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Stephen L. Wasby

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ARTICLE

COURT OF APPEALS DYNAMICS IN
THE AFTERMATH OF A SUPREME
COURT RULING

STEPHEN L. WASBY*

INTRODUCTION

Examinations of the relationship between the U.S. Supreme Court and the U.S. courts of appeals usually look “down” at the impact of

* B.A., Antioch College; M.A., Ph.D. (political science), University of Oregon. Professor Emeritus of Political Science, University at Albany—SUNY. Residing in Eastham, Mass. Contact: wasb@albany.edu.

The author wishes to express his appreciation to Ninth Circuit Senior Judge Alfred T. Goodwin for access to his papers and the case files on which this Article is based, as well as his comments on an earlier draft of this Article, and to Virginia Hettinger, University of Connecticut, for raising useful questions. An earlier version of this Article was presented to the American Political Science Association, Washington, D.C., Sept. 5, 2010.

The author’s interest in the border-search cases goes back at least to the late 1970s, when one of his students at Southern Illinois University—Carbondale, Michael Wepsiec (now States Attorney for Jackson County, Illinois), conducted an honors study of cases involving the “founded suspicion” necessary for a stop in border searches. The work is reported in Michael Wepsiec & Stephen L. Wasby, *Ninth Circuit Border Searches: Doctrines and Inconsistencies* (2000) (unpublished manuscript) (on file with author).

The reader should note that the author reviewed the Goodwin Papers while conducting research for this Article; the unpublished documents cited here are available in the Goodwin Papers, which are held at the Oregon Historical Society, Portland, Oregon. The author has made every effort to ensure the accuracy of citations to, and quotations from, those documents, but the author notes that the editors of the *Golden Gate University Law Review* have not had the opportunity to review the documents from the Goodwin Papers cited or referred to here.

Unpublished dispositions were read in slipsheet form—the only form in which they made available during the period studied—at the Ninth Circuit headquarters courthouse in San Francisco.

Unless otherwise specified, all those named as senders or recipients of memoranda are or were judges of the U.S. Court of Appeals for the Ninth Circuit. “Associates” refers to all the judges of the court.

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single Supreme Court decisions on subsequent lower court rulings; not even the related cases the Justices dispatch with grant-vacate-remand (GVR) orders are taken into account. The implicit assumption seems to be that the relationship is both direct and simple, with later lower-court rulings embodying the substance of the Supreme Court's opinion. Matters are, however, far from being quite so simple. A Supreme Court ruling, particularly if not unanimous, may require interpretation. In addition, more than one Supreme Court case may be simultaneously in play, cases may also be moving between the two courts, and cases likely will be at various stages in the appellate process at the time of the Supreme Court's primary ruling. This sets up a dynamic situation.

Studies of the effects of the U.S. Supreme Court on lower federal courts usually focus on *outcomes* (affirm or reverse) and, to a lesser extent, on whether lower courts' *opinions* reflect or are out-of-sync with the Supreme Court. The effect of the Supreme Court is regularly understated because it misses several elements and particularly the lower courts' lower-visibility actions (or non-actions), which are no less important despite their lower visibility. Included are the often-extensive discussions within the courts of appeals as to the meaning of the Supreme Court's opinions, the pending cases that might have to be revisited, and rehearing petitions that will have to be entertained based on the new Supreme Court rulings. Also not much appreciated is courts of appeals' anticipatory deference to the Supreme Court, particularly the deferring of action when the Justices are seen as likely soon to issue a ruling affecting pending cases, either by having granted certiorari to a case containing an issue before a court of appeals panel or even only *considering* granting certiorari to such a case.

Whether Supreme Court rulings "make a difference" in the lower courts, a question not substantially explored by scholars, thus remains an open question. One reason is that we lack information about how a U.S. court of appeals actually deals with its superior's intervention into its ongoing work and how it handles the fallout from Supreme Court action. A law-changing Supreme Court ruling affects the immediate parties, but it also affects many factually similar or legally related cases. When the Supreme Court decision also potentially affects many cases then "in the pipeline," the affected lower court will have to engage in extra activity to cope, perhaps recalling mandates in recently decided cases and altering outcomes or remanding cases for further proceedings. These effects expand as the Justices return other cases to the circuit for reconsideration in light of the primary ruling or if they soon rule on related issues.

The Supreme Court ruling will also be incorporated into pending cases in the court of appeals, which must engage in discussion of what

the Supreme Court meant. The judges may withdraw submission in cases already submitted for decision and call for supplemental briefing, or they may instead remand rather than reach a merits disposition. From among cases pending, the court may select one or more to serve as vehicles for deciding multiple closely related questions. With many three-judge panels dealing with similar issues, the court may choose to sit en banc to maintain consistent results, and multiple en banc rulings decided at, or nearly at, the same time may reference each other. And, in the dynamic interaction that develops over time, cases that are both before panels and the en banc court may be affected by, and be affected by, Supreme Court rulings. Interaction between the court of appeals and the Supreme Court is thus quite dynamic. An initial Supreme Court opinion on a topic is unlikely to answer all questions. Thus the court of appeals judges can anticipate that the Justices will accept cases on follow-up questions, and those decisions will occur just as the appeals court judges are attempting to assimilate the first ruling, which perhaps may cause them to move hesitantly or even to suspend action until the Justices have ruled. Processes such as these may proceed through several iterations.

This Article provides an examination of such complex dynamic interaction in the aftermath of the key 1973 border-search case of *Almeida-Sanchez v. United States*.¹ In that aftermath, the U.S. Court of Appeals for the Ninth Circuit, where that case originated, had to cope with a mix of fast-developing Fourth Amendment law and the uncertain law of retroactivity as well as the effects in the many recently decided or pending appeals stemming from searches of varying intrusiveness at or near the border, at fixed checkpoints, whether permanent or temporary at a given location, or by roving patrols. The resulting question of retroactivity made the dynamics more complex: Was *Almeida-Sanchez* to be applied to pending cases and, if so, to those where searches pre-dated *Almeida-Sanchez*, to convictions on appeal when it was decided, or to recently-decided rulings not yet final because rehearing was possible? All this was made more difficult as several more Supreme Court rulings came down while the court of appeals was trying to sort out matters.

What we see is, first, a story interesting in its own right for what it has to say with respect to the development of the law of search and seizure, and of border searches in particular, and also for contemporary concerns about “control of the border.” However, we also see a picture that may well be more generally indicative of the inter- and intra-court

¹ *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (warrantless search by roving patrol away from border is not statutorily authorized border search and violates Fourth Amendment).

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dynamics that transpire in areas of law with high volumes of cases that are at various stages of the appellate process when the Supreme Court hands down a major ruling announcing new rules of law.

This Article proceeds in chronological fashion but only roughly so; a chronological baseline is provided to aid the reader, and analysis of aspects of Supreme Court-court of appeals interaction is presented. The Article is based not only on court opinions but also on case files in the papers of Senior U.S. Court of Appeals Judge Alfred T. Goodwin, which contain communications among the judges as they decided cases; these materials provide necessary gritty texture to the usual portrayals of courts. Judge Goodwin's papers are especially significant here because he served as the court's en banc coordinator, responsible for monitoring and facilitating the judges' communication.² While the full court participated in the process of selecting cases for en banc treatment in the *Almeida-Sanchez* "backwash,"³ the en banc coordinator, working in concert with the chief judge and his colleagues, played a particularly important role. He did so not only by serving as the communication node for the court's judges but also by helping direct cases for en banc consideration and even by selecting some of them.

