299
A. The Fourth Amendment Protection on Seizures	300
B. Reasonable Suspicion Required for Stopping <i>El Aguila</i>	301
IV. Implications of Being Aboard a Bus	302
A. Consensual Police Encounters	302
1. "Free to Leave" Test	302
V. Analysis of the Stops at <i>El Aguila</i>	304
A. Detection Questioning on Board <i>El Aguila</i>	305
1. Intimidating Circumstances	305
2. Submission is not Consent	306
3. No Particularized Suspicion	307
4. Passengers are not "Free to Leave"	308
B. Roving Patrols Violate the Reasonable Suspicion Standard	309
C. Stop of <i>El Aguila</i> and Detention of Its Occupants is an Unreasonable Seizure	313
VI. Setting Up a Civilian Review Board at U.S. – Mexico Boarder	315

* St. Mary's University School of Law, Candidate for J.D., May 2001, University of Dallas, B.A. Politics, May 1998. I would like to dedicate this note to my parents and sister, whose strength and determination in a new country revealed that my purpose in life was to address the injustice incurred by those struggling to remain and succeed in the United States. I would like to thank my editors, Marie Galindo, Keisha David, and Yvette Mastin for their help in drafting and developing this Comment. Additionally, I would like to thank Professor Cecelia Espenosa and Professor Lee Teran for their guidance with this comment. Finally, I thank Oscar Munoz, for his unconditional love and support.

A. Function of Civilian Review Agencies 316
 B. The Current Available Remedies 316
 1. Injunctive Relief 316
 2. Filing a Complaint 317
 a. CAP Citizens Advisory Panel 318
 C. Creation of the Civilian Review Board 318
 1. Features of the Civilian Review Board 319
 2. Intermediary in the Complaint Process 319
 3. Provide Information and Education to Residents.. 320
 VII. Conclusion 320

I. INTRODUCTION

When the bus came up to the turn, just before the highway, the border patrol car used its lights and sirens to pull the bus over.¹ It was seven o'clock and I was on my way to work that morning. This was the third time I was aboard *El Aguila*² when it was stopped.³ Two armed border patrol officers boarded the bus and announced that they were going to check for illegal aliens.⁴ The officers proceeded to tell every passenger to present documentation indicating residence or citizenship.⁵ They did not ask, they demanded.⁶ I told myself this time it was going to be different because I would refuse to provide documentation;⁷ after all, I was a United States citizen and had the right to remain silent.⁸ The border pa-

1. Mr. Cantu narrated the events of the stop in an interview; the account, as it appears, has been edited from the original version. See Telephone Interview by Christopher McRorie with Mr. Cantu, resident of El Cenizo, Tex. (Aug. 1999) [hereinafter McRorie Interview with Mr. Cantu]. The names of the residents who were interviewed for this comment were changed to protect their privacy.

2. Most of the habitants of El Cenizo, Texas, use the small county bus called *El Aguila* to get to and from worksites in Laredo, Texas. See Telephone Interview by Christopher McRorie with Jose Gamez, County Director of Rural Transportation (Aug. 19, 1999) [hereinafter McRorie Interview with Mr. Gamez]. Many also use the bus to get to supermarkets, stores, and clinics, which are not available at El Cenizo. See Interview by Christopher McRorie with Mrs. Diaz, resident of El Cenizo, Tex. (Aug. 1999) [hereinafter McRorie Interview with Mrs. Diaz].

3. See McRorie Interview with Mr. Cantu, *supra* note 1.

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.* For purposes of this Comment, the author is asserting that the stops of *El Aguila* constitute a seizure. As such, a person's Fifth Amendment right to remain silent is invoked. See U.S. CONST. amend V. "No person shall be compelled in any criminal case to be a witness against himself. . ."; see also *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

trol officers did not take my exercise of rights well; they hassled and insulted me until they were convinced that I was a United States citizen.⁹

This account is from a resident of El Cenizo,¹⁰ a small community located outside Laredo, Texas, and along the United States-Mexico border.¹¹ Many of the residents of El Cenizo ride a small county bus called *El Aguila* to get to and from work everyday.¹²

El Aguila is the target of random border patrol stops. "The stops occur on the highway, in the city, everywhere, but never at regularly scheduled stops."¹³ Once stopped, border patrol officers demand documentation from everyone in the bus,¹⁴ notwithstanding the fact that most passengers are United States citizens or permanent residents.¹⁵ The passengers are all checked, and everyone who does not have documentation or who refuses to show documentation is told to get off the bus.¹⁶ These passengers must convince the officers that they have a right to be in the United States, even if they profess to be citizens.¹⁷ The bus does not take off until all have been checked and all have presented documents showing that they are citizens or residents of the United States.¹⁸ The stops can

9. See McRorie Interview with Mr. Cantu, *supra* note 1.

10. Although the analysis will focus on the stops in El Cenizo of *El Aguila*, the community reflects the diverse population of United States citizens, legal permanent residents, and immigrants in cities along the United States-Mexico Border.

11. See David McLemore, *S. Texas Town Adopts Spanish, Bans Cooperation with INS* (visited Feb. 2, 2000) <<http://www.usbc.org/info/citusa/texastownspanish.htm>> (relating that El Cenizo is made up of modest houses located about 10 miles down the river from Laredo).

12. See *id.* Most of El Cenizo residents have household incomes falling below the poverty lines thus requiring them to take the bus to and from Laredo. See *id.*

13. McRorie Interview with Jose Gamez, *supra* note 2.

14. See McRorie Interview with Mr. Cantu, *supra* note 1.; McRorie Interview with Mrs. Diaz, *supra* note 2.

15. See McRorie Interview with Mr. Cantu, *supra* note 1 (stating that the three stops combined resulted in the arrest of only two or three undocumented passengers). From this, one can infer that the rest of the passengers, the majority, were United States citizens or lawful permanent residents.

16. See McRorie Interview with Mrs. Diaz, *supra* note 2. She was told to exit the bus along with others, and was asked by three different officers whether she was a United States citizen, and all three times she was asked whether she was sure she was a citizen. See *id.*; McRorie Interview with Mr. Cantu, *supra* note 1 (stating that he was hassled when he refused to show documentation proving he was a United States citizen).

17. See McRorie Interview with Mrs. Diaz, *supra* note 2; see also McRorie Interview with Mr. Cantu, *supra* note 1.

18. See McRorie Interview with Mrs. Diaz, *supra* note 2 (noting that the bus is delayed because people who do not show proper documentation are forced to exit the bus and are not allowed back on until they properly show that they are citizens or residents).

last from twenty to forty-five minutes, which frequently make the passengers late to work.¹⁹

The Border patrol's procedure of randomly stopping *El Aguila* to search for illegal aliens violates the constitutional right of United States citizens and legal permanent residents to travel free from governmental intrusion.²⁰ The border patrol officers justification for this extravagant license to stop is the immigration laws, which on their face allow them to board a bus and question the passengers about their right to be in the United States.²¹ Yet, United States citizens and legal permanent residents maintain that immigration laws cannot be interpreted to allow random seizures and over-inclusive questioning by roving patrols.

This Comment will demonstrate how roving patrols that randomly stop buses between El Cenizo and Laredo, Texas, violate the Fourth Amendment rights of United States citizens and legal permanent residents who live along the U.S.-Mexico border. Part II of this comment presents the federal authority to regulate immigration at the border, specifically defining the standard of reasonable suspicion applicable to roving patrols, which was adopted by the Supreme Court in 1975. Part III, defines the stops of *El Aguila* as seizures requiring the officers to meet the standard of reasonable suspicion. In Part IV, this Comment analyzes the questioning on board *El Aguila* using the law on voluntary police encounters concluding that border patrol does not meet the required standard of reasonable suspicion. Moreover, finding that the procedure of stopping *El Aguila* and detaining its occupants is an unreasonable seizure. Finally, this comment proposes setting up a Citizen Review Board, which would operate in communities along the Texas-Mexico border. The Civilian Review Board would monitor the procedures adopted by INS and provide an intermediary structure in the complaint process, thereby providing a remedy against overbearing border patrol procedures.

II. FEDERAL AUTHORITY TO REGULATE IMMIGRATION AT THE BORDER

The power to regulate immigration is delegated by Congress to the Attorney General, who in turn has empowered the Immigration and Natu-

19. See McRorie Interview with Jose Gamez, *supra* note 2.

20. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 273-74 (1973) (stating that the Court should not forget that these people have indispensable freedoms and not second-class rights).

21. See Immigration and Nationality Act of 1952 § 287 (a)(3), 8 U.S.C. § 1357(a)(3) (1994) (giving border patrol officers the power to board a conveyance within a reasonable distance from the external border to search for undocumented people).

ralization Service (INS) with the authority to enforce immigration laws.²² INS is mandated to place border patrol officers at the international border to detect illegal aliens trying to come into the United States in addition to illegal activity taking place within a reasonable distance from the border.²³

In order to carry out their enforcement activities, the Immigration and Nationality Act (INA) authorizes INS officers to exercise certain powers without a search or arrest warrant.²⁴ For instance, INS officers have the power, without a warrant, to question “any alien or person believed to be an alien as to his right to be or to remain in the United States,” within a reasonable distance from the border.²⁵ The officers have the power to board and search for aliens in any aircraft, conveyance, or vehicle within a reasonable distance from the external border to search for undocumented people.²⁶ The Attorney General has defined the reasonable distance as that area within 100 miles from the border.²⁷

A. *Permanent Checkpoints and Temporary Checkpoints*

Away from the border, the border patrol conducts three types of inland traffic-checking operations in an effort to detect smugglers and control illegal immigration.²⁸ These operations include permanent checkpoints, temporary checkpoints, and roving patrols.²⁹

22. *See id.* § 1357(a)(1); *see also Almeida-Sanchez*, 413 U.S. at 272 (quoting *The Chinese Exclusion Case* to hold that the Federal government has the plenary power to exclude undocumented people and thus pass laws regulating immigration); STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 535 (2d ed. 1997).

23. *See* FEDERAL IMMIGRATION LAW ENFORCEMENT IN THE SOUTHWEST: CIVIL RIGHTS IMPACTS ON BORDER COMMUNITIES 8 (1997) (stating that the border patrol has expanded from patrolling the border to preventing illegal immigration); *The United States Border Patrol* (visited Feb. 2, 2000) <<http://usbp.com/usbp1.htm>>; *see generally* Rebecca Chiao, *Fourth Amendment Limits on Immigration Law Enforcement* IMMIGR. BRIEFINGS, Feb. 1993 at 1, 11, 12 (stating that border patrol officers operate to control the incoming traffic from the international border as well as undocumented aliens or illegal activity taking place in the interior).

