CONSTITUTIONAL LAW—INS RAIDS ON GARMENT FACTORIES—
THE FOURTH AMENDMENT AND EXPEDIENCY—Immigration and

INTRODUCTION

On April 17, 1984, the Supreme Court upheld as constitutional
three factory raids conducted by the Immigration and Naturaliza-
tion Service (INS).1 These raids, or factory surveys, were con-
ducted under the statutory authority of section 287(a)(1) of the
Immigration and Naturalization Act.2 Delgado is illustrative of the
struggle between the broad authority granted INS agents under
section 287(a) (1) and protection of the fourth amendment rights of
lawful citizens who are routinely subjected to INS enforcement ac-
tivities merely because they happen to work for an employer who
hires illegal aliens.3 The perplexities in resolving this struggle are
numerous. The problem of large numbers of illegal aliens in the
United States work force presents serious social and economic
concerns.4 The broad grant of authority by section 287(a)(1) is
Congress' effort to empower the Immigration and Naturalization
Service to effectively deal with these problems.5 Yet, "no Act of
Congress can authorize a violation of the Constitution."6 When a
United States citizen or a lawful resident alien has his workplace

1. Immigration and Naturalization Serv. v. Delgado, 104 S. Ct. 1758 (1984) (was
   a review of International Ladies' Garment Workers' Union v. Sureck, 681 F.2d 624
   (9th Cir. 1982)).
   officer or employee of the Service authorized under regulations prescribed by the
   Attorney General shall have the power without warrant—(1) to interrogate any
   alien or person believed to be an alien as to his right to be or to remain in the
   United States."
3. Delgado, 104 S. Ct. at 1771-72 (Brennan, J., dissenting). As noted by Justice
   Brennan in his dissent in Delgado, many lawful residents constitute the majority of
   the workers in factories surveyed, but, because they appear of alien origin, they are
   "subjected to surprise questioning under intimidating circumstances. . . ."
   aliens in the United States "create significant economic and social problems, compet-
   ing with citizens and legal resident aliens for jobs, and generating extra demand for
   social services."); Chapman, A Look at Illegal Immigration: Causes and Impact
   on the United States, 13 SAN DIEGO L. REV. 34, 35 (1975). ("The result is a large and
   growing population of illegal aliens residing in the United States, taking jobs that
could be filled by unemployed Americans and legal aliens, sending their children to
   public schools, and otherwise utilizing public services such as welfare, food stamps
   and medical care — often without paying their share of federal and local taxes.").
   See also note 35 and accompanying text infra.
surrounded by law enforcement officers and is then intimidated by being asked to, in effect, justify his right to be in the United States, the Court is called upon to balance the two vital interests.

This Note attempts to identify the perplexities in the balancing process and analyzes how the Supreme Court in Delgado tried to resolve them. A facial analysis of section 287(a)(1) reveals an apparently broad power. Courts, however, have qualified the power by declaring that INS activities under the statute are governed by the strictures of the fourth amendment. Although this declaration seems simple enough, the Supreme Court seems quite apprehensive to circumscribe INS authority.

Why this apprehension? The factory survey method of seeking out illegal aliens appears to draw support from the Supreme Court on the proposition that given the weighty public interest in enforcing immigration laws, the raids are the most viable enforcement alternative presently available. Yet, the courts have not been remiss in recognizing at least one alternative. A number of courts have implicitly suggested that a more viable alternative might be to impose sanctions on employers who knowingly hire illegal aliens.

Although there are no sure conclusions in resolving the perplexing battle between the power exercised under section 287(a)(1) by INS officials and the fourth amendment rights of citizens and lawful residents affected by INS raids, there is one appar-


8. For example, in Justice Powell's concurring opinion in Delgado, he concluded after examining the public concerns in this area of law enforcement: "Clearly, the government interest in this enforcement technique is enormous." 104 S. Ct. at 1766 (Powell, J., concurring).

9. United States v. Ortiz, 422 U.S. 891, 914-15 (1975) (White, J., concurring, applying also to Brignoni-Ponce). Accord Delgado, 104 S. Ct. at 1775. (Since "[w]e are unwilling to require American employers to share any of the blame . . ." for the large influx of illegal immigrants, the Court, out of expediency, allows the shortcomings of the system to fall on citizens who work alongside illegal aliens.)

... [W]e must remember that the achievement of substantially higher living standards is a long-term prospect at the very best. Since deterioration in the United States is certainly not an attractive resolution, only one approach remains: Prohibiting the knowing employment of illegal aliens.

ent conclusion. If the goal of the judicial system is to preserve the security of United States citizens and lawful residents, then maybe, in a practical sense, decisions such as Delgado do more for those United States citizens and legal resident aliens who work for employers who hire illegal aliens and are thus affected by INS surveys than would a Supreme Court decision which is more coherent with the fourth amendment. A decision more coherent with the respondents' fourth amendment interests would circumscribe INS activity. Such a circumscription would diminish the ability of the INS to extricate illegal aliens from the American work force. Assuming that the respondents work in the garment industry out of necessity rather than desire, the fewer illegal aliens extricated from the work force would result in fewer employment positions available to United States citizens who are in the same employability posture as the respondents.10

FACTS OF DELGADO

Delgado was a review of International Ladies' Garment Workers' Union v. Sureck.11 The raids in Delgado were conducted at two different garment factories.12 INS conducted its raids by placing agents at the exits of the factories in order to prevent workers from leaving while the remaining agents proceeded through the factory under instruction to question each employee as to his or her citizenship status.'

10. It has been suggested that illegal aliens fill employment positions that United States citizens and legal resident aliens do not want. Nafziger, A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States, 56 OR. L. REV. 63, 70-71 (1977). Nafziger described a "vacuum at the bottom of the labor market" that draws the majority of undocumented aliens. Id. The labor categories at the bottom of the market which form this vacuum are, it is posited, not desirable to "indigenous labor," and would not necessarily be filled by any persons other than illegal aliens. Id.

Whether or not this theory is sound, the fact remains that some United States citizens and resident aliens have no other choice than to work jobs at the bottom of the labor market. Indeed, garment workers are described as the third lowest paying labor category. Id. Yet, Delgado involved two citizens and two legal resident aliens employed as garment workers. See note 14 infra. Without protection, judicial or otherwise, from encroaching illegal aliens, these respondents would suffer.

11. 681 F.2d 624 (9th Cir. 1982). The facts outlined here are taken from both the Supreme Court opinion in Delgado and the circuit court's opinion in Sureck because the findings of fact by the trial court were not published.

12. Id. at 626. The terms "raid" and "survey" or "factory survey" used herein are synonymous. INS calls a raid a "factory survey." A typical factory survey consists of entering a factory, routinely a garment factory, pursuant to a warrant or consent; stationing agents at factory exits; and questioning the workers as to their citizenship status. Id.

13. Id. at 626-27. (according to the Affidavit of the Assistant Director for Investigations, Los Angeles District Office of INS).
The respondents in Delgado were four employees of the factories, two United States citizens and two permanent resident aliens. Each of the four respondents had been questioned during the factory surveys. They initiated suit against the INS, seeking an injunction on the argument that the factory surveys violated their fourth amendment rights.

The Supreme Court was called upon to review two issues: whether each survey constituted a seizure of the entire work force of the factory surveyed, in violation of the respondents' fourth amendment rights to be free from an unreasonable search or seizure; alternatively, whether the individual respondents had been seized during the survey in violation of their fourth amendment rights to be free from an unreasonable search or seizure.

BACKGROUND

Statutory Authority

Congress has given INS agents apparently broad authority to search for illegal aliens. Section 287(a)(1) provides that an INS agent may interrogate, without a warrant, any alien or "person believed to be an alien" as to his citizenship status. There is some

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15. Sureck, 681 F.2d at 627.
16. Delgado, 104 S. Ct. at 1761. The fourth amendment to the United States Constitution provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
18. Id. at 1764.
19. See note 2 supra.
20. Although § 287(a)(1) does not expressly grant INS agents the authority to interrogate persons in their homes, or places of business, the court in Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211 (D.C. Cir. 1981), held that INS agents may question persons in their homes and businesses. The court stated: "Although the statute does not provide by its terms for the INS entry into dwellings or commercial premises, it is logical to suppose, as did the Almeida-Sanchez Court, that INS agents are not always restricted to questioning only those whom they see on the street or in public places." Id. at 1222. Almeida-Sanchez dealt with the constitutionality, under § 287(a)(3), of a search of a vehicle without a warrant, 20 miles from the border, which allows warrantless searches of automobiles within a "reasonable distance" from the border. 413 U.S. at 268. It is difficult to determine where the court in Blackie's found the assumption by the Almeida-Sanchez Court "that INS agents are not always restricted to questioning only those whom they see on the street or in public places." See Blackie's House of Beef, 659 U.S. at 1222.

However, it is established that INS agents may enter a dwelling or commercial premises to search for illegal aliens and to question individuals under § 287(a)(1) as long as the agents have consent to enter regardless of whether or not they have a
debate as to exactly what this provision authorizes. Does the statute authorize non-detentive questioning\(^2\) of any person who is believed to be of alien origin, although the agents have no reason to believe that the person is illegally in the United States? If this is permitted, are INS agents authorized under the statute to conduct detentive interrogations on the belief of alienage alone without reason to believe the person detained and interrogated is in the United States illegally?

One lower federal court has taken the position that an INS agent may not question a person, even to an extent which does not constitute a seizure under the fourth amendment, unless the agent reasonably believes the person questioned is in the United States illegally.\(^2\) In *Marquez v. Kiley*, the court reasoned that authority of an INS agent to interrogate any person who “looks like” an alien, and taking that person into custody if he “cannot provide on-the-spot documentation . . .”\(^2\) is “fundamentally offensive to this nation’s historical concepts of proper law enforcement techniques.”\(^2\) Thus, the court held that INS agents may approach and

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warrant. Illinois Migrant Council v. Pilliod, 398 F. Supp. 882, 899-900 (N.D. Ill. 1975), aff’d, 540 F.2d 1062 (7th Cir. 1976), modified, 548 F.2d 715 (1977); see also United States v. Rodriguez, 532 F.2d 834, 839 (2d Cir. 1976) (after questioning an alien on the street outside his house, agents followed the alien into his house to get his passport, and thereupon the agents searched the house for other aliens; the court held this search was improper without a warrant or consent).

Yet, even though INS agents have a warrant or consent to enter commercial premises, the questioning of individual employees found inside is considered to be done without a warrant. *Sureck*, 681 F.2d at 629 n.8. Furthermore, the individual employees do not have standing to contest the validity of the warrant to enter the commercial premises. *Illinois Migrant Council*, 389 F. Supp. at 900.

Throughout this casenote, the terms “stop,” “seizure” and “detentive questioning” mean a seizure under the fourth amendment not amounting to a traditional arrest. The terms “casual encounter,” “non-detentive questioning” or “casual inquiry” all mean an encounter between a law enforcement officer and a citizen which does not amount to a seizure under the fourth amendment. Any time the term “arrest” is used, a traditional arrest requiring probable cause is indicated.