In the description and analysis that follow, one will see—and should be on the lookout for—a number of elements in the relationship between the U.S. courts of appeals and the Supreme Court. It is certainly clear that the Supreme Court has a great effect on later cases in the lower appellate courts. Thus, upon the Supreme Court's handing down a relevant decision, a court of appeals will reconsider its own rulings on the basis of that decision or will remand to the district courts so that they may do so. While that might be considered obvious, there is also, as will be seen in what follows, considerable evidence that judges of the U.S. courts of appeals wait for the Supreme Court to act. Indeed, cases decided after a major Supreme Court ruling may well have been held until that ruling was issued. So, instead of plunging ahead, a court of appeals may well hold back to await further developments once cases on point have been tendered to the Justices for possible review, in what we might call *anticipatory deference*. Likewise, we see that, within the court of appeals, some panels may also defer action until "lead" cases on a subject are decided, with cases selected for en banc hearing—even

² For a more complete treatment of the work of the en banc coordinator, see Stephen L. Wasby, "A Watchdog for the Good of the Order": *The Ninth Circuit's En Banc Coordinator*, 12 J. APP. PRAC. & PROCESS 91 (2011).

³ The term was used in a memorandum from Chief Judge Richard Chambers to Associates (Jan. 28, 1975).

before panel ruling—to assist all panels in their work. And we will see as well another way in which the court of appeals defers to the Supreme Court, when it facilitates the moving of cases to the high court, perhaps by prompt en banc hearing of cases, which it may do even before panels have completed their work.

THE BEGINNING: *ALMEIDA-SANCHEZ* AND ITS GVRs

Toward the end of its 1972 Term, the United States Supreme Court handed down its ruling in *Almeida-Sanchez v. United States*.⁴ (See timeline at 46.) Justice Stewart, writing for a five-Justice majority, reversed the Ninth Circuit, revoking the carte blanche of 8 U.S.C. § 1357,⁵ and held that a warrantless search of an automobile by a roving patrol at a point at least twenty miles from the border, without probable cause or consent, was not a border search authorized by federal law.⁶ Recognizing that “national self protection reasonably requir[es] one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in,” the Justices upheld the constitutionality of border searches at the physical border or its functional equivalent.⁷ While joining the majority opinion, Justice Powell wrote separately to note that this case did not involve “the constitutional propriety of searches at permanent or temporary checkpoints removed from the border or its functional equivalent,”⁸ thus indicating matters with which the lower courts would have to deal. Not only was Justice Powell’s opinion to be debated, but the date of the Court’s decision—June 21, 1973—was to become central to much subsequent Ninth Circuit activity.

Like all other border-search cases discussed here, the case had originated in the Southern District of California. The panel majority, Judges James Carter and Ozell Trask, had affirmed a conviction for importing marijuana, in a four-paragraph per curiam opinion.⁹ They recognized that the search was not a “border search” but held that the

⁴ *Almeida-Sanchez*, 413 U.S. 266.

⁵ The statute, inter alia, allows immigration officers, without a warrant, to interrogate and arrest aliens and suspected aliens, and to search and board vessels. The relevant regulation spoke of searches within 100 miles of the border. See 8 C.F.R. § 287.1 (Westlaw 2011).

⁶ The actual stop was twenty-five miles north of the border. *Almeida-Sanchez*, 413 U.S. at 268.

⁷ *Id.* at 272 (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1924)).

⁸ *Id.* at 276 (Powell, J., concurring).

⁹ *United States v. Almeida-Sanchez*, 452 F.2d 459 (9th Cir. 1972) (per curiam), *rev’d*, 413 U.S. 266 (1973).

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federal statute and regulation allowed it and found the search reasonable in scope. In his extensive dissent, Judge James Browning recognized, “Of course, prior decisions of other panels of this court bind this panel.” However, he felt that those rulings were “so clearly at odds with the requirements of the Fourth Amendment that they should be overruled.”¹⁰ It was Judge Browning’s position that Justice Stewart basically adopted.

In dealing with border searches before *Almeida-Sanchez*, the Ninth Circuit had adopted some standards. One was “continuous surveillance,” in which a search of a vehicle away from the border would be upheld if the vehicle had been under continuous surveillance since it crossed the border. Also adopted was the related test that a search would be valid if the totality of circumstances persuaded the factfinder with a “reasonable certainty” that the contraband seized had been on board the vehicle from its crossing of the border.¹¹ However, the court had moved toward approving checkpoint searches as if they were border searches, with Judge Browning saying, “We simply upheld all alien searches within 100 miles of the border The fact that some of the searches may have occurred at a checkpoint was irrelevant.”¹² As the Supreme Court, while issuing some denials of certiorari, had not intervened in the Ninth Circuit’s border-search work, one could be “safe in saying that Almeida is the first time the Court has spoken since the 9th Circuit took it upon itself to develop new law re border searches.”¹³

As soon as the Supreme Court decided *Almeida-Sanchez*, two issues were raised, and they were to pervade the subsequent cases. One was whether fixed checkpoints were within *Almeida-Sanchez*’s ambit. It was raised by one of the court’s more senior members, Judge Fred Hamley, who quoted from the Supreme Court’s opinion and asserted that “the Court included checkpoint searches as well as searches by roving patrols.”¹⁴ However, in a theme that recurred in Ninth Circuit discussion over the next few years, he did note “observations” about the lead opinion in Justice White’s dissent and Justice Powell’s concurring opinion “to the effect that Almeida-Sanchez does not involve permanent

¹⁰ *Id.* at 461 (Browning, J., dissenting).

¹¹ *United States v. Alexander*, 362 F.2d 379, 382 (9th Cir. 1966); *see* Memorandum from Barbara Reeves (law clerk to Judge Goodwin) (n.d.).

¹² Memorandum from James R. Browning to Associates (Sept. 1, 1973). This would tend to indicate that ideologically the court was relatively homogeneous on this matter. However, some aspects of search law, such as what constituted “founded suspicion” for a search, did produce disagreement within the court, particularly between its two most liberal members, Walter Ely and Shirley Hufstедler, and their more conservative colleagues.

¹³ Memorandum from Barbara Reeves to Judge Goodwin (n.d.).

¹⁴ Memorandum from Fred Hamley to Judges Eugene Wright, Charles Powell (E.D. Wash.), and Associates, (Aug. 1, 1973) (re *United States v. Schlect*, No. 72-2445).

or temporary checkpoints.”¹⁵ The other issue was retroactivity. Within a few weeks of the Supreme Court’s ruling, a judge wrote to the en banc coordinator, Judge Goodwin, “I am not sure if it was ever decided what case we are waiting for on the decision of retroactivity,” and noted that “I have couple of cases waiting.”¹⁶

The Supreme Court also returned two cases to the Ninth Circuit for reconsideration in light of *Almeida-Sanchez*. In *Foerster v. United States*, after certiorari had been granted in *Almeida-Sanchez* but a year before the Supreme Court’s decision, a panel of Judges Browning, Merrill, and Wright, speaking per curiam and citing the court’s own *Almeida-Sanchez* ruling, had held that immigration officers may stop and investigate cars for concealed aliens without probable cause.¹⁷ After the GVR, Judge Browning, who had “been assigned the writing of an opinion . . . involving the question of *Almeida-Sanchez*’s applicability to searches at ‘fixed checkpoints,’” thought the proper course was to remand cases like *Foerster* (there were others as well) to the district court “to determine whether a search at the relevant checkpoint was the ‘functional equivalent’ of a border search within the meaning of Justice Stewart’s plurality opinion.”¹⁸ His law clerk drafted an opinion, but, showing the interrelationship between various cases in the court of appeals, suggested it be filed only if Judge Goodwin were to hold *Almeida-Sanchez* retroactive to appeals pending when that case was decided.¹⁹ Judge Browning, who proposed to wait for a Judge Goodwin opinion “holding that the rule of *Almeida-Sanchez* is to be applied to pending appeals,”²⁰ said he was “content to await Judge Goodwin’s views on both issues.”²¹

The other post-*Almeida-Sanchez* GVR was *Bowen v. United States*,²² the ruling for which Judge Browning would wait. At first this

¹⁵ *Id.* In a July 12, 1973, memorandum, Judge J. Clifford Wallace quoted Justice White’s dissent and Justice Powell’s concurrence in support of his position that *Almeida-Sanchez* encompassed no more than roving patrols. Judge Browning was to disagree, objecting on Sept. 1, 1973, to Judge Wallace’s calling Justice Stewart’s opinion “the plurality opinion” when, for Browning, it was “the opinion of the Court.”