24. *See* Immigration and Nationality Act of 1952 § 287(a), 8 U.S.C. § 1357(a) (1994); LEGOMSKY, *supra* note 22.

25. Immigration and Nationality Act of 1952 § 287(a)(1), 8 U.S.C. § 1357(a)(1) (1994).

26. *See id.* § 1357(a)(3).

27. *See* 8 C.F.R. 287.1(a)(2) (1999) (noting that the code refers to “air” miles or any shorter distance fixed by the district director); *see also* *Michigan v. DeFillippo*, 443 U.S. 31, 39 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975); *Almeida-Sanchez*, 413 U.S. at 266.

28. *See* *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976); *Almeida-Sanchez*, 413 U.S. at 268.

29. *See* *Martinez-Fuerte*, 428 U.S. at 552; *Almeida-Sanchez*, 413 U.S. at 268.

Conducted in a similar manner, permanent checkpoints and temporary checkpoints consist of routine inquiries regarding citizenship, immigration status, and suspicious circumstances.³⁰ Operated miles away from the border, motorists are alerted about the established checkpoints by signs, flashing lights, and orange traffic cones.³¹

Because motorists have knowledge of the location of the checkpoint and only those cars passing through the checkpoint may be checked,³² the Court has concluded that routine checkpoint inquiries do not require any standard of suspicion.³³ The Supreme Court has furnished border patrol officers the discretion to stop and question motorists at checkpoints, as these are considered functional equivalents to the international border.³⁴

B. *Roving Patrols*

The third form of traffic-checking operation, roving patrols, is used to supplement the checkpoints system in intercepting illegal entrants and detecting smuggling operations.³⁵ Roving patrols involve INS officers that stop and question motorists miles away from the border on roads and highways in the same way police officers apprehend traffic violators.³⁶ Because roving patrol officers look for criminal activity, both alien smuggling and contraband smuggling,³⁷ roving patrols lose their administrative nature and are treated differently from checkpoint stops.³⁸

30. See, e.g., *Martinez-Fuerte*, 428 U.S. at 557-58; *United States v. Hernandez*, 7 F.3d 944, 946 (10th Cir. 1993) (stating that Fourth Amendment jurisprudence allows for this line of questioning); *United States v. Ludlow*, 992 F.2d 260, 265 (10th Cir. 1993).

31. See *Martinez-Fuerte*, 428 U.S. at 545-46; *United States v. Ortiz*, 422 U.S. 891, 893 (1975); *United States v. Davis*, 141 F.3d 1180, 1998 WL 133479, at **1-**2 (9th Cir. 1998).

32. See *Ortiz*, 422 U.S. at 895 (inferring that checkpoint stops are less intrusive because motorists can see that other vehicles are being stopped); *Martinez-Fuerte*, 428 U.S. at 559.

33. See *Martinez-Fuerte*, 428 U.S. at 562 (finding that there is no need for individualized suspicion at permanent checkpoints); Christine L. Vigliotti, Note, *Gonzalez-Rivera v. INS: An Unwarranted Application of the Exclusionary Rule to Civil Deportation Hearings*, 40 VILL. L. REV. 1133, 1142 (1995).

34. See *Ortiz*, 422 U.S. at 896-97; *United States v. Maestas*, 2 F.3d 1485, 1494-95 (10th Cir. 1993); Rebecca Chiao, *supra* note 23, at 12 (stating that all persons are subject to questioning regarding immigration status at border equivalents). Permanent checkpoints, temporary checkpoints and airports are considered border equivalents. See *id.* at 8.

35. See *Martinez-Fuerte*, 428 U.S. at 552.

36. See Rebecca Chiao, *supra* note 23, at 12.

37. See *United States v. Boruff*, 909 F.2d 111, 117 (5th Cir. 1990) (noting that roving patrol officers may stop vehicles when they have reasonable suspicion of drug smuggling or illegal aliens); *United States v. Monsivais*, 907 F.2d 987, 990 (10th Cir. 1990).

38. See *Michigan Police Department of State Police v. Sitz*, 496 U.S. 444, 453 (1990) (distinguishing checkpoints from roving patrols); *United States v. Villamonte-Marquez*, 462 U.S. 579, 587 (1983) (distinguishing roving patrols as not part of the functional equivalents of the border); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975);

In *United States v. Brignoni-Ponce*,³⁹ the Court concluded that roving patrol officers needed to adhere to a higher standard.⁴⁰ Rather than the broad and unlimited discretion conferred on border patrol officers to stop and question at the border and its equivalents, roving patrol officers must have reasonable suspicion.⁴¹ Applying a balancing test, the Court found that the requirement of 'reasonable suspicion' allowed the government sufficient means to safeguard the public interest while also protecting inhabitants of border areas from random official intrusion.⁴²

The government asserted that roving patrols could conduct routine stops based solely on the Mexican appearance or ancestry of the passengers.⁴³ The government claimed that they were authorized under the INA to question anyone believed to be an alien and to board and search for aliens within an aircraft, conveyance, or vehicle.⁴⁴

Although persuaded by the government's alleged need for flexibility in implementing effective procedures to prevent undocumented immigration,⁴⁵ the Court found that immigration laws could not be interpreted as allowing roving patrols the power to make routine stops when there was no reason to believe the passengers were undocumented immigrants.⁴⁶ The Court took into account that a large amount of legitimate traffic might be subject to these stops⁴⁷ and the grave danger that such unreviewable discretion would be abused by some of the officers.⁴⁸ The Court feared that roving patrols would stop motorists at random for questioning, "on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law."⁴⁹ Therefore, random stops of vehicles by roving patrols would not be tolerated, because to do so would subject border area residents to potentially unlimited infringement with

United States v. Venzor-Castillo, 991 F.2d 634, 637 (10th Cir. 1993) (indicating that roving patrol officers operating miles from the border are not a functional equivalent of the border).

39. 422 U.S. 873 (1975).

40. See *Brignoni-Ponce*, 422 U.S. at 882-83.

41. See *id.*; *United States v. Martinez-Fuerte*, 428 U.S. 543, 562-63 (1976) (acknowledging that criteria used to conduct inspections at the border checkpoints would not be sustained when referring to roving patrols).

42. See *Brignoni-Ponce*, 422 U.S. at 883.

43. See *id.* at 877.

44. See Immigration and Nationality Act of 1952 § 287 (a)(3), 8 U.S.C. § 1357(a)(3) (1994); *Brignoni-Ponce*, 422 U.S. at 877.

45. See *Brignoni-Ponce*, 422 U.S. at 878; Kevin R. Johnson, *Race Profiling in Immigration Enforcement*, 14 (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

46. See *Brignoni-Ponce*, 422 U.S. at 884.

47. See *id.* at 882.

48. See *id.* at 882-83.

49. *Id.* at 883.

their use of public roadways.⁵⁰ The Court decided that the Fourth Amendment prohibited roving border patrols from stopping a vehicle near the Mexican border and questioning its occupants as to their immigration status when the only ground for suspicion was that the occupants appear to be of Mexican ancestry.⁵¹ The Court held that appearing to be Mexican while in close proximity to the Mexican border was not sufficient to constitute a 'reasonable suspicion' that immigration laws were being violated.⁵²

While the Court forbade roving patrol officers from stopping vehicles on the appearance of Mexican ancestry alone, it deemed Mexican appearance a relevant factor.⁵³ The Court included Mexican ancestry in a list of relevant factors to be considered when carrying out a stop.⁵⁴ Such relevant factors include characteristics of the area, specifically its proximity to the border;⁵⁵ information about recent illegal border crossing in the area;⁵⁶ a driver's behavior;⁵⁷ the type of vehicle and the characteristic appearance of persons who live in Mexico;⁵⁸ and other factors such as mode of dress and haircut.⁵⁹ The *Brignoni-Ponce* factors have been criticized for their subjectivity in allowing officers to rely on opinions of what illegal aliens might look like.⁶⁰

1. Reasonable Suspicion

The standard of reasonable suspicion requires that roving patrol officers be aware of 'specific articulable facts' which, taken together with rational inferences, reasonably warrant suspicion that a vehicle contains illegal aliens.⁶¹ This means that the officer must be able to point to the facts that formed the basis of his reasonable suspicion for making the

50. *See id.* at 882.

51. *See Brignoni-Ponce*, 422 U.S. at 885-86.

52. *See id.* at 886-87.

53. *See id.* 886-87 (stating that the "likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor").

54. *See id.* at 884-86.

55. *See id.* 884-85.

56. *See Brignoni-Ponce*, 422 U.S. at 885.

57. *See id.* at 885.

58. *See id.* at 885.

59. *See id.* at 884-85.

60. *See* Jonathan L. Hafetz, *Comment, The Rule of Egregiousness: INS v. Lopez-Mendoza Reconsidered*, 19 WHITTIER L. REV. 843, 850-51 (1998).

61. *See Brignoni-Ponce*, 422 U.S. at 881-82; Randall S. Susskind, *Race Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 329 (1994). *See generally* Terry v. Ohio, 392 U.S. 1, 21 (1968) (holding that the Fourth Amendment requires an officer to point to "specific and articulable facts" before an intrusion is found to be warranted).

stop.⁶² The standard of reasonable suspicion entails a minimal level of objective justification for making the stop; it requires more than a hunch but less than probable cause.⁶³ Specifically, border patrol officers must be able to point to facts that suggest the vehicle they are about to detain holds undocumented persons, otherwise the stop equals an unreasonable seizure.⁶⁴

Subsequent decisions affirm that the standard of 'reasonable suspicion' must protect innocent individuals from becoming the target of overbearing police procedures executed on the basis of subjective stereotypes of what undocumented persons look like, or on the basis of characteristics such as race.⁶⁵ This is significant for United States citizens and permanent residents living near the border where they are subject to stops solely on the basis of their appearance.⁶⁶ As such, stopping a vehicle solely on the basis that the passengers appear Mexican is an unreasonable seizure and should not be tolerated.⁶⁷

Courts have upheld the constitutionality of the reasonable suspicion standard as applied by INS,⁶⁸ notwithstanding the fact that the standard of reasonable suspicion fails to determine which factor must be ascertained by roving patrol officers when making the stop.⁶⁹ Consequently,

62. See Chiao, *supra* note 23, at 3 (discussing the 'specific and articulable facts' standard); Susskind, *supra* note 61, at 329 (stating that the reasonable suspicion standard demands specificity in the information relied upon by the officer for making a stop).