23. *Id.* at 114. See also § 287(a)(2) of the Immigration and Naturalization Act, codified as 8 U.S.C. § 1357(a)(2) (1982), which provides that an INS agent may, without a warrant, “arrest any alien in the United States if he has reason to believe that the alien is in violation of any law or regulation.”

interrogate persons as to their citizenship only if the agents have
"a reasonable suspicion based on articulable facts, that the person
may be an alien who is illegally in the country."²⁵

However, in Au Yi Lau v. Immigration and Naturalization
Service²⁶ the court held that section 287(a)(1) permits INS agents
to "seek to interrogate" any individual the agents reasonably be-
lieve to be of alien origin.²⁷ In that case, the court considered this
authority to be analogous to the authority of any police officer to
question any person on the street, assuming the person's coopera-
tion.²⁸ Of course, as long as a court assumes the individual's coop-
eration and recognizes the freedom of the individual being
questioned to refuse answering and to walk away without thereby
creating justification for detentive questioning,²⁹ then this power is
in reality no greater than that of the ordinary police officer on the
street addressing questions to any person.³⁰ Under this analysis,
by enacting section 287(a)(1) Congress has really granted INS
agents no more power than they had already possessed as ordi-
nary citizens and as law enforcement officers. As pointed out in
Marquez v. Kiley, however, this conclusion "is substantially under-
mined by the realities of the matter."³¹ It is difficult to honestly
characterize any encounter between a law enforcement officer and
a citizen as a "casual" inquiry. Tensions and intimidation are
likely to be involved any time a citizen is encountered by an immi-

²⁵. Id.
²⁶. 445 F.2d 217 (D.C. Cir. 1971).
²⁷. Id. at 222.
²⁸. Id. Terry v. Ohio, 392 U.S. 1 (1968) set the ground work for what has be-
   come known as the "casual encounter" between a police officer and a citizen, not
   amounting to a seizure or an investigatory detention under the fourth amendment.
   See notes 61 - 66 and accompanying text infra. Pursuant to Terry and its progeny, if
   a police officer addresses questions to a person without compelling answers, and
   the person voluntarily responds, no intrusion upon the fourth amendment right to
   be free from unreasonable search or seizure has occurred. Florida v. Royer, 103 S.
²⁹. Florida v. Royer, 103 S. Ct. at 1324. ("He may not be detained even momenta-
   rily without reasonable, objective grounds for doing so, and his refusal to listen or
   answer does not, without more, furnish these grounds.").
³⁰. Id. As long as the police officer does not detain the person, even momenta-
   rily, it is only logical that no fourth amendment seizure has occurred. "If there is no
   detention—no seizure within the meaning of the Fourth Amendment—then no con-
   stitutional rights have been infringed." Id. In such a situation, a police officer is
   doing no more than any individual may do to any other individual he meets—
   namely, engage in voluntary conversation. Terry, 392 U.S. at 32-33 (Harlan, J.,
   concurring).
³¹. 436 F. Supp. at 113. "To the extent that the distinction between casual in-
   quiries and detentive stops is, or can be, strictly observed, there is a good deal of
   support for the rule. . . ." However, "[i]t is in the nature of an oxymoron to speak
   of 'casual' inquiry between a government official, armed with a badge and a gun . . .
   and a person suspected of alienage." Id.
The Supreme Court has not directly considered whether an INS agent must suspect illegal alienage before interrogating a person, short of detaining the person, under section 287(a)(1). However, it is doubtful that the Supreme Court will interpret section 287(a)(1) as requiring anything more than reasonable belief of alienage justifying a non-detentive interrogation. The Supreme Court has continuously used the concept of a "casual encounter" to grant INS agents, as well as other enforcement officers, the power to address questions to any person on the street without offending the Constitution, as long as the person is not forcibly detained. If a law enforcement officer may question any person, as long as the questioning is non-detentive, without violating the fourth amendment, then why must an INS agent justify non-detentive questioning of an apparent alien on suspicion that he is illegally in the country?

Furthermore, the INS must have the capacity to deal with the problem of illegal aliens present in the United States. It would

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32. The court in Marquez v. Kiley, 436 F. Supp. at 113, appears to be the only federal court which has authoritatively decided that an INS agent must suspect illegal alienage before engaging a person in questioning under § 287(a)(1), even when the questioning does not amount to a seizure under the fourth amendment. Yet, Justice Brennan, in his dissent in Delgado, did state: "[I]n order to protect both American citizens and lawful resident aliens, who are also protected by the Fourth Amendment . . . , the INS must tailor its enforcement efforts to focus only on those workers who are reasonably suspected of being illegal aliens." 104 S. Ct. at 1772 (citation omitted). Justice Brennan noted that even though § 287(a)(1) of the Immigration and Naturalization Act permits interrogation of persons believed to be aliens, interrogations must be limited to those persons reasonably believed to be illegal aliens because of the intrusive method of the INS factory surveys. Id. at 1773 n.5.

33. Florida v. Royer, 103 S. Ct. at 1324. In Delgado, the Court stated: "What is apparent from Royer . . . is that police questioning, by itself, is unlikely to result in a Fourth Amendment violation." 104 S. Ct. at 1762.

34. The term "non-detentive" questioning is used synonymously with "casual encounter" or a police-citizen encounter which does not amount to a seizure under the fourth amendment.

35. Brignoni-Ponce, 422 U.S. at 878-79 (the economic and social problems created by illegal aliens once they cross the border and settle into the inland cities demonstrate a valid and pressing "public interest demand[ing] effective measures to prevent the illegal entry . . . "); United States v. Ortiz, 422 U.S. 891, 908 (1975) (Appendix to Opinion of Burger, C.J., concurring) ("Once the illegal alien gets settled in a big city far away from the border it becomes very difficult to apprehend him . . . ").
clearly be difficult to recognize and articulate facts creating belief of illegal alienage without an opportunity to interrogate a person, especially since nationality by itself is not sufficient to create reasonable belief of alienage, let alone illegal alienage. To make the INS agents articulate facts creating reasonable suspicion of illegal alienage before questioning an alien even in a non-detentive manner would likely hamstring enforcement efforts to the point of non-productivity. Even that court which has held suspicion of illegality as necessary has recognized the need for the INS to deal with the problem of illegal aliens in the United States work force and the clear authority of Congress to empower INS to do just that. However, regardless of the “plenary power” of Congress to condition the entry of aliens into the United States on submission to reasonable questioning, this power does not justify intrusive questioning of United States citizens who only appear to be aliens.

Thus, presently under section 287(a)(1), INS agents need not suspect a person is illegally in this country before approaching that person and asking questions in a non-detentive manner. However, two questions still remain: at what point does INS activity under the statute constitute a “seizure”; and what factors justify a “seizure” conducted under Section 287(a)(1)?

Immigration and Refugee Policy used the figure of 3.5 to 6 million as the number for 1978. There are surely more now. Total immigration—legal plus illegal—now appears to account for 30 to 50 percent of our annual population growth of about 2 million. Thus, a net annual immigration of 750,000, would lead to a U.S. population in 100 years of over 300 million. One-third of this 300 million would consist of immigrants arriving after 1980 and their descendents. 129 CONG. REC. S1343 (daily ed. Feb. 17, 1983) (statements of Sen. Simpson).

Blackie’s House of Beef, 659 F.2d at 1221 (INS agents searched a restaurant for illegal aliens; the court recognized the “seriousness of the public interest in enforcement of the immigration laws.”).


37. Brignoni-Ponce, 422 U.S. at 886-87; Cheung Tin Wong v. INS, 468 F.2d 1123, 1127 (D.C. Cir. 1972).

38. United States v. Montez-Hernandez, 291 F. Supp. at 715 (“[I]f immigration authorities were unable to question aliens as to their right to be in this country without some independent evidence that they were here illegally, their job would be impossible.”).

39. Marquez v. Kiley, 436 F. Supp. at 113 (“[C]ontrol of a tremendous influx of aliens who have entered the country illegally, is of high importance. . . . Given the plenary power of Congress to regulate the entrance and presence of aliens within the United States, there is nothing objectionable in the proposition that aliens should from time to time be subject to inquiry by INS officials.”).

40. Brignoni-Ponce, 422 U.S. at 884.

41. See note 21 supra, for the distinction between “seizure,” “arrest” and a “non-detentive inquiry.”
SEIZURE UNDER THE FOURTH AMENDMENT: JUSTIFICATION NEEDED

1. The Terry Doctrine and "The Casual Encounter"

*Terry v. Ohio* was the seminal decision "justifying intrusions on less than probable cause." There, the Court was confronted with a situation where a police officer observed two men engaged in what he suspected to be "casing a job." The officer approached the men and asked for their names. In response to a mumbled reply, the officer "patted down" one man in search of a weapon.

Before *Terry*, the courts considered any seizure governed by the fourth amendment to be an "arrest." Furthermore, any seizure or "arrest" under the fourth amendment must have been justified by probable cause in order to be reasonable under the fourth amendment. The Court in *Terry* departed from the traditional fourth amendment standard requiring probable cause for a search and arrest, and it considered the argument that there should be a distinction between a "stop" and an "arrest" and between a "frisk" and a "search." The Court reasoned that since a "stop" of the person is less intrusive than the traditional "arrest," the traditional requirement of probable cause should be replaced by a careful balancing of the individual's privacy interests against the necessity of the officer's conduct. Instead of probable cause, therefore, a "stop" may be justified under the fourth amendment if "the officer acted reasonably in such circumstances," giving "due weight . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."

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42. 392 U.S. 1 (1968).
44. 392 U.S. at 6. (The men were pacing the sidewalk in front of a store window, stopping to look in the store, walking past the store, and then returning in front of the store window, repeating this ritual several times.)
45. Id. at 7.
46. Id.
48. Florida v. Royer, 103 S. Ct. at 1324; Dunaway v. New York, 442 U.S. at 208 ("While warrants were not required in all circumstances, the requirement of probable cause . . . was treated as absolute.").
49. *Terry*, 392 U.S. at 10. See note 21 *supra* (as to the distinction between "stop," "seizure," "arrest" and "casual encounter").
50. Id. at 22-27.
51. Id. at 27. The *Terry* Court was speaking of reasonable suspicion to justify a "frisk" rather than a "seizure." Yet, the same rationale has been applied in INS cases involving the issue of "seizure." In Illinois Migrant Council v. Pilliod, 398 F. Supp. 882 (N.D. Ill. 1975), the court declined to list "articulable facts" necessary to justify a stop under the fourth amendment of a person suspected of being an alien. The court suggested that such a list might be too restrictive and stated that it is better that "the agents be free to engage in on-the-spot assessment of the totality of
What has developed from the *Terry* doctrine is "[t]he reasonableness of seizures that are less intrusive than a traditional arrest depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law [enforcement] officers.'" This balancing requires weighing three factors: the public concerns; the degree to which the seizure advances the public concerns; and the degree of intrusion upon individual liberty. The standard does not always require "some quantum of individualized suspicion." The public interest might be so great and the intrusion upon individual liberty so minimal that no individualized suspicion based on objective facts need be present. However, the "central concern" in the reasonableness standard of balancing the competing interest of the public with the individual's fourth amendment rights is assurance that "an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Thus, without individualized suspicion of misconduct, the balance weighs heavier on the side of the rights of the individual and requires the alternative safeguard of a warrant issued by an impartial party in order to prevent arbitrary and intrusive practices.

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Id. at 899.

The *Terry* Court also noted that a reasonable inference is not an "inchoate and unparticularized suspicion or 'hunch'. . . ." 392 U.S. at 27. From assessment of the objective circumstances, a police officer can make "common-sense conclusions" based on probabilities. United States v. Cortez, 449 U.S. 411, 418 (1981).


55. *Martinez-Fuerte*, 428 U.S. at 560-61.