¹⁶ Memorandum from J. Clifford Wallace to Alfred T. Goodwin (July 12, 1973).

¹⁷ *Foerster v. United States*, 455 F.2d 981 (9th Cir. 1972), *reh’g denied* Mar. 15, 1972, *cert. granted, vacated, remanded*, 413 U.S. 915 (1973).

¹⁸ Memorandum from James R. Browning to Alfred T. Goodwin, Charles Merrill (Aug. 31, 1973).

¹⁹ Memorandum from Jim Babcock (law clerk to Judge Browning) to Browning (Aug. 28, 1973).

²⁰ Memorandum from James R. Browning to Associates (Aug. 15, 1973).

²¹ Memorandum from James R. Browning to Associates (Sept. 1, 1973).

²² *United States v. Bowen*, 462 F.2d 347 (9th Cir. 1972) (per curiam), *cert. granted, vacated*,

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case seemed relatively insignificant, but it was to become one of the Ninth Circuit's first en banc rulings on border searches and the court's focal case in *Almeida-Sanchez*'s immediate aftermath, and it would also return to the Supreme Court. Shortly after the Ninth Circuit's ruling in *Almeida-Sanchez* but before Supreme Court arguments, a panel of Circuit Judges Charles Merrill and Alfred Goodwin and District Judge Lawrence Lydick (C.D. Cal.) had, per curiam, affirmed a conviction for smuggling marijuana and other drugs on the basis that the evidence was sufficient to uphold the convictions.²³ The panel's one sentence about the search ("The search and seizure were plainly lawful."²⁴) was in effect a holding that stops by an immigration officer at a fixed checkpoint station were valid under § 1357.²⁵

A third Supreme Court GVR in light of *Almeida-Sanchez*, *Chambers v. United States*, came at the beginning of the Supreme Court's next Term.²⁶ It had been an unpublished affirmance of a conviction also from the Southern District of California in which the challenged search had taken place in 1972.²⁷ In an indication that the complex development of border search and retroactivity law could delay final action in cases, after the Supreme Court's remand the Ninth Circuit panel of (former) Chief Judge Chambers, Judge Herbert Choy, and District Judge William Sweigert (N.D. Cal.) took until April 5, 1977, to dispose of the case by affirming the district court because *Almeida-Sanchez* "does not retroactively apply to fixed checkpoint searches which occurred prior to the date that case was decided."²⁸

EN BANCS

The Supreme Court's *Bowen* remand began a period of considerable Ninth Circuit en banc activity, with several en banc cases proceeding in parallel. Activity in *Bowen* is a thread tying together the Ninth Circuit's post-*Almeida-Sanchez* border-search cases. At one point, a judge noted that the court had taken *seven* cases en banc to deal with various elements posed by the *Almeida-Sanchez* "problem."²⁹ This is what

remanded, 413 U.S. 915 (1973).

²³ *Bowen*, 462 F.2d 347.

²⁴ *Id.* at 348.

²⁵ *Id.*

²⁶ *Chambers v. United States*, 414 U.S. 896 (1973) (granting cert., vacating, and remanding).

²⁷ *United States v. Chambers*, No. 73-1028.

²⁸ *United States v. Chambers*, 554 F.2d 1071 (1977).

²⁹ Memorandum from Ben C. Duniway to Associates (Feb. 25, 1974) (re *United States v. Bowen*, No. 72-1012).

Judge Goodwin, the Ninth Circuit's en banc coordinator, called a "dreadful glut" of such cases.³⁰ The en banc coordinator had the duty of enforcing court rules, particularly deadlines for circulation of memos about en banc rehearing, and of superintending the voting on whether to rehear a case en banc.³¹ As Chief Judge Richard Chambers had asked Judge Goodwin to take the position not long after Goodwin joined the court in 1971, during decision of the border-search cases he was "a rookie en banc coordinator."³² During this period, the Ninth Circuit en banc was the full court, not the more limited en banc panel (LEB) used starting in 1980, so all the judges were involved in all border-search cases that were proceeding simultaneously during this period of intense activity.

Shortly after the Ninth Circuit received news that the Supreme Court had GVR'd *Bowen*, Judge Goodwin noted that the case had already been discussed at a meeting of court and council³³ and indicated the need for a comprehensive opinion in the case. His position: "I cannot conceive of any basis for refusing to apply Almeida-Sanchez to cases pending on appeal at the time the Supreme Court issued its opinion."³⁴ He pointed to "[t]he manner in which the Supreme Court summarily vacated *Bowen* and remanded it for consideration in light of Almeida-Sanchez," which he said "would seem to answer the question whether Almeida-Sanchez was intended to apply to pending cases."³⁵ As he put it, "The Supreme Court evidently thinks Almeida-Sanchez applies to cases that had been decided in our court, and, a fortiori, would apply to cases still on appeal in our court."³⁶ Not only did his law clerk disagree with him on this point,³⁷ but Chief Judge Chambers also took a poke, taking a dim view of court-wide memoranda on the meaning of "The judgment is vacated and remanded for consideration in the light

³⁰ Email from Alfred T. Goodwin to author (Apr. 15, 2010) (on file with author).

³¹ See Stephen L. Wasby, "A Watchdog for the Good of the Order": *The Ninth Circuit's En Banc Coordinator*, 12 J. APP. PRAC. & PROCESS 91 (2011).

³² Email from Alfred T. Goodwin to author (Apr. 15, 2010) (on file with author).

³³ At that time, the circuit council consisted of the court's active judges sitting while wearing their administrative hats. District judges were to be added to the circuit council in 1980.

³⁴ Memorandum from Alfred T. Goodwin to Judge Wallace, Judge William Byrne (C.D. Cal.), and Associates (July 16, 1973).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Memorandum from Don Friedman (law clerk to Judge Goodwin) to Judge Goodwin (Aug. 6, 1973) ("I don't think that we can draw any inference about how the Court felt that Almeida-Sanchez was to be applied. To my mind, all that the Court was doing was remanding . . . to consider whether or not Almeida-Sanchez was to be given retroactive effect.").

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of”³⁸ Even before the Supreme Court’s GVR order was received, the panel agreed that Judge Goodwin would get the case when the mandate came down, and this case assignment became effective on August 2, 1973.

Discussion quickly took place as to whether to take cases en banc and *which* cases to hear en banc that would present an issue cleanly. Some ideological differences were reflected in approaches put forth, but the focus was on the need to set forth clear statements of the law, and this diminished the role of judges’ ideological propensities. Judge J. Clifford Wallace disagreed with Judges Fred Hamley and James Browning on the need to remand cases to determine if a checkpoint was the functional equivalent of the border. He also noted that there was intra-circuit disagreement, particularly that Judge Browning’s proposed approach in *Foerster* was at odds with the approach to be taken in several cases in which Judge Wallace was in the majority.³⁹ Judge Ben Duniway “supposed that this is the kind of situation in which we ought to go in banc, since there seems to be a pretty sharp disagreement as to the effect of *Almeida-Sanchez* on searches at fixed checkpoints and at temporary checkpoints.”⁴⁰ However, he now felt that a panel should rule “one way or the other and . . . then we should all follow the decision whether we agree with it or not.” If the Supreme Court “doesn’t like our solution it can change it,” he said.⁴¹ Ten days later, Judge Duniway agreed that if the court “can get one lead case on both the retroactivity issue and the checkpoint issue, it will save us a lot of trouble.”⁴² Still later, in the context of the retroactivity of fixed checkpoint searches, he was again to propose that all other panels hold their cases for decision until one lead case was decided, which other panels would follow.⁴³ His view was echoed by Chief Judge Chambers: “My notion has been to ask someone to go ahead as the lead panel and the rest of us to stay our hands.”⁴⁴ Earlier, Chambers had said he couldn’t “imagine . . . proposing en banc” but shortly afterward he said that, in the border-search cases before him,

³⁸ Memorandum from Richard Chambers to Alfred T. Goodwin (July 18, 1973). He said, “[A]s I see it you are free to consider retroactivity in *Bowen* and I think it should be resolved on the basis of whether *Almeida-Sanchez* more nearly fits the cases where the Supreme Court has theretofore given retroactivity or made such a ruling prospective.”