63. See *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 1, 27, 30 (1968) (categorizing reasonable suspicion as an intermediate level of suspicion, which allows a police officer to detain for a reasonable time to investigate without first obtaining a warrant); Susskind, *supra* note 61, at 329.

64. See *Brignoni-Ponce*, 422 U.S. at 884; *Gonzalez-Rivera v. INS*, 22 F. 3d 1441, 1447-48 (9th Cir. 1994) (stating that a stop based solely on the Hispanic appearance of an individual is an unreasonable stop); *United States v. Medina-Gasca*, 739 F.2d 1451, 1453 (9th Cir. 1984); *United States v. Ogilvie*, 527 F.2d 330, 331 (9th Cir. 1975) (noting that border patrol officers need "founded suspicion" to make a stop).

65. See *Sokolow*, 490 U.S. at 12; see also *United States v. Thomas*, 787 F. Supp. 663, 676 (E.D. Tex. 1992).

66. See generally Nadine Epstein, *HISPANICS: Under the Suspicious Eye of Border Agents*, THE CHRISTIAN SCIENCE MONITOR, Apr. 14, 1988, at 16 (relating the story of a Jose Luis Castillo, a United States citizen law student who was stopped because he was of Mexican ancestry; he was short and dark, fitting the description of most "illegal Mexicans").

67. See *Nicacio v. INS*, 797 F.2d at 704; Christine L. Vigliotti, *supra* note 33, at 1142.

68. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 555-56 (1976).

69. See Andrew Jay Flame, *Criminal Procedure—Drug Courier Profiles and Terry-Type Seizures—United States v. Hooper*, 935 F.2d 484 (2d Cir.), cert. denied, 112 S. Ct. 663 (1991), 65 TEMP. L. REV. 323, 336-37 (1991) (noting that there are numerous subjective factors that go into the analysis of reasonable suspicion).

courts must evaluate the “totality of the circumstances”⁷⁰ of each particular case in deciding whether the officer had reasonable suspicion to make the stop.⁷¹ The lack of an objective standard at the outset allows roving patrol officers to create a justification after the stop has been made or when the lawfulness of the stop is under judicial scrutiny.⁷²

2. Application of Reasonable Suspicion Standard

While the reasonable suspicion standard is supposed to protect United States citizens and legal permanent resident of Hispanic descent, as applied it allows roving patrols to violate Fourth Amendment rights of Americans of Hispanic descent.⁷³ By allowing factors that center around Hispanic appearance, the standard allows the border patrol to make a stop based on their subjective notion of what an undocumented immigrant looks like.⁷⁴ Factors like dress and appearance become a substitute for race, while the type of vehicle becomes an alternative for class.⁷⁵ Other factors like “characteristics of the area” and “information about recent illegal crossings” have been found to be invalid because they were considered too broad.⁷⁶

Because roving patrol officers are allowed to factor appearance when deciding to stop, they often engage in a pattern of unlawful stops to ques-

70. The courts examine whether based on the “whole picture,” detaining officers had a particularized and objective basis for suspecting a certain individual of illegal activity. See *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

71. See *Ornelas v. United States*, 517 U.S. 690, 703 (1996) (Scalia, J., dissenting) (noting that reasonable suspicion as probable cause demands a fact-intensive review); *United States v. Villalobos*, 161 F.3d 285, 288 (5th Cir. 1998); *United States v. Inocencio*, 40 F.3d 716, 722 (5th Cir. 1994) (affirming that standard of reasonable suspicion is a fact intensive review that demands each case be examined from the totality of the circumstances).

72. See *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1443 (9th Cir. 1994) (giving account of officers unjustified factors for stopping Gonzalez and his father). The officers stated that although there was nothing suspicious about the vehicle, they had relied on the fact that the two men appeared to be Hispanic, failed to acknowledge the officers, and that Gonzalez had a dry mouth and was “blinking.” See *id.* at 1443. The court rejected, as a matter of law, the factors relied on by the roving patrol. See *id.* at 1446. The court concluded that factors were an attempt to justify an unreasonable stop made solely on the basis of race. See *id.* at 1447-48; see also *Flame*, *supra* note 69, at 336-37 (stating that subjectively scored factors in a drug courier profile make it easier for an officer to manipulate the factors in order meet the reasonable suspicion standard). As with immigration stops based on a passenger’s appearance, an officer’s potential biases to influence conclusions and potential post-seizure fabrication of facts is inherently present. See generally *U.S. v. Rodriguez*, 976 F.2d 592, 595 (9th Cir. 1992).

73. See Hafetz, *supra* note 60, at 847-48.

74. See *Gonzalez-Rivera v. INS*, 22 F. 3d 1441, 1447-48 (9th Cir. 1994); Hafetz, *supra* note 60, at 848.

75. See Hafetz, *supra* note 60, at 848-49.

76. See *id.*

tion persons of Hispanic appearance.⁷⁷ Officers rely on subjective feelings,⁷⁸ which do not provide any rational basis for separating undocumented immigrants from United States citizens and legal residents.⁷⁹ On the border where the population is overwhelmingly Hispanic, people believe that everyone is a target, even those with legal status, such as County Judge Hinojosa.⁸⁰ Judge Hinojosa was stopped and questioned about his citizenship.⁸¹ In addition, Border patrol pulled over Federal District Judge Filemon Vela in Brownsville, Texas, and asked about his citizenship when officers mistook him for an illegal alien.⁸² While driving on an isolated road, Judge Vela along with three of his aides was stopped.⁸³ According to the border patrol agent, there were too many people in the car.⁸⁴

III. THE SEIZURES OF *EL AGUILA*

When roving patrols pull over *El Aguila* on the open highway or inside El Cenizo,⁸⁵ officers seize the passengers on the bus.⁸⁶ Therefore, the Fourth Amendment requires that officers meet the standard of reasonable suspicion applicable to roving patrols stops.⁸⁷

77. In *Nicacio v. INS*, a class of people of Hispanic appearance brought action against the INS following INS practice of engaging in a pattern of unlawful stops to question persons of Hispanic appearance. See *Nicacio v. INS*, 797 F.2d at 701. The plaintiffs asserted that they had experienced repeated stops and would continue to be subjected to these stops as they continued traveling by car on the highways of Washington. See *id.* at 700.

78. See *id.* 705. The officer stated: “[w]e have been around and just from experience we can tell who is illegal and who is not. Sometimes it’s an air about a person or the way he looks, or carries himself, but its kind of hard to just say right off”. *Id.* The Chief Patrol Agent also testified that officers looked for other factors like a “hungry look” or a person’s age when making the stop. *Id.* at 704.

79. See *id.* at 705.

80. Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N. Y. TIMES, Jan. 26, 2000, at A17.

81. See *Inadmissible: Judicial Detention*, TEX. LAW., June 21, 1999 at 3 (discussing how Cameron County Judge Gilberto Hinojosa was stopped at the Harlingen Airport by border patrol agents). Judge Hinojosa responded by asserting his right to remain silent. See *id.* The Judge also stated that when he was stopped, he was wearing a suit and holding a suitcase. See *id.*

82. See *id.*

83. See *id.*

84. See *id.*

85. See McRorie Interview with Jose Gamez, *supra* note 2 (stating that “stops occur on the highway, in the city, everywhere”).

86. See generally *English v. Sava*, 571 F. Supp. 1029, 1035 (S.D.N.Y. 1983) (concluding that the procedure of diverting a bus and the questioning of its passengers amounted to a seizure).

87. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (stating that roving patrols have to be aware of “specific articulable” facts that, taken together with rational

A. *The Fourth Amendment Protection on Seizures*

Courts have uniformly held in light of relevant circumstances that Fourth Amendment protections are invoked whenever a person is seized.⁸⁸ The courts recognize that a seizure occurs when an officer stops an individual and restrains his freedom to walk away.⁸⁹ Seizures involve some termination of movement, which range from forceful arrests to brief detentions.⁹⁰ The Court has found that stopping a vehicle and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment.⁹¹

For purposes of the Fourth Amendment, any restraint on a person amounting to a seizure is invalid unless justified by probable cause.⁹² *Terry v. Ohio*⁹³ created a narrow exception to this general rule. Certain seizures are justifiable if the officer has reasonable suspicion of criminal activity.⁹⁴ Relying on *Terry*, the Supreme Court extended the exception of reasonable suspicion to roving patrol stops.⁹⁵

inferences, reasonably warrant suspicion that undocumented aliens are traveling in the vehicle).

88. See *Michigan v. Chesternut*, 486 U.S. 567, 572-73 (1988); *United States v. Mancillas*, 183 F.3d 682, 701 n.22 (7th Cir. 1999); *United States v. DeBerry*, 76 F.3d 884, 885-86 (7th Cir. 1996); see also *Susskind*, *supra* 330.

89. See *Terry v. Ohio*, 392 U.S. 1, 16 (1968); see also *Brower v. Inyo*, 489 U.S. 593, 598-99 (1989) (defining a seizure as the termination of the freedom to move by the very instrumentality set in motion to achieve that result); *United States v. Marin*, 669 F.2d 73, 81 (2d Cir. 1982).

90. See *Terry*, 392 U.S. at 16 (asserting that a "seizure" does not have to necessarily constitute "a trip to the station"); *Chiao*, *supra* note 23, at 2-3 (defining seizures as detentions which can range from incarceration to brief detentions).

91. See *Whren v. United States*, 517 U.S. 806, 809-10 (1996); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

92. See *Florida v. Royer*, 460 U.S. 491, 497 (1983); *Dunaway v. New York*, 442 U.S. 200, 207-09 (1979).

93. 392 U.S. 1 (1968).

94. The Court held that police officers could "stop and frisk" an individual without a warrant or probable cause granted that the encounter was kept brief and justified by reasonable suspicion. See *Terry*, 392 U.S. at 27-30; see also *United States v. Cortez*, 449 U.S. 411, 418 (1981) (establishing that reasonable inferences drawn by an officer when making a stop should be evaluated to determine if the whole picture rises to the level of "particularized suspicion" of criminal activity of person being stopped); *United States v. Ramos*, 753 F. Supp. 75, 78 (W.D.N.Y. 1990) (citing *Terry v. Ohio*, citation omitted) (affirming that there must be "reasonable suspicion of criminal activity before a person can be stopped").

95. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (finding that the Fourth Amendment prohibits stopping vehicles or detaining persons absent the reasonable suspicion that they may be aliens); see also *United States v. Cortez*, 449 U.S. 411, 417 (1981); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

B. *Reasonable Suspicion Required for Stopping El Aguila*

Executing a stop on a whole bus likewise results in a seizure of its occupants.⁹⁶ The stopping and questioning conducted on *El Aguila* arguably affects the passengers' ability to disregard the presence of the officers and reach their designated stops.⁹⁷ Therefore, the border patrol cannot stop *El Aguila* or conduct routine spot checks of bus passengers without reasonable suspicion that the passengers are illegally present or are committing another unlawful activity.⁹⁸ Although the Court has not addressed the required level of suspicion needed to detain a whole bus, the reasons articulated by the Court for adopting the reasonable suspicion standard for vehicle stops are indistinguishable from bus stops by roving patrols.

The Supreme Court noted the overall degree of interference with legitimate traffic involved in vehicle stops.⁹⁹ With the increases in lawful immigration, the interference with legitimate motorists has only grown since the implementation of standards on roving patrols. Furthermore, this same precaution taken by the Court with regards to legitimate traffic should apply to stops of buses. United States citizens and legal permanent residents are often forced to use buses as transportation to get to different places. To approve a roving patrol stop of a bus, without reasonable suspicion subjects large numbers of United States citizens and permanent residents to potentially unlimited intrusion with highway use, entirely at the disposition of border patrol officers.¹⁰⁰

Moreover, by adopting a reasonable suspicion standard, the Court sought to guard against random stops by roving patrols, which are in violation of the Fourth Amendment.¹⁰¹ As we observe with the stops of *El*

96. See *English v. Sava*, 571 F. Supp 1029, 1035 (S.D.N.Y. 1983).

97. Compare *United States v. Gonzales*, 979 F.2d 711, 713 (9th Cir. 1992) (finding that the border procedure of boarding a Greyhound bus did not affect the passengers ability to ignore officers and continue with their trip because the officer boarded the bus at a designated stop and questioned the individual while the bus continued on its way), with *McRorie Interview with Mr. Cantu*, *supra* note 1.

98. The Courts have found that the border patrol must have individualized suspicion that a particular vehicle is engaged in illegal activity before stopping. See, e.g., *United States v. Moreno-Chaparro*, 157 F.3d 298, 301 (5th Cir. 1998) (summarizing the statement of a border patrol agent by relaying that "it would be manifestly unreasonable to target every Chevy in Texas"); *United States v. Rodriguez*, 976 F.2d 592, 596 (9th Cir. 1992) (stressing the need for "particular, individualized, objectively observable factors" for each case).

99. See *Brignoni-Ponce*, 422 U.S. at 882.

100. See generally *McRorie Interview with Jose Gamez*, *supra* note 2.

101. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976); *Brignoni-Ponce*, 422 U.S. at 884.

Aguila, United States citizens and permanent residents are subject to unrestrained intrusions at random times.¹⁰²

Courts need to adopt the standard of reasonable suspicion for all stops executed by roving patrol at places other than the border and its equivalents. While there is a persuasive argument for apprehending illegal immigrants and reducing illegal immigration,¹⁰³ the standard of reasonable suspicion allows some protection against the random stops of those lawfully in the United States.¹⁰⁴

IV. IMPLICATIONS OF BEING ABOARD A BUS

A. *Consensual Police Encounters*

While the Supreme Court has not addressed the standard of suspicion needed to stop a bus,¹⁰⁵ the Court has addressed what procedures are allowed once border patrol officers lawfully board a bus.¹⁰⁶ Based on the law of police encounters, officers may question individual passengers aboard a bus without implicating the Fourth Amendment and without having to meet any standard of reasonable suspicion.¹⁰⁷ As long as the police encounter is based on consent and there are no intimidating circumstances demonstrating an absence of consent, the interrogation is considered a voluntary encounter that does not invoke Fourth Amendment protections.¹⁰⁸

1. *Florida v. Bostick*

In *Florida v. Bostick*,¹⁰⁹ the precedent case on the issue of police encounters and seizures, the Supreme Court examined police interrogations within the cramped confines of a bus.¹¹⁰ The Court reviewed whether

102. See McRorie Interview with Jose Gamez, *supra* note 2 (noting that the stops are random and occur everywhere except at regularly scheduled stops).

103. See *Brignoni-Ponce*, 422 U.S. at 878 (1975) (stating that the government made a persuasive showing that public interest called for effective measures in preventing illegal immigration).

104. See *id.* (noting that despite the relatively minor interference occasioned by roving patrol stops, the public should be protected from this indiscriminate governmental interference).

105. See *Florida v. Bostick*, 501 U.S. 429, 431 (1991).

106. See *generally id.* at 429.

107. See *generally id.* at 439-40; see also *United States v. Gonzales*, 979 F.2d 711, 713 (9th Cir. 1992).

108. See *generally id.* at 434; *INS v. Delgado*, 466 U.S. 210, 216 (1984); see also *United States v. Anderson*, 663 F.2d 934, 939 (9th Cir. 1981) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

109. 501 U.S. 429 (1991).

110. See *id.* at 433.

such an encounter constituted a “seizure” within the meaning of the Fourth Amendment.¹¹¹ In *Bostick*, officers engaged in drug interdiction efforts boarded a bus and without articulable suspicion approached Mr. Bostick, a passenger, and asked to look at his ticket and search his bag.¹¹² The Supreme Court noted that the police never threatened Bostick with a gun and they advised Bostick he had a right to refuse consent to a search.¹¹³ The Court found that although the man was not free to leave the bus, since the aisle was blocked, he had been free to ignore the officer’s request to see what was in his bag, and therefore the encounter was consensual rather than a detention.¹¹⁴

B. *Police Encounters that Amount to a Seizure*

Under some circumstances, mere questioning, done in the context of a police encounter, can amount to a detention that invokes the Fourth Amendment’s requirement of reasonable suspicion.¹¹⁵ A detention occurs when intimidating circumstances demonstrate an absence of consent.¹¹⁶ Such circumstances can range from the “threatening presence of several officers, the display of weapons by an officer, physical contact with the person, or coercive language.”¹¹⁷

1. “Free to Leave” Test

Courts have developed a test, commonly referred to as the “free to leave” test to determine whether a police encounter amounts to a seizure.¹¹⁸ A seizure occurs when the actions of the officers leads a rea-

111. *See id.* at 433.

112. *See id.* at 431-32.

113. *See id.* at 432.

114. *See Florida v. Bostick*, 501 U.S. 429, 436 (1991); *Gonzales*, 979 F.2d at 712-13 (stating that boarding a bus to investigate immigration status pursuant to an agreement between the bus company and border patrol, and initiating conversation with a passenger to see whether he was an illegal alien was a permissible encounter, not seizure).

115. *See INS v. Delgado*, 466 U.S. 210, 215 (1984) (stating that a consensual encounter can transform to a seizure when the person believes they are not free to leave); *Mendoza v. INS*, 559 F. Supp. 842, 847 (W.D. Tex. 1982); Chiao, *supra* note 23, at 3-4.

116. *See Delgado*, 466 U.S. at 216 (stating that “unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention”); *see also Mendoza*, 559 F. Supp. at 846 (stating that a “person has been seized when it becomes clear to him that an officer has restrained his liberty to move about by means of physical force or show of authority”).

117. Chiao, *supra* note 23, at 3.

118. *See United States v. Mendenhall*, 446 U.S. 544, 553 (1980).

sonable person to believe that he was not free to walk away, or to refuse to answer questions, given the totality of the circumstances.¹¹⁹

The “free to leave” test focuses on whether the reasonable person is free to decline the police encounter given the circumstances of the stop.¹²⁰ If the individual answers the questions asked by the border patrol officer, the court then examines whether the individual consented voluntarily or was forced to consent because of intimidating circumstances.¹²¹

Courts have recognized that the voluntariness of consent is a question of fact to be determined from an assessment of the totality of all the circumstances.¹²² Courts, for the most part, analyze whether the circumstances of the stop were so intimidating that an innocent reasonable person believed he/she had no choice but to cooperate.¹²³ Usually, no single factor is dispositive; rather, courts look to the totality of the circumstances.¹²⁴ Moreover, courts examine the factors that suggest the use of physical force or show of authority by an officer during the encounter, thus restraining the liberty of the passenger.¹²⁵ These factors include the display of authority by government officials¹²⁶ or threatening presence of several officers¹²⁷ that would affect the ability of the passengers to go about their business.¹²⁸

V. ANALYSIS OF THE STOPS AT EL CENIZO

In order to satisfy the Fourth Amendment requirements, border patrol officers must establish that the stop was lawful, and that officers boarding

119. *See id.* at 545 ; *see also* California v. Hodari D, 499 U.S. 621, 628 (1991) (stating that as long as a reasonable person feels free to disregard the police and go about their business, the encounter is consensual).

120. *See Mendenhall*, 446 U.S. at 554.

121. *See id.* at 554 (stating that courts evaluate factors that indicate compliance with officers’ request might have been compelled); Chiao, *supra* note 23, at 10 (stating that the threatening presence of several officers, the display of weapons by an officer, physical contact with the person, or coercive language, or tone of voice were all factors in determining whether a seizure occurred or whether there was freedom to leave).

122. *See* Schneekloth v. Bustamante, 412 U.S. 218, 248-49 (1973).

123. *See id.* at 248 (stating that to justify a search on the basis of voluntarily consent, must prove that it was not the result of coercion, express or implied).

124. *See id.* at 226 (stating that the court must look to “all the surrounding circumstances, both the characteristics of the accused and the details of the encounter).

125. *See Bostick*, 501 U.S. at 434 .

126. *See* Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (stating that the coercive effect of police conduct must be assessed along with distinct details of that conduct).

127. *See Mendenhall*, 446 U.S. at 554 (citing Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (listing other factors such as physical touching, the use of language, or tone of voice to imply that compliance was compelled)).

128. *See, e.g.,* United States v. Gonzales, 979 F.2d 711, 713 (9th Cir. 1992).

and questioning passengers on *El Aguila* were merely involved in a consensual police encounter.¹²⁹ If the questioning escalated to a seizure, border patrol officers must establish that they had reasonable suspicion to stop and question all passengers on *El Aguila*.¹³⁰ The facts regarding the stops of *El Aguila* must be evaluated using the “free to leave” test, looking closely at the circumstances surrounding the stop and questioning by the officers.¹³¹

A. *Detentive Questioning on Board El Aguila*

1. Intimidating Circumstances

The courts examine whether the individual was forced to consent based upon intimidating circumstances.¹³² In evaluating the circumstances of *El Aguila* stops, we note that roving patrol officers randomly stop buses on the highway.¹³³ The armed officers board the cramped confines of the bus.¹³⁴ They question everyone on board about their immigration status and demand documents from all passengers.¹³⁵ Although the Court in *Bostick* deemed that carrying guns alone does not constitute a display of authority,¹³⁶ having officers board a bus in full uniform, displaying their badges and either blocking the aisles or asking the passengers to get off, is an intimidating situation that leads a reasonable person to submit to au-

129. See generally *United States v. Cooper*, 43 F.3d 140, 146 (5th Cir. 1995) (stating that the initial contact of officers boarding the bus and questioning passengers was constitutional as long as a reasonable person would not have felt free to terminate the encounter).