57. Id. at 52.

58. *Prouse*, 440 U.S. at 654-55. "In those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" Id. (citing Camara v. Municipal Court, 387 U.S. 523 (1967); other citations omitted). See also *Brown*, 443 U.S. at 52 (stating that when a stop is not based on suspicion of wrongdoing "the risk of arbitrary and abusive police practices exceeds tolerable limits.") (Citation omitted).

Where the government interest outweighs the individual's interest, precluding insistence upon some quantum of individualized suspicion, "alternative safeguards" usually take the form of a warrant. In *Camara v. Municipal Court*, the Court held that an area warrant was necessary for building inspectors to enter private dwellings to search for code violations. 387 U.S. at 540. The Court held that to obtain the warrant, the officers did not need "specific knowledge of the condition of the particular dwelling." Id. at 598. Furthermore, "if a valid public interest justifies
Thus, the \textit{Terry} doctrine allowing detentive questioning on less than probable cause usually requires some quantum of individualized suspicion that the person detained is involved in illegal activity.\textsuperscript{59} However, if on balance the public interest is sufficiently great and the intrusion upon individual privacy sufficiently minimal, the standard does not require suspicion of illegal activity.\textsuperscript{60}

In \textit{Terry}, the Court went even further than establishing the permissibility of detentions on less than probable cause and established the foundation for what has been termed the "casual encounter." In \textit{Terry}, the Court made an oblique statement in a footnote which is often quoted in later cases: "Obviously, not all personal intercourse between policemen and citizens involves `seizures' of persons."\textsuperscript{61} While the Court in \textit{Terry} did not coin the imprimatur "casual encounter," it did set the mold. The Court assumed, upon the facts of that case, that up to the point of the frisk, no constitutionally protected rights had been violated.\textsuperscript{62} To this assumption, Justices White and Harlan provided teeth for the bite by stating that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets";\textsuperscript{63} and, every citizen, including a police officer, enjoys the "liberty . . . to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away. . . ."\textsuperscript{64}

Thus was born the idea of a "casual encounter" between a police officer and a citizen: "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and

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\item the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." \textit{Id.} at 539.
\item In United States v. Berry, 670 F.2d 583 (5th Cir. 1982), the court decided that a stop of a person in an airport to investigate whether he is transporting drugs is more intrusive than a border stop or a building inspection, thus distinguishing \textit{Camara} and \textit{Martinez-Fuerte}, and requiring some level of individualized suspicion. \textit{Id.} at 690-01 n.22. It is important to note that the leading INS case allowing detentive interrogation on less than individualized suspicion involved a stop comparable to the stop in \textit{Berry}, see notes 72-74 and accompanying text infra.
\item \textit{Martinez-Fuerte}, 428 U.S. at 560-61.
\item \textit{Terry}, 392 U.S. at 19 n.16. See also Delgado, 104 S. Ct. at 1762; Reid v. Georgia, 448 U.S. 438, 440 (1980); United States v. Mendenhall, 446 U.S. 544, 552 (1980); Sureck, 681 F.2d at 630 n.9.
\item \textit{Terry}, 392 U.S. at 19 n.16 (stating that not all personal intercourse between a police officer and citizen involves a seizure).
\item \textit{Id.} at 34 (White, J., concurring).
\item \textit{Id.} at 32-33 (Harlan, J., concurring).
\end{itemize}
objective justification." Yet, this does not mean that the person may "be detained even momentarily without reasonable, objective grounds for doing so. . . ."

2. Developments After Terry

a. INS Survey Cases

Despite the fact that Terry v. Ohio dealt with only a "stop and frisk" situation and not with a "stop" for investigatory questioning, courts have applied the doctrine arising from Terry and its progeny in the area of immigration law enforcement. The standard which has evolved from Terry and applied under section 287(a)(1) in cases at the lower federal level is what has been termed the "dual standard." This standard was articulated in Sureck as follows:

[a]n INS agent . . . may question a person as to his right to be or remain in the United States without forcible detention as long as the agent has a reasonable belief that the questioned person is an alien; but agents may forcibly detain a person temporarily for questioning 'under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country'.

Thus, using the criterion of the "dual standard," the INS agent, while he need not reasonably suspect illegal alienage, must reasonably suspect alienage in order to carry out a non-detentive interrogation. Yet, he must not transgress the nebulous limits of a "casual encounter"; otherwise, he has seized the person and is subject to the requirement that he articulate specific and objective

65. United States v. Mendenhall, 446 U.S. at 554.
67. The Court in Terry expressly stated: "We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for the purpose of 'detention' and/or interrogations." 392 U.S. at 19 n.16.
68. In Brignoni-Ponce, 422 U.S. at 881, the Court held, on the weight of the Terry doctrine:

[Because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.

See also Martinez-Fuerte, 428 U.S. at 554-55 (in a situation involving a border patrol stop of a vehicle, the Terry doctrine balancing test was applied).
69. Sureck, 681 F.2d at 636.
70. Id. at 635-36 (citations omitted).
facts upon which his suspicion of illegal alienage is based.\footnote{71}

The Third Circuit, however, has applied a standard different than the dual standard, even though the standard it has adopted also grows out of the \textit{Terry} doctrine. In \textit{Babula v. Immigration and Naturalization Service},\footnote{72} the Third Circuit applied a standard it had first formulated in \textit{Lee v. Immigration and Naturalization Service}.\footnote{73} The \textit{Lee} standard is described as "whether the questioned conduct was 'reasonably related in scope to the justification for [its] initiation.'"\footnote{74}

The \textit{Lee} standard seeks to avoid distinguishing between a "casual encounter" and a "stop" (or non-detentive questioning and detentive questioning) because of the fine line between the two.\footnote{75} It instead merely asks whether the suspicion formulated justifies

\footnote{71. The dual standard as quoted from \textit{Sureck}, see text at note 70 supra, appears to describe two situations. The first prong appears to describe a situation involving a "casual encounter," and the second prong appears to describe a situation involving a seizure not amounting to a traditional arrest. The first prong does not involve "forcible detention," whereas the second prong does involve "forcible detention." Furthermore, the first prong requires only reasonable belief that the person is an alien, whereas the second prong requires reasonable belief that the person is not only an alien, but also an illegal alien.

A traditional arrest requires probable cause. \textit{Michigan v. Summers}, 452 U.S. 692, 700 (1981). There is only one exception to this general rule that a seizure under the fourth amendment requires probable cause, and that is a less intrusive seizure requiring only reasonable suspicion. \textit{Id}. The second prong must, therefore, describe "forcible detention" not amounting to a traditional arrest, since the court in \textit{Sureck} stated that such a "forcible detention" requires only reasonable suspicion. The first prong must, therefore, describe the casual encounter, or non-detentive interrogation.

73. 590 F.2d 497 (3d Cir. 1979).
74. \textit{Babula}, 665 F.2d at 295 (citations omitted). In \textit{Terry}, the Court stated: "[T]he manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. . . . Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." 392 U.S. at 28-29. Quoting \textit{Terry}, the Court in \textit{Brignoni-Ponce} stated: "As in \textit{Terry}, the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' The officer may question the driver and passengers about their citizenship and immigration status, . . . but any further detention or search must be based on consent or probable cause." 422 U.S. at 881-82.

Thus the fourth amendment imposes two limitations: "[I]t proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." \textit{Terry}, 392 U.S. at 28-29. In \textit{Lee}, the court found at the outset that the police officer relied on several factors creating reasonable suspicion that the individuals questioned were aliens. 590 F.2d at 502. Whereas in \textit{Babula}, the court held that because the person questioned worked for an employer whom a reliable source said was employing illegal aliens, the agents were justified, under the standard the court applied, in detaining the person for questioning. Thus, the \textit{Babula} court appears to have passed over the first vital step of analysis under the fourth amendment.

75. \textit{Lee}, 590 F.2d at 501-02.
the extent of detention employed.\textsuperscript{76} Under this standard, the court in Babula did not consider whether the circumstances constituted a seizure; rather, it applied the constructs of the fourth amendment, reasoning that if INS agents’ actions are presumed a seizure and found reasonable under the fourth amendment, then, \textit{ipso facto}, they are reasonable under section 287(a)(1).\textsuperscript{77}

\textbf{b. Lee Standard v. Dual Standard}

\textbf{(i) Facts of Babula and Sureck}

In Babula, two different INS offices received information from a “reliable source” that a certain factory was employing illegal aliens.\textsuperscript{78} One informant indicated that seven Polish persons believed to be illegal aliens were employed at the factory and indicated that additional undocumented Polish aliens were also employed there.\textsuperscript{79} Upon this information, INS agents conducted a factory raid. Prior to the raid, the INS agents determined that six of the seven persons named by the source were not deportable aliens.\textsuperscript{80}

During the raid, agents were placed at the factory exits to prevent persons from leaving.\textsuperscript{81} Once inside the factory,\textsuperscript{82} the agents inquired as to the location of the seventh person named by the source and were told that although he had previously worked at the factory, he was no longer employed there.\textsuperscript{83} The agents then proceeded through the factory, asking each employee questions as to whether he or she had documentation establishing his or her right to be in the United States and how he or she came to be in the United States.\textsuperscript{84}

When the agents approached two employees in particular, the

\textsuperscript{76} Id. See Sureck, 681 F.2d at 636-37 (stating that the Lee standard “combines the detention inquiry with the justification inquiry”).

In Lee the court stated that by applying the standard of whether the stop and interrogation were reasonably related in scope to the justification for their initiation, the focus of concern was whether circumstances “‘pass the threshold of reasonable suspicion necessary to justify the stop which was made in the case.’” 590 F.2d at 502 (citing United States v. Oates, 560 F.2d 45 (2d Cir. 1977)).

\textsuperscript{77} Babula, 665 F.2d at 295.

\textsuperscript{78} Id. at 294.

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} The agents in Babula did not have a warrant to enter the factory. Id. at 299 (Adams, J., concurring). Neither the necessity nor sufficiency of a warrant is considered in this casenote. See note 20 and accompanying text supra.

\textsuperscript{83} Id. at 295.