³⁹ Memorandum from J. Clifford Wallace to Associates and senior judges (Aug. 27, 1973).

⁴⁰ Memorandum from Ben C. Duniway to Associates (Aug. 31, 1973). “In banc” was Judge Duniway’s preferred spelling.

⁴¹ *Id.*

⁴² Memorandum from Ben C. Duniway to Associates (Sept. 10, 1973).

⁴³ Memorandum from Ben C. Duniway to Associates (July 21, 1975).

⁴⁴ Memorandum from Richard Chambers to Associates (July 28, 1975).

he would follow the *Bowen* panel without taking the case en banc.⁴⁵ This foreshadowed his dissent from the court's action granting en banc hearing.⁴⁶

As this discussion within the court continued, judges increasingly commented on the fact that many border-search cases were in a state of suspension because of undecided *Almeida-Sanchez* issues. At first, individual cases were noted and others in a "holding pattern"⁴⁷ were continually added to the list. When, as en banc coordinator, Judge Goodwin wrote to his colleagues about four cases relating to the "functional equivalent" (of the border), Judge Hamley added one and noted yet another in an Addendum, and Judge Joseph Sneed followed the next day with mention of two more,⁴⁸ one of which, *Brignoni-Ponce*, was to become both an en banc and a Supreme Court case.⁴⁹ Then a list created by one of Judge Browning's law clerks⁵⁰ led Judge Goodwin's chambers also to list all the twenty-four cases, suggested by various judges, with an indication of their status such as whether they had been remanded to the district court. Other members of the court continued over the next weeks to suggest cases with which they were familiar.⁵¹ Some of the cases were already known, at least to Judge Goodwin, but Judge Trask suggested the *Grijalva-Carrera* case,⁵² which later became an en banc decision,⁵³ and Judge Duniway threw several into the hopper,

⁴⁵ Memorandum from Richard Chambers to Alfred T. Goodwin (July 18, 1973); memorandum from Richard Chambers to Shirley Hufstedler, Associates (July 23, 1973). Chief Judge Chambers was generally opposed to en banc rehearing, a view not all judges shared. He felt that if a case was sufficiently important, the Supreme Court would take it and that en banc hearing would delay getting that case to the Supreme Court.

⁴⁶ *United States v. Bowen*, 485 F.2d 1388, 1388 (9th Cir. 1973) (Chambers, C.J., dissenting from grant of rehearing en banc).

⁴⁷ The term was used in a memorandum from Judge J. Clifford Wallace to Alfred T. Goodwin (Oct. 11, 1973), and in a memorandum from Judge Goodwin to all active judges, others (Dec. 14, 1973).

⁴⁸ Memorandum from Alfred T. Goodwin to Associates (Sept. 10, 1973); memorandum from Fred Hamley to Associates (Sept. 13, 1973); memorandum from Joseph Sneed to Associates (Sept. 14, 1973).

⁴⁹ *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974) (en banc), *aff'd*, 422 U.S. 873 (1975).

⁵⁰ Memorandum from David Raish (law clerk to Judge Browning) to James T. Browning (Sept. 14, 1973). In an intriguing bit of research, Raish obtained information of the location of checkpoints, by telephone, from the regional counsel of the INS.

⁵¹ See, for example, a list of six submitted by Judge Wallace. Memorandum from J. Clifford Wallace to Alfred T. Goodwin (Oct. 1, 1973).

⁵² Memorandum from Ozell Trask to Alfred T. Goodwin, Richard Chambers (Oct. 12, 1973).

⁵³ *United States v. Grijalva-Carrera*, 500 F.2d 592 (9th Cir. 1974) (en banc) (per curiam).

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along with comments as to their status, in light of the need for checkpoint cases.⁵⁴

Judge Duniway presented another list of cases in connection with the question of the retroactivity of the court's own *Bowen* ruling,⁵⁵ and Chief Judge Chambers both reported a "group of 21 cases in the slipstream of Almeida-Sanchez that panels of the court have been holding" and also said, "We must have about 40 cases in the backwash of the . . . Supreme Court decisions."⁵⁶ He again touched on the volume of affected cases in a subsequent remark that "altogether we will have 50 petitions for rehearing on retroactivity."⁵⁷ Judge Shirley Hufstедler supplied another list, this time on the question of the retroactivity of the Supreme Court's ruling in the *Ortiz* case,⁵⁸ and Judge Duniway added still more.⁵⁹ The lists shifted somewhat as some issues were resolved and new cases came into the picture, but as almost all cases were from the Southern District of California, they thus came from a small number of district judges, making basically irrelevant *which* district judge had decided a case.

Throughout this process, the judges' concern was not merely one of accounting for cases but of taking consistent actions. Thus, after the *Bowen* en banc ruling, when the government filed "a boiler-plate request for an open-ended stay of the mandate while the Solicitor General picks a case for certiorari," the en banc coordinator suggested that "[i]n the interest of uniformity," all affected panels allow stays of only thirty days "or a stay of the mandate until some day certain."⁶⁰ Judge Duniway suggested that "we have ought to have a uniform policy" in reacting to government requests for extensions of time to file,⁶¹ and the judges agreed to have Chief Judge Chambers issue an appropriate order.

When Judge Goodwin continued discussing which cases should be taken en banc, he reported "two problems in *Bowen*: retroactivity and checkpoint search," while another possible en banc case, *Gordon*, had only retroactivity.⁶² After Goodwin circulated a proposed panel opinion

⁵⁴ Memorandum from Ben C. Duniway to Associates (Oct. 16, 1973).

⁵⁵ Memorandum from Ben C. Duniway to Associates (July 21, 1975).

⁵⁶ Memorandum from Richard Chambers to Associates (Jan. 22, 1975).

⁵⁷ Memoranda from Richard Chambers to Associates (July 28, 1975) (two on same date).

⁵⁸ Memorandum from Shirley Hufstедler to Associates (Oct. 2, 1975). See *United States v. Ortiz*, 422 U.S. 891 (1975), discussed *infra*, at notes 138–42 and accompanying text.

⁵⁹ Memorandum from Ben C. Duniway to Associates (Oct. 3, 1975).

⁶⁰ Memorandum from Alfred to Goodwin to Associates (June 4, 1974).

⁶¹ Memorandum from Ben C. Duniway to Associates (Jan. 16, 1975).

⁶² Memorandum from Alfred T. Goodwin to the *Bowen* panel, Judge Stanley Barnes and District Judge Robert Kelleher (C.D. Cal.) (Aug. 28, 1973).

in *Bowen*, there were scattered votes to go en banc, but the panel itself then called for an en banc vote, using the opinion to support the call.⁶³ This led a judge who voted to en banc the case to suggest that “we might consider taking one or two others that present different aspects of the problem,”⁶⁴ and another proposed taking a post-*Almeida-Sanchez* en banc in case the court were to decide against retroactivity.⁶⁵

At its next court meeting, the judges agreed to en banc *Bowen*, but Chief Judge Chambers, believing strongly that en banc rehearing would impede the case’s inevitable arrival at the Supreme Court, dissented.⁶⁶ He again spoke out on the matter in early 1974, “I do think the situation is such that we should get our rulings out promptly so the Supreme Court can take our cases.”⁶⁷ To facilitate this, he suggested announcing decisions with opinions to follow,⁶⁸ and Judge Choy agreed with that suggestion “if this will expedite getting the matters to the Supreme Court.”⁶⁹ As Judge Chambers was to remark a bit later, “All I wanted was for panels to take various cases [and] get them decided and on the way to the Supreme Court,” particularly where, in his view, “in this *Almeida* chaff, we have never been anything but a way station.”⁷⁰ However, even though some colleagues seemed to agree that the Supreme Court would have the last word,⁷¹ that specific idea was rejected.⁷²

As it appeared that Judge Wallace had a majority in *Bowen* and that Judge Goodwin would dissent, further extensive discussion among the judges led to a combined opinion dealing with, and thus reconnecting,

⁶³ Memorandum from Alfred T. Goodwin to Associates (Sept. 10, 1973).