130. See *id.* at 146; *Mendoza v. INS*, 559 F. Supp. 842, 846 (W.D. Tex. 1982); Chiao, *supra* note 23, at 10.

131. See *Bostick*, 501 U.S. at 439-40 (noting that to determine whether a police encounter escalated to a seizure a court must consider all the circumstances of the stop and whether a reasonable person would have felt they could decline the encounter; *United States v. Garcia*, 909 F. Supp. 334, 336 (D. Md 1995) (stating that a court must consider circumstances surrounding the stop and whether a person would have felt free to terminate the encounter).

132. See *Mendenhall*, 446 U.S. at 554 (acknowledging that factors surrounding the intimidating circumstances include the threatening presence of officers, display of weapons, tone of voice and content of statements must be evaluated in determining compliance was forced); *INS v. Delgado*, 466 U.S. at 210, 215 (1984) (noting that questioning by officers amounts to a seizure when there are intimidating circumstances surrounding the stop); *United States v. Anderson*, 39 F.3d 331 (1995).

133. See McRorie Interview with Jose Gamez, *supra* note 2 (explaining the stops occur on the highway, city, “everywhere, but never at regularly scheduled stops”).

134. See McRorie Interview with Mr. Cantu, *supra* note 1.

135. See *id.*

136. See *Bostick*, 501 U.S. at 439 (inferring that guns alone are not despositive in evaluating what constitutes a display of authority).

thority.¹³⁷ This is particularly true for passengers of *El Aguila*, who are Hispanics who believe they are the targets of the border patrol.¹³⁸

2. Submission is not Consent

Many passengers of *El Aguila* do not know that they can exercise the right to remain silent or walk away when border patrol officers question them. Because passengers on *El Aguila* will not exercise these Fifth Amendment rights, officers will more than likely rely on the Supreme Court's analysis in *Bostick* and claim that the passengers choose to cooperate, making the stop a voluntary police encounter.¹³⁹ However, in *Bostick* the Court noted that police had advised the passenger of his right to refuse consent, a warning that is not offered to *El Aguila* passengers.

As suggested by the dissent in *Schneckloth v. Bustamonte*,¹⁴⁰ the contention that passengers consent voluntarily implies that they know they have the option of withholding consent.¹⁴¹ However, by not informing the passengers that they have a choice the border patrol unjustly forces passengers to relinquish a constitutional right to be free from unreasonable searches and seizure.¹⁴² Justice Marshall, in *Schneckloth*, introduced the notion that officers should inform passengers of their Fifth Amendment right to refuse consent or remain silent, rights that officers are aware passengers possess.¹⁴³ He suggests that not informing the passen-

137. *See id.* at 446-47 (pointing out the fact that officers wearing bright green raid jackets, uniforms and displaying their badges on a bus is an intimidating show of authority).

138. Because minorities, in this case Hispanics, are often targeted by the border patrol, they may feel more pressure to answer, thereby having their liberty constrained. *See* Kathleen M. O'Day, Comment, *Pretextual Traffic Stops: Protecting Our Streets from Racist Police Tactics?* 23 U. DAYTON L. REV. 313, 325 (1998); *see also* Nadine Epstein, *HISPANICS: Under the Suspicious Eye of Border Agents*, THE CHRISTIAN SCI. MONITOR, Apr. 14, 1988, at 16 (commenting that the experiences with border patrol led Joe Louis Castillo, a United States citizen law student, to comment that the border patrol is a "private police force for Hispanics"); Yardley, *supra* note 80 (quoting Judge Hinojosa, who stated that stops were a daily part of life for people living at the border).

139. *See Bostick*, 501 U.S. at 447 (inferring that because the individual failed to get off the bus, he had consented to the encounter); *see also* *Hunter v. State*, 955 S.W. 2d. 102, 108 (Tex. Crim. App. 1997). In accordance with the *Bostick* ruling, the Harper Court states that no detention occurs provided an officer clearly communicates that an individual is not required to consent).

140. 412 U.S. 218 (1973) (Brennan, J., dissenting).

141. *See id.* at 277 (stating "the capacity to choose necessarily depends upon knowledge that there is a choice to be made").

142. *See id.* at 277.

143. *See id.* 284-85 (opining that lack of knowledge invalidates the consent to be searched).

gers allows the officers to “capitalize on the ignorance of the citizens so as to accomplish subterfuge.”¹⁴⁴

Border patrol officers may assert that since they are operating under the law of voluntary encounters and detention, there is no requirement that they read passengers any rights before asking them for documents.¹⁴⁵ However, because passengers of *El Aguila* are not informed of their right to ignore the officers or walk away, the fact that passengers answer the questions does not show a voluntary assent; rather it is a demonstration of submission to authority.¹⁴⁶

As the Supreme Court has consistently held, submission to questioning by border patrol officers does not establish voluntary consent.¹⁴⁷ In *Florida v. Royer*,¹⁴⁸ the Court determined that when conducting a warrantless search, the burden is on the officers to prove that consent was freely given and not be shown by a passenger’s mere submission to a claim of authority.¹⁴⁹

3. No Particularized Suspicion

When boarding *El Aguila*, officers announce at the outset that they are checking for illegal aliens and that everyone needs to get out their documents or get off the bus, which causes everyone to feel they are suspects.¹⁵⁰ Officers demand documentation from everyone in the bus,¹⁵¹ notwithstanding the fact that most passengers are United States citizens or legal permanent residents.¹⁵² In *United States v. Felder*,¹⁵³ the court ruled that the police practice of boarding buses and randomly approaching passengers, without particularized suspicion, violated the Fourth Amendment.¹⁵⁴ As such, border patrol officers violate the Fourth

144. See *id.* at 288.

145. See *Schneekloth*, 412 U.S. at 277.

146. See *United States v. Alexander*, 755 F. Supp. 448, 451 (D.D.C. 1991) (noting that when the passenger was asked why he did not walk away from officers, he replied, “I couldn’t. . . . I didn’t know I could just walk away”).

147. See *Florida v. Royer*, 460 U.S. 491, 497 (1983); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979); see also *Sckneekloth*, 412 U.S. at 233-34.

148. 460 U.S. 491 (1983).

149. See *id.* at 497.

150. See McRorie Interview with Mr. Cantu, *supra* note 1; McRorie Interview with Mrs. Diaz, *supra* note 2.

151. See McRorie Interview with Mr. Cantu, *supra* note 1; McRorie Interview with Mrs. Diaz, *supra* note 2.

152. See McRorie Interview with Mr. Cantu, *supra* note 1. From this, one may infer that the other passengers were U.S. citizens or legal permanent residents. See *id.*

153. *United States v. Felder*, 732 F. Supp. 204 (D.D.C. 1990).

154. See *id.* 209 (stating that the police practice of questioning people at random without articulable suspicion was “repugnant on the nation’s constitutional values and safeguards” in the Fourth Amendment). See *id.* The Metropolitan Police Department’s

Amendment of the passengers when they deem everyone on board *El Aguila* a suspect of illegal alienage without particularized suspicion.

In *Mendoza v. INS*,¹⁵⁵ the court condemned the “dragnet method” of detention¹⁵⁶ because officers violated the rights of innocent people when they did not limit interrogation to those individuals reasonably suspected of being illegal aliens.¹⁵⁷ In *Mendoza*, officers acting on old tips raided three nightclubs simultaneously.¹⁵⁸ The agents in cooperation with local police burst in unannounced, turned off the music, stopped bar service, guarded the doors, and randomly interrogated the people in the bar.¹⁵⁹ The court found that the actions of the border patrol had resulted in a seizure of everyone in the bar.¹⁶⁰ The court declared that officers needed a warrant because their search required the detention of people as to whom they had no individualized reasonable suspicion of illegal status.¹⁶¹ Likewise, stops of *El Aguila* also subject innocent United States citizens and legal permanent residents to seizures when officers demand documentation from everyone without individualized suspicion.

4. Passengers are not “Free to Leave”

Even if passengers wanted to leave, they do not believe that they are free to leave at anytime or free to refuse to cooperate.¹⁶² Not only does the reasonable innocent person feel compelled to answer,¹⁶³ but also refusing to respond or simply walking away subjects passengers to further suspicion.¹⁶⁴ Passengers aboard *El Aguila* stated that they never felt free

Narcotic Interdiction Unit had engaged in boarding buses and randomly questioning and searching passengers on board the buses. *See id.* at 205. The court acknowledges that although there was a drug epidemic, everyone who boarded an interstate bus was not to be deemed a suspected drug courier. *See id.* at 209. *See generally* *English v. Sava*, 571 F. Supp. 1029, 1039 (S.D.N.Y. 1983) (finding that officers were allowed to question without particular suspicion, as to each passenger, because they had already established reasonable suspicion).

155. *Mendoza v. INS*, 559 F. Supp. 842 (1982).

156. *See id.* at 848 (noting the dragnet method “was used by the court to define the sweep and over-inclusive questioning conducted by INS officers).

157. *See id.* at 848-49.

158. *See id.* at 844-45.

159. *See id.* at 845.

160. *See id.* at 846.

161. *See Mendoza v. INS*, 559 F. Supp. 842, 849 (1982).

162. *See* McRorie Interview with Mr. Cantu, *supra* note 1 (providing facts that would lead a reasonable person to believe he was detained).

163. *See Alexander*, 755 F. Supp. at 453 (declaring the court’s disagreement with decisions holding that the reasonable innocent person being questioned in a populated public bus would feel free to decline or walk away even if the path was open).