\textsuperscript{84} Id.
employees attempted to flee, to which the INS agents responded by restraining their flight and asking questions as to their alienage.\textsuperscript{85} Up to the moment of restraint, the agents knew only that the persons attempting to flee worked for an employer a "reliable source" had identified as employing illegal aliens and that one person named by the source as being an illegal Polish alien had at one time been employed at the factory.\textsuperscript{86} Furthermore, the agents knew that the night foreman spoke English with difficulty and Polish fluently.\textsuperscript{87}

In \textit{Sureck},\textsuperscript{88} agents conducted three factory raids on two different factories.\textsuperscript{89} Agents were stationed at the factory exits to prevent persons from leaving, while the remaining agents proceeded through the factories questioning workers.\textsuperscript{90}

\textbf{(ii) Distinctions Between Babula and Sureck}

Important distinctions arise between the dual standard as applied in \textit{Sureck} and the \textit{Lee} standard as applied in \textit{Babula}. In \textit{Sureck}, the court applied the same test as it had in \textit{United States v. Anderson},\textsuperscript{91} stating if a reasonable person under all the circumstances feels he is not free to leave, then a seizure under the fourth amendment has occurred.\textsuperscript{92} The court found under this test that the entire factory had been seized in the raid when the agents stationed themselves at the factory exits.\textsuperscript{93} It held that placing agents at the exits was a message by the INS agents to the work force that departures were not allowed.\textsuperscript{94} The court also found that the agents' verbal annunciation of authority, display of badges, planned element of surprise, and systematic execution of the sur-

\textsuperscript{85} Id. at 297.
\textsuperscript{86} Id. at 296.
\textsuperscript{87} Id.
\textsuperscript{88} 681 F.2d 624. The facts of \textit{Sureck} outlined here are taken from the opinion of the Ninth Circuit Court of Appeals because the opinions and holdings of the district court were not published.
\textsuperscript{89} Id. at 627.
\textsuperscript{90} Id. at 626-27. See text at notes 12-18 supra.
\textsuperscript{91} 663 F.2d 934 (9th Cir. 1981). In \textit{United States v. Anderson}, the court outlined several factors to be considered in determining whether a 'seizure under the fourth amendment has occurred. The factors outlined were: "'threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" Id. at 939 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).
\textsuperscript{92} \textit{Sureck}, 681 F.2d at 631.
\textsuperscript{93} Id. at 634 ("[W]e must conclude that even before individual questioning began, a reasonable worker 'would have believed that he was not free to leave.'" (citation omitted)).
\textsuperscript{94} Id.
vey would lead any reasonable person to believe that his freedom to leave was restricted.\textsuperscript{95} Since the employees were also aware that persons attempting to leave were being prevented from doing so by the agents\textsuperscript{96} and had observed INS agents handcuffing workers they suspected of being illegally in the country,\textsuperscript{97} the court reasoned that the INS agents presented such an intimidating and threatening presence that even before personal confrontation, no reasonable person would have felt free to leave.\textsuperscript{96}

Once the Ninth Circuit Court of Appeals found that the entire factory had been seized, the INS agents' conduct fell under the scrutiny of the second prong of the dual standard. The second prong of the dual standard, as stated by the \textit{Sureck} court, requires suspicion of illegal alienage in order to justify the seizure as reasonable.\textsuperscript{99}

The Supreme Court has not decided whether an investigatory stop under section 287(a) (1), in a context other than the stop of a vehicle by INS agents away from the border, requires belief of illegal alienage or belief of alienage alone.\textsuperscript{100} However, the court in \textit{Sureck} reasoned that "allowing detentive questioning on suspicion of alienage alone would diminish the privacy and security interests of both citizens and aliens legally in this country."\textsuperscript{101} Thus, the court held that suspicion of alienage alone was not sufficient to justify a detentive interrogation under section 287(a) (1).\textsuperscript{102}

\textsuperscript{95} \textit{Id.} \\
\textsuperscript{96} \textit{Id.} at 633. Knowledge that the factory was surrounded is essential. In \textit{Yam Sang Kwai v. Immigration and Naturalization Serv.}, 411 F.2d 683 (D.C. Cir. 1969), the court considered a situation where INS agents had surrounded a restaurant during a survey. None of the employees inside the restaurant were aware of the fact that it had been surrounded. The court held that employees must be aware that they are surrounded, otherwise the employees could not reasonably have believed that their freedom to leave was being restrained. \textit{Id.} at 686. \\
\textsuperscript{97} \textit{Sureck}, 681 F.2d at 634. \\
\textsuperscript{98} \textit{Id.} at 633-34. \\
\textsuperscript{99} \textit{See} note 71 and accompanying text \textit{supra}. \\
\textsuperscript{100} \textit{Sureck}, 681 F.2d at 635 (citing United States v. Brignoni-Ponce, 422 U.S. 873 (1975)). In \textit{Brignoni-Ponce}, the Court reserved the question of whether INS agents away from the border could stop persons reasonably believed to be aliens when the agents have no reason to believe the persons are illegally in the country. \textit{Id.} at 884, n.9. The Court did decide, however, that except at the border and its functional equivalent, INS agents must reasonably suspect that a vehicle contains aliens who may be illegally in the country before stopping the vehicle for questioning under § 287(a) (1). \textit{Id.} at 884. \\
\textsuperscript{101} \textit{Sureck}, 681 F.2d at 639. \\
\textsuperscript{102} \textit{Id.} at 638. As noted above, under the developments after \textit{Terry}, not all seizures under the fourth amendment require individualized suspicion of illegal activity. \textit{See} note 54 \textit{supra}. The test is whether, on balance, the public interests outweigh the intrusion on individual liberty. Protection of individual privacy and security interests receive the greater weight when detention is not based on suspicion of criminal activity. \textit{See} note 97 \textit{supra}. 
Upon deciding that suspicion of illegal alienage was required under section 287(a)(1) when the questioning was detentive, the court considered whether less than an individualized suspicion was sufficient where the factory was known to employ illegal aliens.\footnote{Sureck, 681 F.2d at 635.} The court concluded that reasonable suspicion that the individual questioned is illegally in the country is required and could not be satisfied on the basis of the “milieu” in which the person is found.\footnote{Id. at 641-43.} The court reasoned that without a requirement of objective individualized suspicion, the agents would be too indiscriminate in their enforcement methods.\footnote{Sureck, 681 F.2d at 639.}

Yet, in \textit{Babula}, the court did not attempt to distinguish between detentive questioning and non-detentive questioning. Rather, the court assumed that the questioning by the INS agents was a seizure under the fourth amendment, and then proceeded to determine whether it was reasonable under the fourth amendment.\footnote{Babula, 665 F.2d at 295.} By assuming at the outset that the agents’ conduct was a seizure under the fourth amendment, it would appear that the standard applied should require at least a minimum level of individualized suspicion of illegality justifying the detentive questioning.\footnote{Assuming that the actions of a law enforcement officer constitute a seizure under the fourth amendment, certain preconditions must be satisfied in order for the seizure to be justified under the fourth amendment. \textit{Terry}, 392 U.S. at 28-29. One of these preconditions is that the brief detention, even though short of a traditional arrest, must be supported by reasonable suspicion that the person is in violation of a law. \textit{Id. See also} United States v. Cortez, 449 U.S. at 417. Yet, in \textit{Martinez-Fuerte}, the Court held that although it is the general rule that “some quantum of individualized suspicion” is necessary, “the Fourth Amendment imposes no irreducible requirement of such suspicion.” 428 U.S. at 560-61. However, this exception to the general rule arises only where the governmental need sufficiently exceeds the extent of intrusion upon the individual privacy interests. \textit{Id. See also} text at notes 158-187 infra.} Yet, the court in \textit{Babula} did not seem to agree with this proposition, in that it allowed what it assumed to be a seizure under the fourth amendment on less than an individualized suspicion of illegality.\footnote{Babula, 665 F.2d at 296.}

The factors upon which the \textit{Babula} court found the assumed
seizure under the fourth amendment to be reasonable were that
the employees were working for an employer known to employ il-
legal aliens and that the foreman spoke Polish fluently and English
with difficulty. The court, in applying a fourth amendment anal-
ysis, reasoned by analogy to United States v. Brignoni-Ponce, where
the Supreme Court had held that stopping a vehicle on the
belief that the vehicle contained aliens who may be illegally in the
country was permissible. The court in Babula reasoned that
since the agents had reasonable suspicion that illegal aliens were
employed in the factory based upon a reliable tip, the agents were
justified in questioning the employees working in the factory be-
cause of the milieu in which they worked.

The court attempted to justify its holding by noting that the
employees were at work and not in their homes where greater pri-
vacy is expected. Yet, it is incoherent with the Terry doctrine to
assume that because a person's expectation of privacy is less while
at work than at home, the requirement of individualized suspicion
of illegality is thereby dispensed with. In Michigan v. Sum-

109. Id.
110. 422 U.S. 873 (1975).
111. Id. at 884. The Brignoni-Ponce Court actually stated that the agents must
have reasonable suspicion that the vehicle contains "aliens who may be illegally in
the country." Id. (emphasis supplied). This language suggests that the Court did
not consider as necessary, the formulation of reasonable suspicion that the persons
stopped were illegal aliens. However, the Court's emphasis was on suspicion,
based on objective factors, that the aliens stopped were illegally in the country, not
suspicion that the vehicle contained aliens who, on the hunch of the officer, may be
illegally in the country. This is clearly indicated by the Court's statement: "[T]o
approve roving-patrol stops of all vehicles in the border area without any suspicion
that a particular vehicle is carrying illegal immigrants, would subject the residents
of these and other areas to potentially unlimited interference . . . " at the sole dis-
cretion of the officers. Id. at 882.
112. Babula, 665 F.2d at 296. The Babula court concluded that Brignoni-Ponce
held that "persons in cars may be questioned about their alien status although
there is no suspicion that a given individual is an alien." Id. On the weight of
Brignoni-Ponce, the Babula court analogized the factory to a vehicle; holding that
the agents could question all persons found in the factory since a "reliable source"
said the factory employed aliens.
113. Id. If the "central concern" of the reasonableness standard under the
fourth amendment as developed in light of Terry is protection of reasonable expec-
tations of privacy from arbitrary invasions by police officers, Brown, 443 U.S. at 51
(see text at note 56 supra), then a logical extension of this principle is that the
greater the privacy expectations, the greater the level of protection afforded under
the reasonableness standard. Conversely, the lesser the privacy expectation, the
lesser the protection. Martinez-Fuerte, 428 U.S. at 561-62. When deciding whether
individual suspicion was necessary, the court must balance the governmental inter-
est against the individual's privacy interest. Id. at 561. If the governmental interest
outweighs the privacy interest, and the individual stopped is not singled out for the
intrusion, then no individualized suspicion is necessary. United States v. Berry, 670
F.2d at 600 n.22 (citing Martinez-Fuerte, 428 U.S. at 561).
114. There is clearly a difference in the degree of fourth amendment protection
mers, the Supreme Court analyzed *Brignoni-Ponce* in light of the *Terry* doctrine and concluded that *Brignoni-Ponce* recognized the principle that "limited intrusions on the personal security of those detained . . . are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity." Justice Stewart, in his dissent in that case, stated that cases like *Martinez-Fuerte* and *Brignoni-Ponce* establish that a detention is reasonable under the fourth amendment without probable cause because the government in those cases is able to demonstrate an important purpose beyond normal investigations or can demonstrate "an extraordinary obstacle to such investigation."

Thus, simply because privacy expectations are less while at work, individualized suspicion is not dispensed with under cases such as *Brignoni-Ponce* unless the governmental interest in that enforcement technique is sufficiently great or the police are faced with obstacles so great that the enforcement technique is necessary in light of the governmental interest. It would appear that the court in *Babula* applied only half of the test justifying detention on less than individualized suspicion, i.e., privacy expectations but not governmental interest or obstacles.

In *Babula*, the court further held that under the standard it applied, where persons questioned as to their citizenship attempted to flee, the agents were justified in restraining the persons in order to obtain the answers. The court held the "attempted escape led the agents to believe reasonably that [the workers] were illegal aliens, and justified their brief restraint . . ." so the agents could establish probable cause to arrest. Going even further, the court held that if the person remained silent or refused to produce evidence of his identity, this would justify suspicion of illegal alienage.

expected from persons in varying situations. For example, a person in a public street or in an automobile has less of a privacy expectation than does the person in his home. *Martinez-Fuerte*, 428 U.S. at 561. Thus, the idea of a casual encounter between a police officer and a citizen may have perfect application to a street encounter. Yet, to assume that an employee's expectation of privacy while at his place of employment is far less than the privacy expectations while in one's home, and to thereby apply the same standards as applied to a street encounter, is clearly stretching the *Terry* doctrine.