⁶⁴ Memorandum from Ben C. Duniway to Associates (Sept. 18, 1973).

⁶⁵ Memorandum from James R. Browning to Associates (Sept. 19, 1973).

⁶⁶ “None of the earmarks of the normal case for en banc are here. It is inescapable that the Supreme Court will decide the questions here. They are too big and too far reaching for that Court to ignore them. This en banc hearing results in about a three-months’ delay in the case getting to the Supreme Court,” with district courts meanwhile “almost choked with the retroactive [retroactivity] question.” In his inimitable style, he ended, “Taking this case en banc is simply flying off into the air without a payload.” *United States v. Bowen*, 485 F.2d 1388, 1389 (9th Cir. 1973) (Chambers, C.J., dissenting from grant of en banc rehearing).

⁶⁷ Memorandum from Richard Chambers to Associates (Jan. 25, 1974).

⁶⁸ *Id.*

⁶⁹ Memorandum from Herbert Choy to Associates (Jan. 28, 1974).

⁷⁰ Memorandum from Richard Chambers to Associates (Apr. 9, 1974).

⁷¹ See, for example, Judge Goodwin, writing to a judge in another circuit: “I do think the Supreme Court is going to have to straighten this out.” Letter from Alfred T. Goodwin to Reynaldo Garza (S.D. Tex.) (June 24, 1974).

⁷² See the comment of Judge J. Clifford Wallace: “I do not think it looks well for our court to have a matter under submission as long as this, and then file an order indicating that an opinion will follow later, when we could have done so long ago.” Memorandum to Associates (Jan. 30, 1974).

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both issues in one case. That became more necessary as the voting in *Gordon* had shifted and resulted in an evenly divided court.⁷³ Thus, in *Bowen*, in two separate 7-6 votes, the court held, first, that immigration officers could not search vehicles at fixed checkpoints without probable cause or a warrant, thus applying *Almeida-Sanchez* to those locations, but, second, that *Almeida-Sanchez* should not apply prior to the date of the Supreme Court's ruling in that case.⁷⁴ On the first point, Judge Goodwin, using the "reasonable certainty" test, argued that the fixed checkpoint search in the case was not a search at the functional equivalent of the border, as the Supreme Court defined it in *Almeida-Sanchez*. Dissenting, Judge Wallace, who would have remanded to the district court to determine the search's reasonableness, pointed to the facts that only four Justices had outlawed searches at fixed checkpoints not at the border or its functional equivalent and that Justice Powell's concurring opinion was at best limited to roving stops.⁷⁵ Judge Wallace then wrote the majority opinion for those judges who would have limited the new decision's retroactivity, reasoning that *Almeida-Sanchez* was new law, as it overruled precedent concerning fixed checkpoints; moreover, freeing those persons arrested prior to June 21, 1973, the date of *Almeida-Sanchez*, would not deter future inappropriate police activity.⁷⁶ Judge Hufstедler disagreed as to retroactivity, believing that *Almeida-Sanchez* did not establish new precedent, and even if it did, that would not be pertinent to its retroactivity.⁷⁷

Bowen came during the key period for Ninth Circuit border search en banc decisions of May and June 1974. Two cases—*Bowen* and *United States v. Peltier*⁷⁸—were handed down on May 9, and three more came down on June 14. There had been no panel ruling in *Peltier*. It was thus an "initial en banc," that is, without a formal disposition first having been filed by the panel. The case was taken en banc at the April 10 court and council meeting for the purpose that, as Judge Goodwin stated in his proposed opinion, "the full court can consider whether the rule announced by the Supreme Court in Almeida-Sanchez should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced."⁷⁹ With the court again dividing 7-6,

⁷³ There is no record of this action in the *Federal Reporter*; perhaps no formal filing was made.

⁷⁴ *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974) (en banc) (per curiam).

⁷⁵ *Id.* at 981 (Wallace, J., dissenting).

⁷⁶ *Id.* at 965.

⁷⁷ *Id.* at 982 (Hufstедler, J., dissenting).

⁷⁸ *United States v. Peltier*, 500 F.2d 985 (9th Cir. 1974) (en banc).

⁷⁹ Draft opinion (n.d.), in casefile. In a memorandum during later en banc activity in a case

the majority did apply *Almeida-Sanchez* retroactively to roving border patrol search cases in which appeals were pending on June 21, 1973, on the basis that *Almeida-Sanchez* did not overrule precedent,⁸⁰ while Judge Wallace repeated his view that it did establish new law and argued that *Stovall v. Denno*,⁸¹ permitting prospective application only, should apply.⁸² The interrelation between the various cases the court was considering en banc could again be seen in a comment by Judge Goodwin's law clerk that "the court decided that Peltier and Bowen would go down as separate, self-sufficient opinions with neither one citing the other," but Judge Wallace's *Peltier* dissent "quotes extensively from his majority opinion in Bowen."⁸³

Several other en banc rulings were part and parcel of this considerable activity. In one, the court was unable to resolve the question posed because the en banc court divided evenly. In that case, a panel had withheld submission of a case until after the Supreme Court decided *Almeida-Sanchez*. A panel member then wrote to his colleagues that if the report of the Supreme Court's decision in the *Los Angeles Times* were true, the district court would have to be reversed, but in a companion case the result would be affirmance, as the latter case involved a checkpoint.⁸⁴ Judge Goodwin, a member of the panel, agreed, as the stop had been on the same highway as the stop in *Almeida-Sanchez*, but said that case "leaves checkpoint searches to another day."⁸⁵ The panel, quoting from Justice Powell's concurrence, ruled in an unreported order that the Supreme Court's ruling required reversal of a conviction from a roving search. However, within a month, before the mandate was issued, the panel withdrew its order "when the government pointed out that the retroactivity of Almeida-Sanchez had not been

on standards for ineffective assistance of counsel, Judge Goodwin wrote to his colleagues, "Members of the court will recall that a good deal of paperwork was occasioned by the failure of our court to deal with the retroactivity problems in the slipstream of Almeida-Sanchez. The Supreme Court eventually solved our problem, but there was still a lot of paper shuffling connected with the operation. It is hoped that we can avoid some of this by focusing on these problems on a pre-need basis." Memorandum from Alfred T. Goodwin to Associates (Sept. 9, 1977) (re *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (en banc)). The judge more recently has referred to the "tedious retroactivity question" that faced the court in the border-search cases. Email from Alfred T. Goodwin to author (Apr. 14, 2010, 17:30 EDT) (on file with author).

⁸⁰ *Peltier*, 500 F.2d 985.

⁸¹ *Stovall v. Denno*, 388 U.S. 293 (1967).

⁸² *Peltier*, 500 F.2d at 990 (Wallace, J., dissenting).

⁸³ Memorandum from Donald Friedman (law clerk to Judge Goodwin) to Judge Goodwin (Apr. 19, 1974).

⁸⁴ Memorandum from Stanley Barnes to panel (June 22, 1973) (re *United States v. Gordon*, No. 73-1524). The other case was *United States v. Hendrix*, No. 73-1523.

⁸⁵ Memorandum from Alfred T. Goodwin to panel (June 26, 1973).

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conceded”⁸⁶ and asked the parties to brief the retroactivity question. At year’s end, the entire court withdrew the case from the panel for en banc consideration, “for the purpose of deciding whether in a roving search case coming under the decision in Almeida-Sanchez, the Almeida-Sanchez decision is retroactive.”⁸⁷ This was consonant with Judge Goodwin’s earlier suggestion that the court consider separating the retroactivity question “from the other compound questions involved in the ‘functional equivalent’ cases,”⁸⁸ and *Gordon* had been one of the cases he noted.