164. *See* McRorie Interview with Mr. Cantu, *supra* note 1 (stating that he was harassed when he refused to show documentation proving he was a United States citizen).

to remain silent or to refuse to show documentation.¹⁶⁵ One passenger was hassled and insulted when he refused to show documentation proving he was a United States citizen;¹⁶⁶ and another was told to get off the bus because she was not carrying documentation confirming she was a United States citizen.¹⁶⁷ Refusing to consent and show the appropriate documents only subjects them to further suspicion. Officers who carry out bus sweeps acknowledge this heightened suspicion to be true.¹⁶⁸

Using the “free to leave” test to determine consent is a justification by the government and border patrol to violate the Fourth Amendment rights of Americans who appear Mexican. However, this justification is not sufficient for the seizure of the bus. Officers need to have some particularized suspicion that the person they are about to question is an illegal alien.¹⁶⁹ The fact that a person looks Mexican is not indicative of illegal alienage and does not give border patrol the right to approach a person and question them about their citizenship.

B. *Roving Patrols Violate the Reasonable Suspicion Standard*

When roving patrol officers execute a seizure of the entire bus and detain its occupants, they must be able to articulate factors relied upon for making the stop and questioning all the occupants.¹⁷⁰ In determining whether the officers met the standard of reasonable suspicion, a court must look to the totality of the circumstances and the facts known to the officer before executing the stop.¹⁷¹

A vital element of the reasonable suspicion standard is that the officer believes that the vehicle in question came from the border.¹⁷² Although

165. See *id.* (concluding that because the officers tell the passengers what to do, and do not ask, the passengers believe they must comply); McRorie Interview with Mrs. Diaz, *supra* note 2 (providing facts that would lead a passenger of *El Aguila* to feel they could not refuse to comply).

166. See McRorie Interview with Mr. Cantu, *supra* note 1.

167. See McRorie Interview with Mrs. Diaz, *supra* note 2.

168. *Bostick*, 501 U.S. at 447; see also *Felder*, 732 F. Supp. at 205 (D.D.C. 1990) (stating that officers testified that when passengers refuse to consent they take it upon themselves to notify the authorities at the next stop). See generally *Babula v. INS*, 665 F.2d 293, 298 (3d Cir. 1981) (noting that if each person questioned chose to remain silent and refuse to show documentation this would validate an agent’s suspicion that the person is undocumented); *Marquez v. Kiley*, 436 F. Supp. 100, 114 (S.D.N.Y. 1977).

169. See *United States v. Chavez-Villarreal*, 3 F.3d 124, 127 (5th Cir. 1993).

170. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

171. See *United States v. Casteneda*, 951 F.2d 44, 47 (5th Cir. 1992); see also *United States v. Villalobos*, 161 F.3d 285, 288 (5th Cir. 1998); *United States v. Rodriguez*, 976 F.2d 592, 594 (9th Cir. 1992) (stating that the court must ascertain whether the factors relied upon by the officers established the necessary suspicion to make the stop).

172. *United States v. Moreno-Chaparro*, 180 F.3d 629, 632 (5th Cir. 1998); *United States v. Pallares-Pallares*, 784 F.2d 1231, 1233 (5th Cir. 1986); *Rodriguez*, 76 F.2d at 747.

the county bus has just come from an area close to the border, the presence in a border area "does not place the citizenry within a 'deconstitutionalized zone'".¹⁷³ *El Aguila* operates on a regular route transporting residents of the county from El Cenizo to worksites, supermarkets, and clinics in Laredo, Texas. The county sets the bus route based on the needs of the residents who are predominately United States citizens and permanent residents.¹⁷⁴ The fact that the bus begins its route close to the border does not establish reasonable suspicion that the passengers are undocumented persons.

There may be circumstances where a particular stop would not be in violation of the Fourth Amendment. For example, when the border patrol receives an anonymous tip that undocumented people have just crossed the river and are attempting to go undetected by riding *El Aguila* the circumstances may justify a stop of *El Aguila*. In *English v. Sava*,¹⁷⁵ the court found that an anonymous tip together with the officers corroborating evidence, that there were large groups of West Indian persons taking the bus, provided the suspicion to stop the bus and question its occupants.¹⁷⁶ Courts find that the authenticity of the unknown informant can be supported if the officer's own observations of some activity are consistent with the tip, which would appear harmless without it.¹⁷⁷ In the stops of *El Aguila*, the fact that everyone is ordered to show documentation¹⁷⁸ discounts the possibility that officers are targeting a single person or group and confirms that everyone is a suspect of being undocumented. If the officers allege that they were following a specific passenger who they believed to be undocumented, it is the duty of the officers to limit the scope of an investigative detention to that necessary to dispel their suspicion.¹⁷⁹ Therefore, an officer's over-inclusive questioning of all pas-

173. *United States v. Newell*, 506 F.2d 401, 405 (5th Cir. 1976); *see also United States v. Lopez-Valdez*, 178 F.3d 282, 286 (5th Cir. 1999).

174. *See* McRorie Interview with Jose Gamez, *supra* note 2.

175. *English v. Saug*, 571 F.Supp 1029 (S.D. N.Y. 1983).

176. *See id.* at 1042. In other cases the court has reaffirmed its position that an anonymous tip may be enough to establish reasonable suspicion. *See United States v. Garcia-Nunez*, 709 F.2d 559, 561 (9th Cir. 1983) (finding that an anonymous tip which was substantiated by neighbors was enough to establish reasonable suspicion); *United States v. Nunn*, 525 F.2d 958, 959 (5th Cir. 1976) (finding that anonymous tip that indicated illegal aliens would be found in the open bed of a two-tone late model Ford pick-up driven by two black men, justified an investigatory stop).

177. *See Bailey v. United States*, 386 F.2d 1, 3 (5th Cir. 1967), *cert. denied*, 392 U.S. 946 (1968).

178. *See* McRorie Interview with Mr. Cantu, *supra* note 1 (noting that border patrol demands documentation from every passenger in the bus).

179. *See United States v. Soto-Cervantes*, 138 F.3d 1319, 1322 (10th Cir. 1998); *see also United States v. Davis*, 94 F.3d 1465, 1468 (10th Cir. 1996) (describing an investigative

sengers discounts the allegation that they have reasonable articulable suspicion to believe someone is undocumented.

Also, the Hispanic appearance of the passengers alone does not establish sufficient suspicion to lead the officers to believe the bus is transporting undocumented people. The Court has long recognized that relatively small numbers of individuals traveling on roads near the border are illegal.¹⁸⁰ With the growing increase in lawful immigration,¹⁸¹ Hispanic appearance has become even less probative of illegal alienage and should

detention as a seizure of limited scope and duration); *English v. Sava*, 571 F. Supp. 1029, 1040 (S.D.N.Y. 1983).

180. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975).

181. The following three acts account for much of the increase in the numbers of legal permanent residents from Mexico: 1) 1965 elimination of quotas; 2) Immigration Reform and Control Act of 1986 (IRCA's); legalization, and 3) the Immigration Act of 1990 (IMMACT 90). Family immigration prioritized reunification of temporarily divided families since the Immigration and Nationality Act of 1952. See LEGOMSKY, *supra* note 22 at 131. However, it was the Immigration and Nationality Act Amendments of 1965 which repealed the national-origin quotas and initiated a seven-category visa system for family unification and skills that actually aided numbers of immigrants to reunite with families lawfully in the United States. See THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC AND FISCAL EFFECTS OF IMMIGRATION 28 (1997) (noting that the preference system caused 80% of the numerical limits to be allocated to United States family members). The modifications in immigration admissions provided for in IRCA and IMMACT 90 also increased the number of legitimate immigrants as well as the number of naturalized citizens. See *id.* at 28. See generally LEGOMSKY, *supra* note 22 at 1040 (citing to the 1994 STATISCAL YEARBOOK, Table 45 for the years 1992, 1993, and 1994). The number of filings per year rose readily from 342,000 to 522,000 to 543,000. See *id.* One of IRCA's overall objectives was to decrease the number of undocumented immigrants residing in the United States. See IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPARTMENT OF JUSTICE, IMMIGRATION REFORM AND CONTROL ACT: REPORT ON THE LEGALIZED ALIEN POPULATION, (1991); LEGOMSKY, *supra* note 22, at 499 (stating that one of IRCA's ways of reducing the undocumented immigrant, population was legalization, also known as amnesty). IRCA's principle program provided for legalization of undocumented immigrants who lived in the United States continuously since January 1, 1982, providing 2.65 million immigrants with legal permanent residency. See *id.* at 500 (affirming that certain aliens who had been residing unlawfully in the United States for several years were allowed to regularize their status to permanent residence). By providing 2.65 million immigrants with permanent residency, IRCA thereby initiated a chain of eligibility for additional family members. See Cecilia Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGRA. L.J. 343, 354 (1994) (noting that many of those individuals were subsequently allowed to remain in the United States while their applications were pending under provisions which were known as family unity). Lastly, the IMMACT 90 increased the immigrant labor force when it continued the policy of family unification by granting an unlimited number of visas for immediate relatives, but more importantly, increasing the number for priority workers and professionals raising the annual immigrant cap from the 260,000 annual limit to 700,000. See *id.* at 354-55.

not be used to justify a stop.¹⁸² Moreover, statistics reflect that 98.8% of colonia residents are Hispanic;¹⁸³ and two thirds of colonia residents were born in the United States.¹⁸⁴ Due to the increasing number of United States citizens and legal permanent residents of Hispanic descent, Hispanic appearance cannot alone be deemed a relevant factor under the reasonable suspicion standard.¹⁸⁵

Finally, previous experience with alien traffic and information about recent illegal crossings are two other factors that a court must weigh in deciding whether roving patrol stops were justified in stopping a vehicle.¹⁸⁶ Border patrol may allege that a number of persons cross the border near El Cenizo and use the county bus because it is a convenient, inexpensive option to travel to the nearest city. Nonetheless, in *United States v. Rodriguez*,¹⁸⁷ the court found that the combined factors of Hispanic appearance, a heavily loaded vehicle, and the use of a notorious smuggling route were not enough to rise to the level of reasonable suspicion.¹⁸⁸ These factors were not enough because they could potentially be used to describe too many innocent motorists.¹⁸⁹ Thus, factors such as extraordinary number of passengers, driver's behavior, and appearance

182. See *United States v. Espinoza Montero-Camargo*, 2000 U.S. App. LEXIS 6494 (concluding that due to the changes in ethnic and racial appearance, Hispanic appearance is not an appropriate factor in determining reasonable articulable suspicion). In the past two decades, because Hispanics have become one of the fastest growing ethnic groups in the nation, appearance alone can no longer be associated with illegal alienage. See Orlando Rodriguez, *The New Immigrant Hispanic Population: An Integrated Approach to Preventing Delinquency and Crime* (visited Jan. 2000) <<http://www.ncjrs.org/txtfiles/hispop.txt>> [hereinafter Orlando Rodriguez] (stating that Hispanics increased 50% between 1980 and 1990 and now make up nine percent of today's population); see also THE NEW AMERICANS, *supra* note 181, at 115 (projecting the impact of immigration on the United States population). The bipartisan Commission on Immigration Reform found that in the year 2050, the Hispanic population would rise to 95 million or about 1 in 4 of the population. See *id.*

183. *Colonias Factbook Summary* (visited Mar. 20, 2000) <<http://chud.tamu.edu/colonias/factbook.html>> [hereinafter *Colonias Factbook Summary*].