116. *Id.* at 699.
117. *Id.* at 708.
118. *Id.*
119. *Babula*, 665 F.2d at 297.
120. *Id.*
121. *Id.* at 298.
Although an attempt to flee is one factor to consider in formulating a reasonable individualized suspicion justifying detention, mere refusal to answer questions furnishes no grounds for even a momentary detention. Furthermore, the court had assumed from the outset that the circumstances constituted a seizure under the fourth amendment. Thus, the court appears to have been attempting to justify a seizure by occurrences after the fact. If the agents' conduct was a seizure under the fourth amendment from its inception, then no amount of evidence produced after the fact will justify its reasonableness under the fourth amendment if it could not be justified upon circumstances at the inception.

In summary, the court in Sureck inquired as to whether the agents' conduct amounted to a seizure under the fourth amendment and then considered whether the seizure was justified under the fourth amendment. Whereas, in Babula, the court first assumed the conduct was a seizure and then considered only whether the extent of the seizure was justified upon the suspicions held by the agents. In Sureck, the court required individualized suspicion of illegal alienage to justify the detention; whereas, in Babula, the court required only suspicion of alienage based not on individualized factors but upon the milieu in which the questioned persons were found.

122. Au Yi Lau, 445 F.2d at 223.
123. Florida v. Royer, 103 S. Ct. at 1324. At this juncture, it should be noted that attempts to flee and refusal to answer questions are distinct in their effect on creating reasonable suspicion to detain. Various courts have held that an attempt to flee is an important factor in formulating reasonable suspicion to detain in the area of INS activities. See, e.g., United States v. Varkonyi, 645 F.2d 453, 458 (5th Cir. 1981); Au Yi Lau, 445 F.2d at 223; Illinois Migrant Council, 398 F. Supp. at 899.

However, in Babula, relying on Illinois Migrant Council and Marquez v. Kiley, the court appears to make an erroneous conclusion on the basis of this precedent that remaining silent or refusing to produce evidence of identity justifies suspicion of illegal alienage. 665 F.2d at 298. This conclusion appears to grow out of the statement made in Marquez, noting with disapproval, that in some cases appearance of nervousness may be held to provide reason to suspect illegal alienage. 436 F. Supp. at 114 (citing Au Yi Lau, 445 F.2d at 220). This statement by the Marquez court is not entirely supported by the Au Yi Lau case. In Au Yi Lau the activity characterized as appearance of nervousness by the Marquez court was in fact an attempt to flee. Au Yi Lau, 445 F.2d at 224-25 (the INS agent pursued two Chinese persons throughout a hospital, into and across a parking lot before being able to stop them).

124. Berry, 670 F.2d at 598. ("Once a stop has been held a seizure, it can be constitutional only if based upon reasonable suspicion."). The question is: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate. Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." Terry, 392 U.S. at 21-22 (citations omitted).
CONSTITUTIONAL LAW

ANALYSIS: INS v. DELGADO

Introduction

As previously suggested, it is doubtful that the Supreme Court would hold that INS agents must formulate reasonable suspicion of illegal alienage before interrogating, in a non-detentive manner, any person believed to be an alien. Beyond this initial proposition, the background to Delgado is unclear as to both the extent of power granted INS agents under section 287(a)(1) and the restrictions imposed by judicial construction of the statute. The statute appears to grant INS agents the authority to detain any person believed to be an alien, without requiring the agents to formulate a reasonable belief that the person detained is also an illegal alien. Yet, the courts have questioned the validity of such authority by stating, abstractly, that Congress cannot authorize a violation of the Constitution.

The question follows, therefore, to what extent does the Constitution circumscribe the broad authority under the statute? The first step in the analysis of this question is, when do constitutional limitations engage? This has been answered by the courts following the Terry doctrine: Whenever a person feels that he is not free to walk away or refuse to answer, he has been "seized" as that term is used to indicate application of fourth amendment restrictions.

Once a court has concluded that the actions of INS agents constitute a seizure, then the court must decide what standard it will apply in considering whether the seizure was justified under the fourth amendment. At this juncture, the court is faced with a choice between the dual standard and the Lee standard. The Lee standard, as applied in Babula, weighs the extent of the seizure (its intrusiveness) against the suspicions justifying the seizure. If the suspicions formulated by the agents justify the extent of detention (its intrusiveness), then the seizure is reasonable under the fourth amendment. Further, the Lee standard does not require that the INS agent reasonably suspect, upon individualized factors, that the person detained is illegally in the country. The dual standard, however, requires that the INS agent formulate rea-

125. See text at notes 32-39 supra.
126. See note 2 and accompanying text supra.
127. See text at note 6 supra.
129. See text at note 74 supra.
130. See text at note 76 supra.
131. See text at notes 109-112 supra.
sonable suspicion that the person detained is an alien illegally in the country before detaining the person for questioning.\textsuperscript{132}

Even though a court finds that no seizure has occurred and, therefore, no fourth amendment rights have been infringed, the dual standard and section 287(2)(1) raise an additional requirement. The dual standard requires reasonable belief that a person questioned in a non-detentive manner is of alien origin.\textsuperscript{133} Further, section 287(2)(1) explicitly states that an INS agent may interrogate any person "believed to be an alien."\textsuperscript{134} Thus, assuming the Court would adopt the dual standard, the question remains whether section 287 imposes a standard more restrictive than the fourth amendment.

Finally, given an ultimate conclusion that the fourth amendment requires reasonable suspicion that a person questioned in a detentive manner is an illegal alien, why does the Court refuse to circumscribe INS activity under the statute? It has been suggested that legislative recourse in the form of sanctions against employers who hire undocumented aliens is a possible alternative.\textsuperscript{135} The viability of this alternative, and its questionable side effects, may suggest the answer to why the Court is apprehensive to circumscribe INS authority.

In \textit{Delgado}, the Supreme Court granted certiorari because the "decision of the Court of Appeals [presents] serious implications for the enforcement of the immigration laws and presents a conflict with the decision reached by the Third Circuit in Babula v. INS."\textsuperscript{136} It is hard to comprehend why the Supreme Court in \textit{Delgado} prefaced its opinion with the statement that \textit{Sureck} represented a conflict with \textit{Babula} when the Court did not resolve this conflict. The opinion in \textit{Delgado} does not seem to follow that of the court in \textit{Babula}, nor does the opinion appear to contradict much of what was said in \textit{Sureck}, including the statements of the Ninth Circuit Court of Appeals denouncing the logic applied in \textit{Babula}.\textsuperscript{137}

The opinion of the Supreme Court does not authoritatively harmonize the conflict apparent between the two circuits. On a close analysis, it appears that the Court merely disagrees with the circuit court of appeals' characterization of the facts of the case as a seizure of the work force, but does not necessarily disagree with

\begin{itemize}
  \item \textsuperscript{132} See text at notes 70-71 supra.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} See note 2 and accompanying text supra.
  \item \textsuperscript{135} See note 9 and accompanying text supra.
  \item \textsuperscript{136} Delgado, 104 S. Ct. at 1762 (citation omitted).
  \item \textsuperscript{137} Sureck, 681 F.2d at 641 ("We have serious problems with the Babula reasoning and find it inapposite to the facts of this case.").
\end{itemize}
the statements of legal principles involved as to the applicability and operation of the dual standard.\textsuperscript{138}

\textit{Majority Holding}

The majority in \textit{Delgado} rejected the conclusion of the circuit court of appeals in \textit{Sureck} that the entire work force had been seized.\textsuperscript{139} The Supreme Court abstained from deciding whether suspicion of alienage alone was sufficient for questioning but held that questioning a person as to his identity or a request for identification does not constitute a seizure under the fourth amendment in light of the \textit{Terry} doctrine.\textsuperscript{140} Further, the stationing of agents at the exits was not a seizure but only an attempt to ensure that all persons were questioned.\textsuperscript{141} It concluded, therefore, "[i]f mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits."\textsuperscript{142}

In reaching this conclusion the Court focused narrowly on the four employees involved in the action. The Court acknowledged evidence that the INS agents attempted to restrain persons from leaving the factory but found no evidence that the four respondents themselves were restrained.\textsuperscript{143} Indeed, the record revealed that two of the respondents did, in fact, leave and reenter the factory during the survey without being hindered by the agents posted at the exits.\textsuperscript{144}

The Court appears to have overlooked the fact that the agents were placed at the factory exits for the admitted purpose of preventing employees from leaving during the survey.\textsuperscript{145} From the affidavit of an official, it appears that securing the exits to prevent departures is a routine and integral function during a factory survey.\textsuperscript{146} In the face of this evidence, the Court appears to have rationalized the situation into one where the agents were attempting to ensure merely that all employees were questioned.

\textsuperscript{138} Since the majority in \textit{Delgado} found that the circumstances did not amount to a seizure under the fourth amendment of either the factory as a whole or the individual respondents, 104 S. Ct. at 1763-64, it is fair to say that there was no need for the Court to choose between the \textit{Lee} standard and the dual standard. However, if the Supreme Court based its grant of certiorari on the fact that the case conflicted with other circuits, it seems only logical to expect that the Supreme Court would attempt to resolve the conflict.

\textsuperscript{139} \textit{Delgado}, 104 S. Ct. at 1763.

\textsuperscript{140} \textit{Id.} at 1762-63.

\textsuperscript{141} \textit{Id.} at 1763.

\textsuperscript{142} \textit{Id.} at 1764.

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.} at 1764 n.7.

\textsuperscript{145} See text at note 13 \textit{supra}.

\textsuperscript{146} \textit{Sureck}, 681 F.2d at 632.
However, implicit in the Court's opinion is that if any of the four respondents had been prevented from leaving, a seizure under the fourth amendment would have occurred. Although the Court reasoned that the employees were merely being addressed questions at the exits, it noted that if a person refuses to answer and the authorities forcibly detain him, some objective justification for this seizure is required. Thus, it appears that the Supreme Court would not endorse the holding of Babula that a refusal to answer justifies forcible detention.

The Supreme Court's opinion does not seem to diverge from the circuit court of appeals conclusion that the agents could detain a person only upon articulable objective facts of individual suspicion. The Supreme Court noted that under its analysis, if the entire factory had not been seized, then the issue of the reasonableness of the detention would be presented only if one of the four respondents had been seized. Thus, the Supreme Court proceeded to analyze whether the individual employees had been seized. This analysis ended in the conclusion that the "encounters [between the INS agents and the employees] were classical consensual encounters rather than fourth amendment seizures."

Again, the Court reasoned that the employees were merely asked questions, and they voluntarily responded. It also concluded "[w]hile persons who attempted to flee or evade the agents may eventually have been detained for questioning, respondents did not do so and were not in fact detained." Thus, the Court concluded that a reasonable person would not have believed that his freedom to move about was restricted.

The standard applied in Babula does not find any support in the majority opinion in Delgado. Throughout the majority opinion, the Court seems to have applied the dual standard rather than the standard adopted in Lee and Babula. The Supreme Court opened its analysis, characteristically, by quoting Terry v. Ohio, stating that not all personal intercourse between a police officer and a citizen constitutes a seizure under the fourth amendment. It prefaced its analysis with the typical statement describing the

147. Delgado, 104 S. Ct. at 1763.
148. Id. at 1764.
149. Id.
150. Id. at 1765.
151. Id. at 1764-65.
152. Id. at 1765.
153. Id.
154. See notes 72-74 and accompanying text supra.
155. Delgado, 104 S. Ct. at 1762.
point at which "mere" questioning becomes a detention: that as long as a reasonable person would feel free to leave, no seizure has occurred. Yet, the Supreme Court noted that if a person refuses to answer, further steps taken by the INS agents to obtain the answers must be justified by some minimal level of objective justification.