Then, illustrating that en banc rehearings don’t always resolve matters, changes within the court served to preclude a decision on the question for which the case had been en banc’d. This problem stemmed from courts of appeals not always having an odd number of sitting judges, coupled with any senior judge being able to sit on en banc rehearing of the case. Thus, even with an odd number of active judges, adding a senior judge to the en banc court might produce a tie vote, something that happened in *Gordon*. One of the panel members, Senior Judge Stanley Barnes, had been thought to favor retroactivity. Had he so voted, an 8-6 vote in that direction would have resulted. However, he changed his position, with the result that “we have an evenly divided court and there is nothing to do with Gordon except to affirm by an equally divided court,” 7-7.⁸⁹ That, said Judge Duniway, “leaves the question of retroactivity in roving search cases still up in the air, a result that none of us wanted to have happen.”⁹⁰ When the court of appeals later considered whether to appoint a lawyer for *Gordon* to file a certiorari petition, another Supreme Court case, holding that there was no right to a lawyer at that stage of the proceedings,⁹¹ came into play. One judge predicted wrongly that “no doubt the Supreme Court will recognize this as a cert case a mile off—without a lawyer’s help,”⁹² and certiorari was denied on June 30, 1975.⁹³

Gordon may have failed of resolution, but it illustrates the interconnectedness of the court’s en banc rulings on border searches. In his revised *Bowen* opinion, Judge Goodwin applied *Almeida-Sanchez* to fixed checkpoints and then applied the retroactivity rule of the parallel

⁸⁶ As reported by Alfred T. Goodwin, memorandum to all active judges, others (Dec. 1973).

⁸⁷ As explained later in a memorandum from Ben C. Duniway to Associates (Mar. 29, 1974).

⁸⁸ Memorandum from Alfred T. Goodwin to all active judges, others (Dec. 14, 1973).

⁸⁹ Memorandum from Ben C. Duniway to Associates (Mar. 29, 1974).

⁹⁰ Memorandum from Ben C. Duniway to Associates (Mar. 29, 1974).

⁹¹ *Ross v. Moffitt*, 417 U.S. 600 (1974).

⁹² Memorandum from James Browning to Associates (July 16, 1974).

⁹³ *Gordon v. United States*, 422 U.S. 1057 (1975).

pending *Gordon* en banc ruling to fixed checkpoints.⁹⁴ The close connection was also clear when Judge Hufstедler complained simultaneously about Judge Wallace’s dissents in both cases as “contrary to the controlling authority of Mr. Justice Stewart’s opinion for a majority of the Supreme Court in Almeida-Sanchez,” with a “misread[ing of] the effect of Mr. Justice Powell’s concurring opinion” there.⁹⁵ Judge Duniway made clear the difficulties caused by that interconnectedness: “We originally agreed that the retroactivity problems would be settled in the Gordon case and that the fixed checkpoint problem would be settled primarily in the Bowen case” and “we separated the two cases for that reason.”⁹⁶ However, another judge had said Judge Wallace “proposes that we do not reach the issue of the fixed checkpoint.”⁹⁷ Judge Duniway feared that Judge Wallace’s proposed majority opinion would mean that “all of the work, discussion, etc. of thirteen of us on the fixed checkpoint question will go down the drain. That is a hell of a way to run a railroad.”⁹⁸

Also in play was the seemingly technical matter of which case was to be filed first, as the first case to be filed would govern those following and might foreclose certain rulings in them. The en banc coordinator thus proposed to his colleagues that several en banc rulings be filed simultaneously.⁹⁹ Before *Gordon* fell by the wayside, there was even a relatively sharp exchange between two judges as to whether *Gordon* or *Bowen* would be filed first, with a disputed claim that an agreement had been reached on the matter.¹⁰⁰ However, other judges made clear that they wished to avoid a rush to file but wanted the matter handled systematically and by agreement. For example, as Judge Duniway put it, “I think it is not good for us to have a race to the clerk’s office in order to make our personal views the law of the circuit in this area.”¹⁰¹

In the situation left by *Gordon*, the judges began to consider other cases—on which Judge Barnes had not served—that would present the retroactivity question without complications. One of Judge Merrill’s law clerks, writing about a “clean Almeida-Sanchez type case” that could be

⁹⁴ See *supra*, text accompanying notes 74–76.

⁹⁵ Memorandum from Shirley Hufstедler to Associates (Feb. 19, 1974).

⁹⁶ Memorandum from Ben C. Duniway to Associates (Feb. 25, 1974).

⁹⁷ Memorandum from Charles Merrill to Associates (Feb. 25, 1974).

⁹⁸ Memorandum from Ben C. Duniway to Associates (Feb. 25, 1974).

⁹⁹ Memorandum from Alfred T. Goodwin to Stanley Barnes, Associates (Apr. 16, 1974).

¹⁰⁰ Memorandum from James R. Browning to Associates (Apr. 1, 1974) (*Gordon* to be filed first); memorandum from J. Clifford Wallace to Associates (Apr. 8, 1974) (no such recollection, and explanation of events).

¹⁰¹ Memorandum from Ben C. Duniway to Associates (Sept. 10, 1973).

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used as a substitute for Gordon, thought that *Peltier* “might be suitable as an en banc substitute . . . to dispose of the Almeida-Sanchez retroactivity issue,” although *Peltier* “is not as pure as Almeida-Sanchez itself.”¹⁰²

A case that the court did take en banc led to a clear outcome on one point, the status of the San Onofre (San Clemente) checkpoint on I-5 sixty-five miles north of the Mexican border.¹⁰³ Slightly over two weeks after the Supreme Court handed down *Almeida-Sanchez*, the case was heard by a panel of Judges Goodwin and Wallace and District Judge William M. Byrne, Sr. (C.D. Cal.). The panel decided to affirm the marijuana conviction, but Judge Goodwin’s law clerk argued that *Almeida-Sanchez* was *not* limited to roving searches “but rather applies to all surveillance by the Border Patrol along inland roadways as distinct from searches at the border itself or its functional equivalents.”¹⁰⁴ When Judge Byrne circulated his proposed opinion on October 9, the clerk made the same point again, more directly: “This opinion can not stand. Apparently at the time that it was decided and assigned, the panel thought that Almeida-Sanchez did not apply to fixed checkpoint searches. Judge Byrne never got the word that times have changed.”¹⁰⁵ Saying he would concur, Judge Wallace thought Judge Byrne’s opinion should be held “until we have taken the various Almeida-Sanchez issue cases en banc.” He then went further to suggest that Judge Goodwin “might consider taking this one en banc because it is a permanent checkpoint and has no other significant issues” that would muddy the waters.¹⁰⁶

By month’s end, the court ordered the case reheard en banc in conjunction with *Bowen*, with Chief Judge Chambers dissenting from this action as he had in *Bowen*.¹⁰⁷ In June 1974, a month after deciding *Bowen* en banc and the same day that the *Brignoni-Ponce* en banc decision was handed down, in *United States v. Morgan* an 11-2 en banc court, in a very brief per curiam opinion written by Judge Goodwin, held that the San Onofre checkpoint was not the functional equivalent of the border, under *Almeida-Sanchez* and *Bowen*.¹⁰⁸ However, because *Bowen* had held *Almeida-Sanchez* not applicable to fixed checkpoint searches

¹⁰² Memorandum from Stephanie [no last name] (law clerk) to Charles Merrill (Apr. 1, 1974); confirmed in memorandum from Alfred T. Goodwin to Associates (Apr. 3, 1974).

¹⁰³ The checkpoint is the San Clemente checkpoint, which is in San Onofre.

¹⁰⁴ Memorandum from Don Friedman (law clerk) to Judge Goodwin (Aug. 22, 1973) (re *United States v. Morgan*, No. 73-1669).