184. *Id.* The factbook also points out that the other 39.1 are foreign born. See *id.* Foreign born encompasses a wide range of persons from legal permanent residents, person awaiting visas, persons who have overstayed their visas, to undocumented persons.

185. See *Brignoni-Ponce*, 422 U.S. at 885-87; Johnson, *supra* note 45, at 14; Victor H. Polmier, *Preface to FRANK BEAN, ET AL., OPENING AND CLOSING THE DOORS, EVALUATING IMMIGRATION REFORM AND CONTROL* at xv (1989); see also Robert Stacy McCain, *Minorities to Account for Most of Future U.S. Population*, WASH. TIMES, Oct. 7, 1999, at A10 (stating that immigration has been the contributing factor for over one-third of the increase in the minority population since 1980 and more specifically, 40 percent of the Hispanic growth).

186. See *Brignoni-Ponce*, 422 U.S. at 884-85.

187. *United States v. Rodriguez*, 976 F.2d 592 (1992).

188. See *id.* at 594-96.

189. See *id.* at 595.

of the vehicle do not establish suspicion since they are necessary for the operation of the bus and describe innocent behavior.

C. *Stop of El Aguila and Detention of Its Occupants Is an Unreasonable Seizure*

Because roving patrol officers stop *El Aguila* without reasonable suspicion that the bus is carrying undocumented persons, then question its occupants without particularized suspicion of alienage, the stop is an unreasonable seizure.¹⁹⁰ The Supreme Court has clearly stated that when officers have seized an individual, the Fourth Amendment requires that the seizure be reasonable.¹⁹¹ Determining the reasonableness of a seizure, which involves a brief detention, turns “on a balance between the public interest and the individuals right to personal security free from arbitrary interference by law officers.”¹⁹²

In *Brown v. Texas*,¹⁹³ the Court found that officers had seized the appellant when they detained him for the purpose of requiring him to identify himself.¹⁹⁴ When the officers observed appellant and another man in an alley known for high incidence of drug traffic, they decided to stop the appellant.¹⁹⁵ The officers did not claim that the appellant was a suspect of specific misconduct, but rather that he looked suspicious, since he had never been seen in the area.¹⁹⁶ When appellant refused to identify himself, he was arrested for refusing to give his name and address to an officer when lawfully stopped and requested for information.¹⁹⁷ The Court found that the factors relied upon by the officers did not amount to reasonable suspicion because appellant’s activity was no different from any other pedestrian.¹⁹⁸ In the absence of reasonable suspicion, the balance tips in favor of the appellant’s right to personal security and freedom from governmental intrusion.¹⁹⁹

When considering the constitutionality of a seizure involving a brief detention, the Supreme Court in *Brown* established a balancing test.²⁰⁰

190. Cf. *Brignoni-Ponce*, 422 U.S. at 881-882 (stating that reasonable suspicion requires officers to be aware of specific articulable facts that a particular vehicle contains illegal aliens); *Rodriguez*, 976 F.2d at 594 (finding that officers cannot stop a motorist without a particularized basis for suspecting them of criminal activity).

191. See *Brown v. Texas*, 443 U.S. 47, 50 (1979).

192. See *Pennsylvania v. Mims*, 434 U.S. 106, 109 (1977); *Brown*, 443 U.S. at 50.

193. 443 U.S. 47 (1979).

194. See *id.* at 50.

195. See *id.* at 48-49.

196. See *id.* at 49.

197. See *id.* at 48-49.

198. See *Brown*, 443 U.S. at 52.

199. See *id.* at 52.

200. See *id.* at 50-51.

The test weighed the gravity of the public interest served by the seizure, the extent to which the seizures furthered the public concern, and the severity of the interference with individual's right to be free from governmental intrusion.²⁰¹ Although the Court found that the Texas statute was designed to advance a significant social objective, the prevention of crime, the degree to which it furthered that purpose was uncertain.²⁰² Moreover, the intrusion of stopping individuals without suspicion that they are engaged in criminal activity, is a subjective police practice that exceeds the acceptable limits of the Fourth Amendment.²⁰³

In determining the constitutionality of the bus seizures at hand, the court must weigh the governmental concern against the privacy interest of the individual being seized using the *Brown* test. First, a court must determine the public concern served by seizures of *El Aguila* and the questioning of its occupants.²⁰⁴ Because *El Aguila* buses are only stopped between El Cenizo and Laredo,²⁰⁵ one can infer that the public interest being served by these seizures is to apprehend and deter undocumented immigrants who have crossed the river near El Cenizo and use the bus to travel undetected.²⁰⁶ Second, the court must evaluate to what extent seizures of *El Aguila* further this public concern.²⁰⁷ Information pertaining to the stops reveals that few persons were arrested following the seizures.²⁰⁸ We do not know if the persons arrested were residents of El Cenizo and Rio Bravo, and were using the bus to travel to work; or if the persons had recently crossed the river, and were using *El Aguila* to get to Laredo undetected. However, we know that the other passengers, United States citizens and permanent residents were permitted to continue to their destinations following the thirty-minute stop.²⁰⁹ Third, we must weigh this severe governmental practice against the interests of United States citizens and legal permanent residents detained and questioned.²¹⁰ The intrusion is great. Random seizures subject innocent residents of El Cenizo and Rio Bravo to unwarranted police harassment,

201. *See id.*

202. *See id.* at 52 .

203. *See Brown v. Texas*, 443 U.S. 47, 52 (1979).

204. *See id.* at 51 (presenting the factors that must be weighed, the first, which was the concern of the public interest advanced by the seizures).

205. *See* McRorie Interview with Jose Gamez, *supra* note 2.

206. *See Brignoni-Ponce*, 422 U.S. at 878.

207. *See Brown*, 443 U.S. at 51 (delineating the second factor as the degree to which the seizures advance the public interest).

208. *See* McRorie Interview with Mr. Cantu, *supra* note 1 (noting that only two or three people were arrested following the stops by border patrol).

209. *See id.*

210. *See Brown*, 443 U.S. at 51 (delineating the third factor of the balancing test as the severity of the interference with individual's right to be free from governmental intrusion).

interference of movement, and consumption of time. All controvert the safeguards of the Fourth Amendment of Constitution. Those lawfully in the United States are at liberty to utilize the public highways.²¹¹ As such, they have a right to travel without interruption unless it is clear to the officer that the vehicle contains undocumented persons.²¹²

As in *Brown*, the intrusion on United States citizens and legal permanent residents occasioned by these stops outweighs the government's need to apprehend individuals attempting to violate immigration laws. Moreover, the government's need to enforce immigration laws does not justify the manner in which they seize United States citizens and permanent residents on board *El Aguila*. Border patrol's practice of boarding buses at a location other than the international border or checkpoints and questioning passengers without articulable suspicion violates the Fourth Amendment as it subjects innocents to unreasonable seizures, notwithstanding their right to travel free from governmental intrusion.

VI. SETTING UP A CIVILIAN REVIEW BOARDS AT U.S.-MEXICO BORDER

Since border patrol officers have engaged in practices that violate the Fourth Amendment rights of United States citizens and legal permanent residents, it is necessary to determine where we go from here. An independent regional Civilian Review Board, which is already entrusted with the task of police officer accountability in many communities,²¹³ should be established to monitor the practices of INS and provide an intermediary complaint structure for local communities. A Civilian Review Board would offer a practical method of restraining officer discretion and improving the legitimacy of roving patrols.²¹⁴ Although such procedures have been recommended on a local basis in the past,²¹⁵ INS has resisted their establishment.²¹⁶

211. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 274-75 (1973).

212. See *id.* at 274.

213. See Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 593 (1997).

214. See generally *id.*

215. See Jesus A. Trevino, *Comment: Border Violence Against Illegal Immigrants and the Need to Change The Border Patrol's Current Complaint Review Process*, 21 Hous. J. INT'L L. 85, 99 (1998) (relating that Human Rights Watch-America, a national civil rights group, Senator DeConcini, and U.S. Commission on Immigration Reform were among some to propose and support the creation of an independent citizen's review panel); Lee J. Teran, *Obtaining Remedies for INS Misconduct*, IMMIGR. BRIEFINGS, May 1996 at 1, 14 (noting the Court's imposition of various review procedures to curb continued violations).

216. See Lee J. Teran, *supra* note 215, at 18; Jesus A. Trevino, *supra* note 215, at 99 (recognizing that INS and Border Patrol strongly opposed the passage of a civilian review

A. *Function of Civilian Review Agencies*

The Civilian Review Board is a concept that started in the late 1950's and has become increasingly accepted to improve relations between police and the communities in which they operate.²¹⁷ A Civilian Review Board is an external procedure employed to handle citizen complaints against police officer misconduct.²¹⁸ In addition, an independent review process monitors internal policies and procedures and recommends changes.²¹⁹ The civilian review agencies vary in structure from a multiple board to a single director²²⁰ and from total independent citizens to the involvement of sworn officers.²²¹

B. *The Current Available Remedies*

At this time, a citizen who has been unlawfully stopped may choose to file a grievance with the local border patrol agency; or, if the practice subjects a class of people to unlawful stops, they may bring a class-action suit to enjoin the INS practices.²²²

1. Injunctive Relief

In the past, the INS has been enjoined through a class action suit "from stopping, questioning, and detaining individuals without reasonable suspicion of illegal presence in the United States."²²³ However, filing injunctive relief is considered an "extraordinary and drastic remedy" by the courts, which should only be awarded when the plaintiff clearly carries the burden of proof.²²⁴ Moreover, because bringing injunctive relief

board claiming that outside interference would infringe on the agency's right to due process and that there was no need for the review board).

217. See Hecker, *supra* note 213, at 594 (stating that the majority of large cities now have civilian review agencies and a rising number of small cities are implementing them as well).

218. See *id.* at 593.

219. See *id.* at 594-95.

220. See *id.* at 594 (noting that "eighty-two percent of civilian review agencies involve multimember [agencies], while [eleven percent] are organized under a single director").