Thus, the majority in Delgado did nothing more than recharacterize the facts, holding that the work force was not seized and that the encounters between the INS agents and the four respondents were classically consensual. Although the Court did not authoritatively resolve the conflicts between Sureck and Babula, an analysis of the opinion suggests that the Court would adopt the reasoning and holding in Sureck if the Court had found either that the factory had been seized or that the individual respondents had been seized. The statements of the legal principles prefacing the Supreme Court’s analysis appear to uphold the dual standard rather than the Lee standard and seem to reject the conclusion in Babula allowing forcible detention on less than objective factors of individualized suspicion of illegality as well as the conclusion in Babula that refusal to cooperate in answering questions justifies forcible detention.

Public Interest In The Balancing Test

By concluding that the majority in Delgado implicitly rejected application of the Lee standard as applied in Babula and implicitly adopted the dual standard, the question remains whether individualized suspicion is necessary to justify a seizure under the fourth amendment. The dual standard as enunciated in Sureck requires reasonable suspicion that the individual detained is illegally in the United States. As previously discussed, however, the fourth amendment does not always impose a requirement of individualized suspicion. Under the Terry doctrine and its progeny, a seizure may be held reasonable under the fourth amendment even though the seizure was not based on individualized suspicion. Thus, the requirement of individualized suspicion, while it is usually required, may not be required where public concerns and the degree to which a seizure advances the public concerns outweigh the seizure’s intrusion upon individual liberty.

156. Id.
157. Id. at 1763.
158. See text at note 104 supra.
159. See text at notes 52-55 supra.
160. See text at notes 52-55 supra.
161. See text at note 53 supra.
The concurring opinion of Justice Powell in Delgado illustrates the weight of the illegal alien problem in the United States. Although Justice Powell was not entirely convinced that the factory surveys were not seizures under the fourth amendment, he was convinced that even assuming the surveys were seizures under the fourth amendment, they were reasonable. Justice Powell analyzed the Delgado case in light of Martinez-Fuerte and concluded that no individualized suspicion was necessary to make the assumed seizure reasonable under the fourth amendment. The Court in Martinez-Fuerte held that no individualized suspicion was necessary to stop vehicles at a permanent checkpoint sixty-six miles into California from the Mexican border. In making this conclusion, the Court balanced the necessity of this enforcement method, along with the public interest, against the extent of the intrusion upon individual security.

Justice Powell, upon balancing the public interest against the fourth amendment interests of the individual respondents, concluded that the public interest "in this enforcement technique is enormous," while the intrusion of the fourth amendment interest of the individuals is slight. He noted that between three and six million illegal aliens are present in the United States at any one time for "perhaps the main reason" of seeking employment.

162. Delgado, 104 S. Ct. at 1766; see also note 35 and accompanying text supra.
163. Id. at 1765. Justice Powell, in his concurrence, termed the question a "close one," stating: "The question turns on a difficult characterization of fact and law: whether a reasonable person in respondents' position would have believed he was free to refuse to answer the questions put to him by INS officers and leave the factory." Id.
164. Id.
165. Martinez-Fuerte, 428 U.S. at 545, 561.
166. Id. at 561.

A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well disguised smuggling operations, even though smugglers are known to use these highways regularly.

Id. at 557. As to the intrusiveness, the Court found that "the potential interference with legitimate traffic is minimal"; motorists are not surprised by the stop since they become aware of it at least two miles before the checkpoint, if they are not aware of it even before they travel the road, the officers have less discretionary power in that the location is fixed by higher authority and all vehicles, not a selection of them, are required to pass through the checkpoint. Id. at 559. In sum, unlike Brignoni-Ponce, where the Court required suspicion of illegal alienage to stop a vehicle, the checkpoints leave "less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." Id.

168. Id. at 1766 (emphasis in original).
Furthermore, he suggested that "[f]actory surveys strike directly at [the] cause . . ." by diminishing the incentive for dangerous passage across the border.169

Even though the exact number of illegal aliens in the United States is uncertain, the fact that the numbers are large really is beyond debate.170 In United States v. Ortiz171 Chief Justice Burger, in a detailed appendix to his concurring opinion, outlined many of the problems created by illegal aliens.172 Problems striking closest to home for the United States citizen are those such as: "[I]n 1971, when 595,000 Californians were unemployed . . . there were between 200,000 and 300,000 illegal aliens employed in California . . .",173 illegal aliens compete with legal residents of low to no income producing families for jobs — the citizens "who form that very group which our society is trying to provide with a fair share of America's prosperity."174 In referring to INS border patrol operations, Chief Justice Burger concluded that the INS operations at the border tended to provide a very real deterrent to border crossings by illegal aliens.175

INS border operations have a deterrent effect on border crossings by making the cost of covert transportation more expensive, as a result of heavy penalization of persons engaged in the business of smuggling aliens across the border.176 But to extend this reasoning to the conclusion that INS factory surveys likewise have

169. Id.
170. The Congressional Budget Office, when estimating the cost of Senate Bill 529, text at notes 225-248 infra, used the figure of 4.5 million illegal aliens, stating:

    It has been generally accepted that there were 3 to 6 million unauthorized aliens in the United States in the late 1970's. Some have suggested that there has been a net inflow of such aliens into the United States in the last few years, raising the number above 3 to 6 million. However, recent studies by the Census Bureau of the number of illegal aliens counted in the 1980 Census indicate that the 3 to 6 million range may be too high. Hence, the CBO estimate uses the midpoint of the original 3 to 6 million: 4.5 million illegal aliens.

171. 422 U.S. 891 (1975).
172. Id. at 900-14.
173. Id. at 903.
174. Id.
175. Id. at 914.
176. Id. at 913-14.

The cost of the transportation provided to the aliens is approximately $225 to $250 for each alien for the trip through the checkpoint on to the Los Angeles area. Since smuggling operations are almost exclusively 'cash and carry' businesses and the average income among Mexican nationals who may wish to seek residence here illegally is quite small, this cost tends to act as a very significant deterrent in and of itself. The checkpoints are the
a deterrent effect is ignoring the fact that the source of much of the problem (the employers) is not affected by the factory surveys, as is the source of the problem at the border (the smugglers). The Immigration and Nationality Act specifically excludes employers who hire undocumented aliens from punishment for harboring aliens.\textsuperscript{177} There exist no laws making it a crime for employers to knowingly hire undocumented aliens.\textsuperscript{178} As noted by Justice Brennan, this is a "powerful [incentive] for aliens to cross our borders illegally in search of employment."\textsuperscript{179} Indeed, the facts of \textit{Delgado} illustrate the non-deterrent effect of factory surveys on employment practices. In \textit{Delgado}, the first factory survey conducted on the Davis Pleating factory resulted in the arrest of 78 out of 300 employees.\textsuperscript{180} The second survey on the same factory only nine months later resulted in the arrest of 39 employees out of 200.\textsuperscript{181} Thus, the employer's percentage of illegal aliens decreased by only 6.5%. These figures are not very convincing that the employer was deterred in any way from hiring undocumented aliens.

Furthermore, the element of possible discovery once the alien crosses the border and secures employment would not seem to have a deterrent effect on an alien's decision to cross the border. The deterrence of the border patrol operations results from the impact on the transporter, passed on to the alien through the economics of business — the escalating cost of the risk factor.\textsuperscript{182} Factory raids do not have a similar effect on either employers or aliens. The specter of being caught and deported once an alien successfully crosses the border and secures employment would appear to have no similar deterrent effect.\textsuperscript{183} Thus, while the public interest in controlling the illegal alien problem may be great, it would be one more encouragement to illegal immigration.

\textit{Id.}

\textsuperscript{177} 8 U.S.C. § 1324(a)(3) (1982) provides in part:

\textit{Any person . . . who willfully or knowingly conceals, harbors or shields from detection, or attempts to conceal, harbor or shield from detection, . . . any [illegal] alien . . . shall be punished . . .: Provided however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.}

(emphasis in original).


\textsuperscript{179} \textit{Delgado}, 104 S. Ct. at 1775 (Brennan, J., dissenting).

\textsuperscript{180} \textit{Sureck}, 681 F.2d at 627.

\textsuperscript{181} \textit{Id.}

\textsuperscript{182} See note 176 and accompanying text supra.

\textsuperscript{183} Salinas \& Torres, \textit{The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis}, 13 \textit{Hous. L. Rev.} 863, 885 (1976) "The undocumented entry statute provides little, if any, deterrence. The Mexican national does not expect to be jailed for going to the United States. On the contrary, he expects to be returned to
there is little logic to the conclusion that factory surveys contribute to any deterrent effect on the continuous flow across the borders.

Concluding that the intrusions upon those lawful residents who are subjected to the factory surveys is minimal as compared to the public need for this enforcement technique is, therefore, clearly fantastic. Under the Terry doctrine, a detention does not infringe on fourth amendment rights if supported by reasonable suspicion not amounting to probable cause if, on balance, the intrusion upon the individual's liberty is minimal and the law enforcement interests are substantial.\(^{184}\) In this balance, before a court can uphold a detention as reasonable under the fourth amendment, "the government must demonstrate an important purpose beyond the normal goals of criminal investigation, or must demonstrate an extraordinary obstacle to such investigation."\(^{185}\) Furthermore, the requirement of individualized suspicion is not dispensed with unless the governmental need for the enforcement method sufficiently outweighs the intrusion upon individual security.\(^{186}\)

In summary, even though the majority in Delgado did not reach the question whether individualized suspicion is required under section 287(a)(1), Justice Powell argued that the public interest in the factory survey method as a deterrent to illegal immigration outweighs the intrusiveness of the raids. Thus, Justice Powell concluded, no individualized suspicion should be required. Although his analysis is theoretically consistent with the Terry doctrine and its developments, upon close scrutiny, his analysis does not support the conclusion that the factory survey method of enforcement deters illegal immigration or employer hiring of undocumented aliens.\(^{187}\)

**Reason To Believe**

Another question is raised by concluding that the majority in Delgado implicitly adopted the dual standard. The court in Sureck posited the first prong of the dual standard as follows: "An INS . . . agent may question a person as to his right to be or remain in the border, and sees this as merely forcing him to begin the journey all over again; most return repeatedly." \(^{184}\) *Id.*


\(^{185}\) *Id.* at 708. \(^{185}\) See also Florida v. Royer, 103 S. Ct. at 1325 (Stewart, J., dissenting).

\(^{186}\) Martinez-Fuerte, 428 U.S. at 560-61. \(^{186}\) See also note 52 and accompanying text supra.

\(^{187}\) See text at note 169 supra.
the United States without forcible detention as long as the agent has a reasonable belief that the person questioned is an alien. . . ."188 Questioning without forcible detention describes a "casual encounter" or non-detentive interrogation.189 Furthermore, section 287(a)(1) specifically provides that an agent may interrogate a person if the person is "believed to be an alien."190 Thus, the question is raised, under the first prong of the dual standard, where the agent's conduct amounts to neither a seizure nor an arrest under the fourth amendment, does the agent need "reason to believe" that the person questioned is an alien before the agent may question the person pursuant to section 287(a)(1) in a non-detentive manner?