¹⁰⁵ Memorandum from Don Friedman to Judge Goodwin (Oct. 9, 1973).

¹⁰⁶ Memorandum from J. Clifford Wallace to panel (Oct. 12, 1973).

¹⁰⁷ Order filed Oct. 31, 1973, *United States v. Morgan*, No. 73-1669.

¹⁰⁸ *United States v. Morgan*, 501 F.2d 1351 (9th Cir. 1974) (en banc) (per curiam).

prior to June 21, 1973, and because the search in the case took place before that date, suppression did not apply and the conviction was affirmed.¹⁰⁹ Judge Wallace (joined by Chief Judge Chambers) dissented on this point, saying there was an inadequate basis for deciding that the checkpoint was not the functional equivalent of the border.¹¹⁰

The en banc court also held, in another per curiam, *United States v. Grijalva-Carrera*, that when there was no indication of a border patrol checkpoint and a border patrol agent parked alongside a road where he could turn on his headlights and observe the occupants of passing cars and had instructions to stop all northbound vehicles after dark, a search of a car was a roving patrol search prohibited by *Almeida-Sanchez*.¹¹¹ A panel of Chief Judge Chambers, Judge Ozell Trask, and District Judge Byrne had initially affirmed by unpublished memorandum on November 12, 1972. Almost a year later, on October 12, 1973, Judge Goodwin's secretary, while she thought the case "technically not in the en banc active track yet," notified the judges about denial of rehearing and provided the possibility for them to seek en banc "because it appears to be Almeida-related."¹¹² Over another Chambers dissent, the court shortly thereafter took the case en banc.

Judge Goodwin told his colleagues that the case presented "two complications" in the way of a clean resolution of the retroactivity question: all cars, not just some, were being stopped, making the location "a de facto temporary checkpoint," and the government "can argue that this was a Terry-stop to check identification, because it was in a 'high crime' area."¹¹³ Nonetheless he circulated another proposed per curiam opinion while setting out several options for disposition of the case and selecting one "for the pragmatic reason that this is the one the author would vote for."¹¹⁴ The individual views that he hoped his proposal would prompt *were* expressed, as Judge Sneed raised questions about the status of temporary checkpoints, some of which could be little more than roving patrols. However, the court adopted the Goodwin proposal, and the opinion came down after the circuit's *Peltier* ruling but before the Supreme Court's consideration of that case. Because this case was on

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1351 (Wallace, J., concurring in part and dissenting in part).

¹¹¹ *United States v. Grijalva-Carrera*, 500 F.2d 592 (9th Cir. 1974) (en banc) (per curiam).

¹¹² Memorandum from Helen Murdock (secretary) to Alfred T. Goodwin and clerks (Oct. 12, 1973).

¹¹³ Memorandum from Alfred T. Goodwin to Associates (Mar. 28, 1974) (memo in *Bowen* file).

¹¹⁴ Memorandum from Alfred T. Goodwin to Associates (May 16, 1974).

appeal when the Supreme Court decided *Almeida-Sanchez*, the circuit's *Peltier* decision on retroactivity applied.¹¹⁵

The Supreme Court did not deal with *Morgan*, *Grijalva-Carrera*, or *Gordon*. However, it did take up another June 14, 1974, en banc ruling on a conviction for transporting aliens. This was another case with no three-judge panel ruling, but in which the full court, on October 13, 1973, ordered an en banc hearing, Judge Goodwin said, "I don't want to seem officious, but the case turned up among those being 'coordinated,'" and he offered to write the opinion if Judge Duniway—the most senior judge participating—"wants to assign it to me."¹¹⁶ Judge Duniway, although saying that he "doubt[ed] that I have any authority to assign it," accepted the "invitation" and made that assignment.¹¹⁷

Judge Goodwin had first noted that this case "may have to be more than a summary statement of facts" with citations to *Almeida-Sanchez* and *Peltier*, because of the "significant issue" of whether someone believed to be an alien could be stopped and interrogated about that matter, something the Tenth Circuit had ruled permissible.¹¹⁸ The judge's law clerk thought the case "closely keyed to the result in *Grijalva-Carrera*,"¹¹⁹ on certain stops being more like those by roving patrols than those at fixed checkpoints, and Judge Goodwin himself reported that he had "started to prepare a perfunctory memorandum to dispose" of the case. However, he said that "two controversial problems, one or more of which may be under consideration by other panels," one being the Tenth Circuit's position, led him to a more complete proposed opinion.¹²⁰ Further illustrating the interrelation between pending cases, Judge Goodwin discussed Judge Sneed's reservations in the pending *Grijalva-Carrera* en banc about the status of temporary checkpoints, which Judge Goodwin wished to resolve "without taking another case en banc."¹²¹

Accepting Judge Goodwin's approach, the Ninth Circuit unanimously reversed the conviction.¹²² The opinion first tied the case

¹¹⁵ *United States v. Grijalva-Carrera*, 500 F.2d 592 (9th Cir. 1974) (per curiam) (en banc).

¹¹⁶ Memorandum from Alfred T. Goodwin to the panel (Judges Duniway and Sneed, and District Judge William Sweigert [N.D. Cal.]) (May 15, 1974) (re *United States v. Brignoni-Ponce*, No. 73-2161).

¹¹⁷ Memorandum from Ben C. Duniway to Goodwin and panel (May 17, 1974).

¹¹⁸ *United States v. Bowman*, 487 F.2d 1229 (10th Cir. 1973).

¹¹⁹ Memorandum from Donald Friedman (law clerk) to Judge Goodwin (May 21, 1974).

¹²⁰ Memorandum from Alfred T. Goodwin to Associates (May 22, 1974).

¹²¹ *Id.*

¹²² *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974) (en banc).

to the court's own *Peltier* ruling making *Almeida-Sanchez* retroactive to all cases involving roving patrol stops pending on appeal as of the date of *Almeida-Sanchez*; because the car had not been stopped at the checkpoint, the situation was more like a roving patrol than a fixed checkpoint stop.¹²³ Then, dealing with the government's claim that the case involved not a search but a stop to interrogate about alien status, Judge Goodwin declined to take the Tenth Circuit's view, which he found "entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*" and "with settled law of this circuit" as well.¹²⁴ There was, he said, no "founded suspicion" (necessary for a proper stop) that those in the car were illegal aliens, the ruling that was to be the core of the Supreme Court's ruling in the case.

Return to Panel. The Ninth Circuit initially voted to take en banc two other cases to resolve outstanding questions but then returned the cases to their panels for disposition. In one of those cases, District Judge Robert Peckham (N.D. Cal., sitting by designation) told his panel colleagues to say that, for him, the difference between roving patrols and temporary and fixed checkpoints was "a distinction without a difference." He suggested that he might write separately in this case, as he preferred resting the ruling on the Ninth Circuit's *Almeida-Sanchez* decision, which had criticized stops in all three situations, rather than relying on "a fifth Justice's neutral statement" (referring to the Powell concurrence) that the case didn't involve fixed and temporary checkpoints.¹²⁵ Peckham's message led fellow panel member Judge Charles Merrill to write to en banc coordinator Judge Goodwin, "It begins to look as though the vote of the whole court might be appropriate on this question."¹²⁶ The court then withdrew the case from the panel and that case became involved in the *Bowen* proceedings.

The court decided that Judge Goodwin would write a per curiam opinion applying *Almeida-Sanchez* to the San Onofre checkpoint, based on the reasoning of the then-in-process *Bowen*.¹²⁷ Indeed, Judge Goodwin circulated a proposed (unpublished) memorandum disposition. However, he then almost immediately communicated that he had written the disposition because he thought it "involved only a housekeeping

¹²³ *Id.* at 1110.

¹²⁴ *Id.* at 1111.

¹²⁵ Memorandum from Robert Peckham (N.D. Cal.) to panel, *United States v. Heiden/United States v. Klein*, No. 73-1471/73-1570 (Aug. 1, 1973).