221. See *id.* at 595.

222. See generally Lee J. Teran, *supra* note 215, at 14.

223. *Id.* at 14; see also *Murillo v. Musegades*, 809 F. Supp. 487, 498 (1992) (noting that plaintiffs of Hispanic descent have been questioned, detained and searched without cause, and thus have a right to bring a cause of action); *Nicacio v. INS*, 797 F.2d 700, 704 (1986) (relating the court's decision to enjoin INS practice of stopping vehicles affecting persons of Hispanic descent); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1072 (7th Cir. 1976), *modified*, 548 F.2d 715 (7th Cir. 1977) (*en banc*) (concerning migrant workers who were successful in enjoining the INS from stopping and searching class members based on their appearance).

224. See *Murillo*, 809 F. Supp. at 497.

against the INS requires enormous costs associated with litigation and the availability of counsel willing and able to pursue a federal lawsuit, many people injured by unconstitutional actions are not able to pursue litigation.²²⁵

2. Filing a Complaint

Because filing suit to enjoin the actions of INS officers is difficult to obtain, filing an administrative complaint, and requesting that a particular officer be reprimanded or that the INS investigate the procedures being executed by its officers, may be the only feasible remedy.²²⁶ Yet, the current complaint procedure is ineffective in documenting, investigating, or resolving complaints.²²⁷ Currently, three separate offices, with remarkably general guidelines as to the procedure to be followed, handle complaints.²²⁸ Depending on the nature of the Complaint, the Office of the Inspector General receives the complaints and either retains them or routes them to the Office of Professional Responsibility or Office of Internal Audit for investigation.²²⁹ However, the investigators themselves do not have a clear idea about which offices have which obligations.²³⁰

Moreover, many people feel that filing a grievance is a futile attempt to resolve the INS misconduct.²³¹ Others fear that if they complain, INS

225. See Lee J. Teran, *supra* note 215, at 17.

226. See *id.* at 14.

227. See Stephen A. Rosenbaum, *Keeping an Eye on the I.N.S.: A Case for Civilian Review of Uncivil Conduct*, 7 LA RAZA L.J. 1, 9-10 (1994) (asserting that the current complaint procedure is ineffectual); see also *Cap Recommends Improved Complaint Procedures*, 75 Interpreter Releases 303, 303 (1998).

228. See Stephen A. Rosenbaum, *supra* note 227, at 10 (noting that complaints are currently being handled by the Justice Department's Office of Professional Responsibility, the Officer of Inspector General, and by the Office of Internal Audit); see also *Cap Recommends Improved Complaint Procedures*, INTERPRETER RELEASES, Mar. 2, 1998, at 285, 303 (finding that the complaint procedure is cumbersome, requiring the three offices to be involved that have different missions and priorities making it difficult to investigate and resolve the complaints).

229. See Stephen A. Rosenbaum, *supra* note 227, at 10-11.

230. See *id.* 11.

231. See Lee J. Teran, *supra* note 215, at 17 (stating that people do not file complaints believing these to be ineffective); Amnesty International, *United State of America: Human Rights Concerns in the Border Region with Mexico* (visited Apr. 3, 2000) <<http://www.amnesty.org/ailib/aipub/1998/AMR/25100398.htm>> [hereinafter Amnesty International] (relating the case of Bowie High School, where legal permanent residents were frequently harassed and ill-treated by Border Patrol agents, but seldom protested against their treatment because they feared reprisals and believed that the complaints were futile). See generally Maggie Rivas, *Judge Rules Border Patrol Violated Rights at El Paso School*, THE DALLAS MORNING NEWS, Dec. 4, 1992, at 22B (quoting a Bowie High School Alumnus that grew up thinking that there was nothing that could be done when Hispanics were stopped by Border Patrol agents).

will take repercussions against them or family members who might be undocumented or awaiting visas.²³²

a. CAP-Citizens Advisory Panel

In an attempt to resolve the purportedly ineffective complaint procedure, Congress instituted the Citizens Advisory Panel (CAP).²³³ CAP is a national agency, comprised of private citizens and government employees appointed by the Attorney General.²³⁴ CAP aimed to provide a forum for advocates to present new initiatives, report INS abuses, and create solutions for an operative complaint system.²³⁵ CAP recognized that cultural concerns formed part of the setbacks of the complaint procedure.²³⁶ The cultural problems include: "language barriers, community literacy, perceptions of intimidation or retaliation directed at complaints, and previous experience with government agencies."²³⁷ CAP advised the distribution of information regarding border patrol's power and limitations as to its procedures,²³⁸ and proposed to work with local communities in implementing a course for INS staff to be given by the local organizations.²³⁹

C. Creation of the Civilian Review Board

The establishment of a border Civilian Review Board will aid CAP at the local level in managing the review process and implementing the desired programs.²⁴⁰ A Citizens Review Board will have the authority to examine problems, recommend disciplinary action for officers engaged in

232. See Lee J. Teran, *supra* note 215, at 17 (noting that other people do not file a complaint out of fear of INS agents); *Cap Recommends Improved Complaint Procedures*, *supra* note 227, at 303 (finding that among problems with current complaint system was the fear of retaliation and intimidation).

233. See Jesus A. Trevino, *supra* note 215, at 99 (noting that the citizens advisory panel was suggested as an answer to charges against the Border Patrol).

234. Established in 1994, and empanelled in April 1995, with 13 voting members appointed by the Attorney General. See Lee J. Teran, *supra* note 215, at 18. These voting members include four U.S. governmental officials and nine private sectors individuals, including immigration and civil rights advocates. See *id.*; *Cap Recommends Improved Complaint Procedures*, *supra* note 227, at 303.

235. See *id.*

236. See *Cap Recommends Improved Complaint Procedures*, *supra* note 227, at 303.

237. *Id.*

238. See *id.* (recommending that INS distribute materials that define officer's limitations on regulations, such as, firearm use, searches, etc.).

239. See *id.*

240. See generally Stephen A. Rosenbaum, *supra* note 227, at 18 (noting that civilian review board is essential at the local level to make the review process more effective).

suspect practices, and recommend changes in policy and procedures affecting the local residents, while also keeping the community informed.²⁴¹

1. Features of the Civilian Review Board

The Civilian Review Board may be established by a “city ordinance, state statute, voter referendum, mayoral executive order, or police chief administrative orders.”²⁴² The ability to institute the revised review process at a regional level is essential to its manageability.²⁴³ Since border patrol sectors are set up in regions, the civilian review board would also operate in regions with CAP as the centralized body of the region chapters.

The Civilian Review Board would function in the following manner. The City Council or Mayor of the colonias or cities in each sector shall appoint the board members to the Civilian Review Board. The Civilian Review Board may consist of a small number of members, not to exceed ten, which would be appointed for one-year terms and eligible for re-selection not exceeding three years. The Civilian Review Board would be outfitted with an attorney who is able to provide information about the rights of residents against border patrol practices while assisting the board members in recommendations to INS.

2. Intermediary in the Complaint Process

A Civilian Review Board would be able to provide a responsive intake, for all residents who have complaints. Providing an intermediary structure between INS and the residents, the Civilian Review Board would document the initial intake and deliver it to INS along with its recommendation for disciplinary action of the officer or its perspective on the INS procedure. Moreover, the Civilian Review Board will provide a place to keep records of complaints, both providing accessibility to the residents making the complaints, as well as to CAP and attorneys looking to monitor patterns of abusive and unlawful stopping in communities like El Cenizo. Instituting such procedures would lessen the work where litigation may ensue.

241. See generally Hecker, *supra* note 213, at 596 (stating that review boards conduct public hearings on individual complaints and informs residents via an annual report regarding complaints and resolutions); Stephen A. Rosenbaum, *supra* note 227, at 16 (noting the purposes of citizens review boards). Specifically, the Board will serve to identify and punish the officers engaged in unlawful conduct, give aggrieved parties the means to redress, and act as a deterrent for future misconduct. See *id.*

242. Sean Hecker, *supra* note 213, at 594.

243. See Stephen A. Rosenbaum, *supra* note 227, at 23 (noting that a centralized body will not work because of the large size of INS). Therefore, local agencies are needed to make it manageable under a decentralized administration. See *id.*

3. Provide Information and Education to Residents

In addition to the aforementioned complaint procedure, the Civilian Review Board would publish and circulate the latest information about complaints and their ultimate disposition in a monthly newsletter.²⁴⁴ The board would provide the complainant with information including any status, change, or disposition made by INS.²⁴⁵ Moreover, the distribution of statistical information related to complaints received and their final disposition, would keep residents informed about problems with INS procedures.

The information presented in the monthly reports also would serve to educate the residents about border patrol's authority and limitations under the Fourth Amendment and case law.²⁴⁶ Additionally, the reports would also provide education about asserting certain rights; for instance, the right to remain silent or the right to walk away in certain situations.

Ultimately, the intervention of an external citizens review board validates the concerns of citizens, particularly in minority communities along the border.²⁴⁷ The regional structure would serve as a voice for all Hispanics who find themselves unreasonably stopped. The citizens review board would corroborate the notion that border patrol practices must conform to the Fourth Amendment's limitations because "a citizen's constitutional rights cannot be twisted to conform to current [border patrol's] practices."²⁴⁸

VII. CONCLUSION

Congress' power to exclude illegal aliens cannot be interpreted so broadly as to limit Fourth Amendment rights to persons legally in the United States. Citizens and legal permanent residents near the border should not be encumbered with the intrusion, harassment, and embarrassment of being asked whether they have 'papers' simply because of the color of their skin or the place they chose to reside.

244. *See id.* at 26 (stating that an important feature of the civilian review board is disseminating information about the status of complaints).

245. *See id.* at 25 (stating that the civilian review board must provide up-to-date information for complainant).

246. *See Cap Recommends Improved Complaint Procedures, supra* note 227, at 303 (noting that information should be distributed regarding officer's authority to "use of firearms, use of force, vehicular pursuits, searches, site inspections, and power to arrest, interrogate, and detain").

247. *See Hecker, supra* note 213, at 600 (recognizing that fear runs rampant in the minority community, that law enforcement will fail to respond to allegations of discriminatory practices runs rampant amongst the minority community).

248. *United States v. Felder*, 732 F. Supp. 204, 209 (1990).

“The thought that an American can be compelled to ‘show his papers’ before exercising his right to walk the streets, drive the highways or board the trains is repugnant to American institutions and ideals.”²⁴⁹ It is the “freedom of movement [that] is the very essence of our free society” enjoyed in the United States.²⁵⁰

249. *State ex rel. Ekstrom v. Justice Court of State of Arizona*, 663 P.2d 992, 997 (Ariz. 1983) (Feldman, J. concurring).

250. *Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).