Admittedly, the Supreme Court was not called upon to determine whether the INS agents had reason to believe the respondents were aliens because the circuit court of appeals did not address this question.191 However, the circuit court of appeals did make a curious statement in referring to Tejeda-Mata v. Immigration and Naturalization Service,192 a prior decision of the same court in which the court addressed whether an INS agent had sufficient reason to believe a person was an alien. In Sureck, the court noted:

The court's discussion as to the statutory standard [requiring reason to believe a person is an alien] in Tejeda-Mata could be regarded simply as dicta or it could be seen as this court's acknowledgment that immigration officials, in the absence of a constitutional violation, must meet the statutory standard requiring a reasonable belief in the questioned person's alienage. Since the facts in this case do not require a decision regarding the statutory standard, we decline to clarify the discussion of section 1357(a)(1) in Tejeda-Mata.193

However, in Sureck, the court noted that during a routine factory survey, INS agents are instructed to question every worker present in the factory.194 Clearly, if INS agents fulfill these instructions, they are not founding their decision to interrogate a person on any objective belief that the person questioned is an alien. Yet, quoting from an INS Handbook, the court in Sureck noted that INS

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188. Sureck, 681 F.2d at 636.
189. See note 71 and accompanying text supra.
190. See note 2 supra.
191. Sureck, 681 F.2d at 683 n.18 (holding that the facts did not require a decision on this issue).
192. 626 F.2d 721 (9th Cir. 1980).
193. Sureck, 681 F.2d at 638 n.18.
194. Id. at 627.
agents are instructed that to question a person under section 287(a)(1), the agents must have a reasonable belief of alienage, whereas to detain the person to obtain the answers, the agents need reasonable belief as to illegal alienage. It is clear, therefore, that even though section 287(a)(1) requires belief of alienage and even though the INS written policy requires belief of alienage, in actual practice the agents are admittedly quite indiscriminate in their decision of whom to question.

Yet, under the rationale of the Terry doctrine — pursuant to which the majority in Delgado obtusely characterized the circumstances of that case as "the classical consensual encounter" — INS agents really need not form a belief of alienage before proceeding to question a person as to his citizenship status. If a police officer can address questions to anyone on the street without offending constitutional rights, as long as the person so questioned may ignore the officer and walk away, then why must an INS agent formulate reason to believe a person is an alien before addressing questions to such person?

Thus, the Sureck analysis raises an important question, that is, whether the authority of INS agents is circumscribed by a statutory standard requiring a reasonable belief of alienage even though the agent's conduct does not amount to a seizure under the fourth amendment. One lower federal court appears to consider the standard under section 287(a)(1) as synonymous to that under the Terry doctrine: "This allowance for mere questioning, which assumes the individual's cooperation, is analogous to decisions which have contemplated the same scope of authority for police officers, as well as for other administrative officials."

Although this question was not raised in Delgado, it would appear from the Supreme Court's majority opinion that the agents

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195. *Id.* at 634 n.12. The quoted provision stated:

To stop and question a person encountered in establishments such as restaurants, factories, or hospitals, or beyond 25 miles from any external boundary of the United States, regarding his right to enter or remain in the United States, an officer must have a reasonable suspicion based on specific articulable facts and rational inferences drawn from those facts that the person is an alien. However, to detain such a person, the officer must have a reasonable suspicion that he is an alien illegally in the United States. (emphasis in original.)

196. *Delgado*, 104 S. Ct. at 1771-72 (Brennan, J., dissenting) ("To say that such an indiscriminate policy of mass interrogation is constitutional makes a mockery of the words of the Fourth Amendment.").

197. *Id.* at 1765.


200. *Id.* at 222.
need not formulate such a belief of alienage. This conclusion is based upon the Court's substantial reliance on *Terry v. Ohio*\(^{201}\) and *Florida v. Royer*.\(^{202}\) In *Royer*, the Court stated: "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [and] by putting questions to him if the person is willing to listen. . . ."\(^{203}\)

In relying on *Terry* and *Royer*, the Supreme Court concluded that the agents' actions of securing the exits were only to ensure that all employees were questioned. The Court did not proceed to determine whether the agents had reasonable belief that the respondents were aliens. Thus, one can easily conclude that the Court considered non-detentive questioning of all employees permissible without reason to believe any particular employee was an alien.

However, the relevance of the necessity of reasonable belief of at least alienage is apparent to those courts which have considered the question. In *Marquez v. Kiley*\(^{204}\) the court stated:

> [W]hatever theoretical appeal there may be to a rule which permits casual, voluntary questions upon suspicion of alienage alone, but requires suspicion of illegality for detention, is in our view substantially undermined by the realities of the matter. It is in the nature of an oxymoron to speak of "casual" inquiry between a government official, armed with a badge and a gun,. . . and a person suspected of alienage.\(^{205}\)

The realities of the matter as alluded to in *Marquez v. Kiley*, are that, first, there is no way to accurately distinguish among aliens and native-born or naturalized citizens who appear to be aliens;\(^{206}\) second, because of the characteristically intrusive nature of the factory surveys, "it is simply fantastic to conclude that a reasonable person could ignore all that was occurring throughout the factory and, when the INS agents reached him, have the temerity to believe that he was at liberty to refuse to answer their questions and walk away."\(^{207}\) Thus, the fact that factory surveys are at least minimally intrusive of personal privacy\(^{208}\) and the fact that citizens

\(^{201}\) 392 U.S. 1 (1968).


\(^{203}\) *Id.* at 1324.


\(^{205}\) *Id.* at 113.

\(^{206}\) *Delgado*, 104 S. Ct. at 1772 (Brennan, J., dissenting) (citing *Brignoni-Ponce*, 422 U.S. at 886).

\(^{207}\) *Id.* at 1770.

\(^{208}\) *Au Yi Lau*, 445 F. 2 d at 222.
and aliens are often times virtually indistinguishable, a minimum requirement of belief of alienage would be appropriate even under the Terry doctrine.

Indeed, the query might be made whether Congress itself intended to limit INS operations further than the constraints of the "casual encounter" doctrine by requiring agents to reasonably identify objective factors creating a belief of alienage. Congress presumably knows that it cannot authorize an infringement upon the fourth amendment rights of citizens. If the fourth amendment requires that a detention be based upon reasonable belief that the person detained is, or is about to be, in violation of the law, then Congress cannot permit detentive questioning on the basis that a person appears to be an alien since alienage is not criminal. Thus, it might be assumed that Congress was cognizant of its limitations and did not intend to expand the power of INS agents but intended instead to circumscribe that power.

However, it is doubtful that Congress intended to limit the authority of the INS agents, given the recognized need for dealing with the increasing problem of illegal aliens. The language of the statute makes this clear. If Congress intended to limit the authority of an INS agent, then it would not have provided for interrogation "without a warrant." It is obvious that if police questioning does not amount to a seizure under the fourth amendment, there is no need for a warrant. Therefore, Congress clearly intended to expand INS authority by section 287(a)(1).

Yet, if the statute has been interpreted by the courts as synonymous with the power of any police officer to address casual inquiries to a person without offending the fourth amendment,

209. Brignoni-Ponce, 422 U.S. at 886.
210. In Terry, the Court pointed out that under its decision "courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires." 392 U.S. at 15. Although the Court in Terry was speaking of detentive questioning beyond a "casual encounter," the principle is illustrative of the citizen's right to be free from random interference with his daily life.
211. Brignoni-Ponce, 422 U.S. at 884.
212. Brown v. Texas, 443 U.S. at 51. "We have recognized that in some circumstances an officer may detain a suspect briefly for questioning although he does not have 'probable cause' to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. However, we have required the officers to achieve a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Id. See also United States v. Cortez, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.").
213. See note 2 supra.
214. Au Yi Lau, 445 F.2d at 222 ("This allowance for mere questioning, which
then the requirement in the statute for "reason to believe" a person is an alien would be meaningless. Thus, there is some logic to the statement made in *Sureck* that the statute might require reasonable belief of alienage even when there has been no constitutional seizure.

If this is so, then given the fact that the INS agents in *Delgado* executed the factory surveys under directions to question every employee, leaving little doubt that no objective factors creating reasonable belief of alienage were considered beforehand, the relief sought by the respondents would seem to have been appropriate. The same relief was sought in *Illinois Migrant Council v. Pilliod*. The trial court found that INS agents had routinely questioned persons of apparent Mexican ancestry or with Spanish surnames, with no other objective factors creating reasonable belief of alienage. Based on the findings of the trial court, the appellate court granted an injunction, prohibiting questioning by INS agents of any person of Mexican ancestry or of a Spanish surname unless the agent reasonably believes the person to be an alien.

However, the judiciary's apparent reluctance to circumscribe INS agents' authority to seek out illegal aliens is illustrated by the lack of clear authority on whether section 287(a)(1) establishes a statutory standard more restrictive than the *Terry* doctrine of casual inquiry. Although the language of section 287(a)(1) seems lucid enough, the courts have generally not addressed it. This is clearly demonstrated in *Sureck* where the facts, as outlined by the circuit court of appeals and in Justice Brennan's dissent in *Delgado*, suggest that the INS agents questioned the respondents on the basis of their appearance of nationality or their mere pres-

assumes the individual's cooperation, is analogous to decisions which have contemplated the same scope of authority for police officers, as well as for other administrative officials.

215. *Sureck*, 681 F.2d at 627. (the court indicated that during one of the factory surveys, the INS agents did in fact question each employee present in the factory). 216. In the two surveys during which the agents did not question every person employed in the factory, the agents selected those persons questioned based on a "combination of objective and subjective factors." *Id.* Yet, the objective factors listed by the INS agents were: "the person's clothing, facial appearance, hair coloring and styling, demeanor (i.e., anxiety or fright), language and accent..." *Id.* at 627 n.6. Each of these factors, except demeanor, relate to ethnicity. Appearance of a certain ethnicity, standing alone, does not support a reasonable belief that a person is an alien. *Brignoni-Ponce*, 422 U.S. at 886-87.

218. *Id.* at 890-91.
220. *Sureck*, 681 F.2d at 627 n.6.
ence in the factory, rather than any other factors. Indeed, INS agents admitted that they tried to question all employees. Yet, neither court addressed the question of whether the agents had sufficient belief of alienage.

The reason for this is clear. If the Supreme Court is willing to characterize what were clearly intimidating circumstances as only "casual encounters" in order to remove the agents' actions from operation of the second prong of the dual standard which requires objective suspicion of illegality, it is not very likely to thwart those efforts by even hinting at a requirement of articulable facts justifying reason to believe the person questioned is of alien origin. The courts have been very attentive to the obvious problem of illegal aliens, themselves admitting that they "strain to accommodate the requirements of the Fourth Amendment to the needs of [the] system. . . ."224

Employer Sanctions

It has been suggested that the Court should not strain to accommodate the needs of the system when the system irrationally allows employers to hire illegal aliens. Indeed, Justice Brennan, in his dissent in Delgado, argued that the method of factory surveys is "more the product of expediency than [the product] of prudent law enforcement policy."226 When referring to the positions of the majority and Justice Powell's concurring opinion, Justice Brennan stated:

What this position amounts to, I submit, is an admission that since we have allowed border enforcement to collapse and since we are unwilling to require American employers to share any of the blame, we must, as a matter of expedi-

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222. Since the courts have not considered whether the statute imposes a standard requiring reasonable belief of a questioned person's alienage even where an interrogation is non-detentive, there are presently no guidelines as to whether the fact that an individual works in a factory which is suspected of employing aliens is sufficient to support a reasonable belief that a person is an alien. Furthermore, we are not dealing here with a standard imposed by the fourth amendment. Thus, the necessary factors justifying belief of alienage under the constructs of the statute may not be accurately analogized to the standard of individualized suspicion imposed under the fourth amendment. However, there is an inconsistency in stating on the one hand, as did the Court in Brignoni-Ponce, that appearance of a certain nationality does not justify belief that the person is an alien, and stating on the other hand, that working in a factory suspected of employing illegal aliens justifies belief that any person working therein is an alien. See text at note 37 supra.

223. Sureck, 681 F.2d at 627.

224. United States v. Ortiz, 422 U.S. at 915 (White, J., concurring in both Ortiz and Brignoni-Ponce).

225. Id.

226. Delgado, 104 S. Ct. at 1775 (Brennan, J., dissenting).
ency, visit all of the burdens of this jury-rigged enforce-
ment scheme on the privacy interests of completely lawful
citizens and resident aliens who are subjected to these fac-
tory raids solely because they happen to work alongside
some undocumented aliens.227

Yet, congressional attempts to enact legislation intended to
deter employers from hiring undocumented aliens have met with
little success.228 Presently, there are pending in Congress two bills
which, if enacted into law, would make it illegal for employers to
knowingly hire undocumented aliens—one introduced in the Sen-
ate,229 and one introduced in the House of Representatives.230
Both bills were introduced on February 17, 1983.231 House Bill
1510, introduced by Representative Mazzoli from Kentucky, is a re-
sult, according to Mr. Mazzoli, of “a decade of research, analysis,
and hearing[s]” by Congress.232 Presumably, both bills are a re-
sult of various proposed legislation introduced in Congress over
the last ten years attempting to establish sanctions on employers,
beginning with H.R. 16188 introduced by Representative Peter
Rodino in the 92d Congress.233

Both bills have passed the house in which they were first in-
troduced. The House of Representatives passed H.R. 1510 on June
20, 1984.234 The Senate passed S. 529 on May 18, 1983.235 In its final
form, as passed by the Senate, section 274(a)(1)(A) of the pro-
posed law would make it illegal for any person “to hire, or for con-
sideration to recruit or refer, for employment in the United States
an alien knowing the alien is an unauthorized alien. . . .”236 The
strength of the bill as it would effect deterrence of employment of
undocumented aliens, is found in the sanctions imposed. A fine of
$1000 per unauthorized alien employed would be levied on employ-
ers for the first offense, $2000 per unauthorized alien for the second
offense, and up to $1000 and six months imprisonment per violation
for employers found to have engaged in a pattern or practice of

227. Id.
228. Blackie’s House of Beef, Inc., 659 F.2d at 1220 n.10. Salinas & Torres, supra
note 183, at 900-12. Comment, Illegal Immigration: Short-Range Solution of Em-
231. S. 529, 98th Cong., 2d Sess., 129 CONG. REC. S1342 (daily ed. Feb. 17, 1983);
232. Id. at S1342 (statement of Sen. Simpson).
233. Id. at S1343 (statement of Sen. Simpson).
236. Id. H.R. 1510 as passed by the House of Representatives is identical in this
respect to S. 529. 130 CONG. REC. H6150 (daily ed. June 20, 1984).
violating the law.\textsuperscript{237}

Interestingly, preparatory research behind these efforts suggests that employer sanctions for hiring illegal aliens imposed in other countries have not been entirely successful in deterring employment of illegal aliens.\textsuperscript{238} Cited as the two major reasons for the failure in other countries are the nominal penalties imposed and the constraints on enforcement such as manpower and strict legal constraints on investigations.\textsuperscript{239} This information may be the impetus behind the hefty penalties proposed in the bills.

Also of note is a message to Congress from the American Civil Liberties Union (ACLU) expressing disapproval of S. 529.\textsuperscript{240} The ACLU has suggested that "federal sanctions on employers who violate the requirements of such a system could result in a tendency to obviate that risk by discriminating against individuals who speak with an accent or who ‘look foreign.’"\textsuperscript{241} Thus, the ACLU suggests that employer sanctions would increase employment discrimination based on ethnicity\textsuperscript{242} which cannot be ameliorated under the "inadequate" protection of Title VII.\textsuperscript{243}

The major criticism of prior congressional attempts to curb employment of illegal aliens has been the discriminatory effect such a law could have on American citizens and legal resident aliens because of their appearance as aliens.\textsuperscript{244} As suggested by one commentator, the more recent bills provide for an identification program to curb the potential for employer discrimination.\textsuperscript{245} The bills pending before Congress now have similar identification schemes.\textsuperscript{246} Yet, the procedures are time consuming, and there would still remain the criticism that if an employer is faced with the choice of hiring a white or black person over one who looks like an alien, the employer would likely hire one of the former. An

\textsuperscript{237} 129 CONG. REC. S6971 (daily ed. May 18, 1983).
\textsuperscript{238}  Id. at S6948 (letter to Hon. Alan K. Simpson, Chairman, Subcommittee on Immigration and Refugee Policy, Committee on the Judiciary, U.S. Senate, from U.S. General Accounting Office, William J. Anderson, Director, referring to Canada, Federal Republic of Germany, France and Switzerland).
\textsuperscript{239}  Id.
\textsuperscript{240}  Id. at S6946 (memorandum to Interested Persons from ACLU, Apr. 28, 1983, Re: Employer Sanctions in the “Immigration Reform and Control Act” (S. 529) and the Inadequacy of Title VII Protections Against Employment Discriminations).
\textsuperscript{241}  Id.
\textsuperscript{242}  Id.
\textsuperscript{243}  Id. at S6947.
\textsuperscript{244}  Salinas & Torres, supra note 183, at 910; Comment, supra note 228, at 686.
\textsuperscript{245}  Comment, supra note 228, at 686.
\textsuperscript{246}  130 CONG. REC. H6167 (daily ed. June 20, 1984). Section 274(a)(7)(b) of H.R. 1510 provides a “verification method” whereby employers must submit the social security number of applicants to be validated, and must record the validation in the applicant’s file.
anti-discrimination provision to the Senate bill has been proposed which would create a new United States Immigration Board to hear discrimination charges filed by a special counsel in the Justice Department.\textsuperscript{247} Failure of Senate and House conferees to agree on this anti-discrimination provision indicates passage of the bill is unlikely.\textsuperscript{248}

These two possible barriers to final passage of either of the bills is indicative of the major problems facing the fight against the incessant problem of illegal aliens.

CONCLUSION

\textit{Immigration and Naturalization Service v. Delgado} does little to resolve the many conflicts in the present authorities. One reading the majority opinion might breathe a sigh of anticipatory relief at the Court’s opening statement that it granted review on the basis of the conflict between the circuit courts, only to finish in a state of compounded confusion.

The first area of confusion is that between \textit{Babula} and \textit{Sureck}. In \textit{Babula} the court applied the \textit{Lee} standard which assumes a seizure under the fourth amendment and then asks whether the intrusiveness of the seizure is justified by the reason for its initiation.\textsuperscript{249} Whereas in \textit{Sureck} the standard applied was the dual standard, allowing non-detentive questioning upon belief of alienage alone, but requiring suspicion of illegality if the agents detain the person to obtain the answers to their questions.\textsuperscript{250} While the \textit{Lee} standard attempts to eliminate the fine line drawing between detentive and non-detentive questioning, its application in \textit{Babula} removes any initial requirement under the fourth amendment for objective and individualized suspicion of either illegality or of mere alienage for what was clearly a detentive interrogation.\textsuperscript{251}

In apparently attempting to reconcile the \textit{Lee} standard with the dual standard applied in \textit{Sureck}, the Supreme Court in \textit{Delgado} leaves the reader without an understanding of a clear position. The majority stated that unless the circumstances are so intimidating as to lead a reasonable person to believe that he is not free to ignore the questions asked, nothing other than a voluntary encounter has occurred.\textsuperscript{252} However, by proceeding under these

\begin{itemize}
  \item \textsuperscript{247} The Wall Street Journal, Sept. 27, 1984, at 39, col. 1.
  \item \textsuperscript{248} \textit{Id.}
  \item \textsuperscript{249} \textit{See} text at note 76 \textit{supra}.
  \item \textsuperscript{250} \textit{See} text at note 70 \textit{supra}.
  \item \textsuperscript{251} \textit{See} text at notes 109-112 \textit{supra}.
  \item \textsuperscript{252} 104 S. Ct. at 1763.
\end{itemize}
principles to the conclusion that the encounter between the respondents and the INS agents was classically consensual, the Supreme Court seems to have ignored its prefacing statements of principle. The manner in which the factory surveys were conducted could not have been more intimidating without physically accosting the respondents or without telling them that they were required to respond.  

The second area of confusion is whether the INS agents actually need to formulate reason to believe a person is an alien before proceeding to question him as to his citizenship status. Although the language of the statute clearly provides such, the language of the courts is anything but lucid. Though the Supreme Court was not called upon in Delgado to address this question, the factual findings of the circuit court of appeals would not have foreclosed the Supreme Court from considering this issue. On the authority of Illinois Migrant Council v. Pilliod, both the circuit court of appeals and the Supreme Court could have granted the injunctive relief sought by the respondents in Delgado. Yet, the circuit court of appeals made the ambiguous statement that maybe it considers the requirement of "reason to believe alienage" as a statutory standard in addition to the standards of the fourth amendment.

In Brignoni-Ponce, Justice White suggested:

Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country.  

The answer to why the Supreme Court would sanction an INS raid such as that conducted in Delgado may well be found in Justice Brennan's dissent, where he suggests that the majority's decision is an admission that out of expediency, the shortcomings of the system must fall on those citizens whose fourth amendment inter-

253. Id. at 1770 (Brennan, J., dissenting). Illustration of the intrusive manner of the INS survey is found in Justice Brennan's description of the encounter between INS agents and one of the respondents:

[Respondent Delgado, a naturalized American citizen, explained that he was standing near his work station when two INS agents approached him, identified themselves as immigration officers, showed him their badges, and asked him to state where he was born. Delgado, of course, had seen all that was going on around him up to that point and naturally he responded. As a final reminder of who controlled the situation, one INS agent remarked as they were leaving Delgado that they would be coming back to check him out again because he spoke English too well.  

Id. (citation to record on appeal omitted).

254. 548 F.2d 715 (7th Cir. 1977).

255. 422 U.S. at 915 (White, J., concurring).
ests are infringed during these factory raids. The public interest in extricating illegal aliens from the United States is clearly potent. While employers who encourage the flow of illegal aliens across the border have not yet been forced to cease, Congress has not been altogether inattentive in its efforts. However, congressional proposals of the heavy sanctions, which are apparently necessary to actually deter employment of undocumented aliens, have met with considerable opposition.

The majority opinion of the Supreme Court in *Delgado* appears clearly to be wrong in that the facts do not constitute "classical consensual encounters" between the INS agents and the respondents. Yet, in light of the obstacles presented to the one alternative, employer sanctions, the judiciary may be the only immediately available means of guaranteeing that the INS is not quagmired in its efforts to extricate illegal aliens from the work force. Until a scheme can be devised to effectively deter employment of illegal aliens, the judiciary cannot ignore the fact that greater restraints on the INS may do more immediate harm to lawful citizens than the respondents actually realize. More undocumented aliens hired would mean fewer jobs and lower wages for United States citizens and legal residents. Although United States citizens should be covetous of their fourth amendment rights, it may not hurt to realize that democracy is not absolute, and sometimes actual benefits from such a system may require a voluntary trade-off of some of the theoretical benefits.

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