¹²⁶ Memorandum from Charles Merrill to Alfred Goodwin, others (Aug. 14, 1973).

¹²⁷ Internal memorandum in *Heiden/Klein* case folder (Dec. 18, 1973).

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matter controlled by the Bowen retroactivity issue,” when instead the panel might want to deal with issues in the case other than *Almeida-Sanchez* retroactivity. For unexplained reasons, the order returning the case to the panel was not issued until after mid-July 1974. On December 16, 1974, the panel resolved the case on the basis that the stop, which in any event had occurred prior to the Supreme Court’s *Almeida-Sanchez* decision, was valid.¹²⁸

The other case involved three defendants convicted of conspiracy to import marijuana. The panel (Judges Barnes, Goodwin, and J. Blaine Anderson) had held the case pending the Supreme Court’s determination of *Almeida-Sanchez*. They then decided not to apply that ruling because the stop in the case was at a checkpoint, not by a roving patrol. The court took the case en banc. However, after handing down *Bowen*, applying *Almeida-Sanchez* to fixed checkpoints only prospectively, and *Morgan*, holding that the San Onofre checkpoint was not the equivalent of the border, the en banc court returned the case to the panel, which then ruled the search valid because it took place on March 8, 1971, before the crucial date of June 21, 1973.¹²⁹

SUPREME COURT RULINGS

If the May–June 1974 period was the key time for Ninth Circuit en banc rulings, it was late June 1975 when the Supreme Court weighed in heavily on border searches. The Court focused in *Peltier* on retroactivity and held, by a 5-4 vote, with Justices Stewart, Douglas, Brennan and Marshall dissenting, that *Almeida-Sanchez* was not retroactive to a case pending on appeal on the date *Almeida-Sanchez* was announced. Justice Rehnquist said, “[I]f the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial” or that their conduct was within the law, the “imperative of judicial integrity” was not offended by introduction of that evidence or material seized through such conduct “even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass” the evidence or had held that the conduct “is not permitted by the Constitution.”¹³⁰

¹²⁸ *United States v. Heiden/United States v. Klein*, 508 F.2d 898 (9th Cir. 1974).

¹²⁹ *United States v. Mollet*, 510 F.2d 625 (9th Cir. 1975). The account here is from that opinion; there is no *Federal Reporter* citation for the panel’s initial ruling. Judge Anderson, disagreeing over a sentencing issue, concurred in part and dissented in part. At some point, the *Mollet* case had produced another evenly divided en banc court, see memorandum from Alfred T. Goodwin to Associates (Mar. 28, 1974), but that was before the case was resolved by returning it to the panel.

¹³⁰ *United States v. Peltier*, 422 U.S. 531, 537-38 (1975).

The Court then affirmed the *Bowen* non-retroactivity ruling, so that, as to roving patrols, the rule of *Almeida-Sanchez* would apply from June 21, 1973.¹³¹ For the majority, Justice Powell said that, as the court of appeals had correctly decided that *Almeida-Sanchez* was not to be applied retroactively, “it should have refrained from considering whether our decision in that case applied to searches at checkpoints”¹³²—that is, the decision extending *Almeida-Sanchez* to traffic checkpoint searches was unnecessary.¹³³

In the *Brignoni-Ponce* case, which demonstrates the interplay between the two courts that is at the heart of their interaction dynamics, Justice Powell again wrote for the Court, affirming the Ninth Circuit. The timeline for this case is of some note. As Justice Powell acknowledged, the appeal from the conviction was pending in the Ninth Circuit when the Supreme Court handed down *Almeida-Sanchez*.¹³⁴ The government had not challenged the Ninth Circuit’s characterization of the stop of Brignoni-Ponce as equivalent to one by a roving patrol, the court’s treating San Clemente as not the functional equivalent of the border, or its holding on retroactivity of *Almeida-Sanchez*. The key was that the Court now held that a roving patrol could not stop a car near the border to question about immigration status where apparent Mexican ancestry was the only ground for suspicion.¹³⁵ Thus, other than at the border or its functional equivalent, one could stop cars only on articulable facts that gave rise to reasonable inferences, and if suspicion led an officer to believe a car had aliens, the officer could stop the vehicle and question briefly about citizenship.¹³⁶ Justice Rehnquist, while joining the majority opinion, focused on that opinion’s limitation to the particular type of stop involved, and Justice Douglas joined the judgment but disagreed with the majority’s “suspicion” test.

The Supreme Court also affirmed the decision in another border patrol case, *United States v. Ortiz*.¹³⁷ This had been a Ninth Circuit unpublished disposition invalidating a search at the San Clemente checkpoint by officers who lacked reasons for suspecting that the car they stopped contained illegal aliens; the appeals court had also held that probable cause was needed for all vehicle searches, whether conducted at

¹³¹ *Bowen v. United States*, 422 U.S. 916 (1975).

¹³² *Id.* at 921 (1975).

¹³³ Justice Douglas, and Justice Brennan joined by Justice Marshall, dissented on the basis of their *Peltier* dissents, and Justice Stewart dissented without comment.

¹³⁴ *United States v. Brignoni-Ponce*, 422 U.S. 873, 875 (1975).

¹³⁵ *Id.* at 886-87.

¹³⁶ *Id.* at 889.

¹³⁷ *United States v. Ortiz*, 422 U.S. 891 (1975).

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checkpoints or by roving patrols. Again speaking through Justice Powell, the Court held that “at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause.”¹³⁸ Four Justices wrote three separate concurrences; two concurred only in the judgment, with only the compulsion of precedent keeping all in the majority.¹³⁹ Justice Rehnquist complained of the extension of *Almeida-Sanchez*’s “unsound rule”;¹⁴⁰ Chief Justice Burger, joined by Justice Blackmun, complained of the difficulty of stopping the influx of illegal aliens; and Justice White, also joined by Justice Blackmun, said that the majority’s “largely foreordained” ruling meant that justifying investigatory stops at checkpoints without probable cause or reasonable suspicion would be difficult.¹⁴¹

The Justices used GVR orders to return two other cases to the Ninth Circuit for reconsideration in light of both *Brignoni-Ponce* and *Ortiz*.¹⁴² The cases involved convictions for marijuana possession with intent to distribute that had been affirmed in unpublished dispositions by overlapping panels.¹⁴³ On remand, both panels affirmed the district court in published opinions. The panel of Judges Carter, Wallace, and Jameson acted first, holding on December 5, 1976, that officers had reasonable suspicion that alien smuggling was occurring when they made their stop one-and-one-half miles from the border in an area “notorious” for alien smuggling.¹⁴⁴ After having “re-examined the facts of this case in light of the[] recent Supreme Court cases” and having discussed the cases, the judges found no substantive difference between the Ninth Circuit’s “founded suspicion” test and the “reasonable suspicion” test the Supreme Court had enunciated in *Brignoni-Ponce*; they then ruled that the officers had that “reasonable suspicion.”¹⁴⁵ On January 26, 1976, the other panel (Judges Wallace, Koelsch, and Jameson), in a brief per curiam, cited the previous case for the equivalence of the tests and

¹³⁸ *Id.* at 896-97.

¹³⁹ *See id.* at 898 (Rehnquist, J., concurring). Chief Justice Burger’s concurring opinion, which was joined by Justice Blackmun, is reported at *United States v. Brignoni-Ponce*, 422 U.S. 899, 899 (1975). Justice White’s concurring opinion, which was also joined by Justice Blackmun, is reported at *id.* at 914.

¹⁴⁰ *Ortiz*, 422 U.S. at 898 (Rehnquist, J., concurring).

¹⁴¹ *Brignoni-Ponce*, 422 U.S. at 915 (White, J., concurring in judgment).

¹⁴² *Rocha-Lopez v. United States*, 422 U.S. 1053 (1975); *Gonzalez-Diaz v. United States*, 422 U.S. 1053 (1975).

¹⁴³ Judges Carter and Wallace and District Judge William Jameson (D. Mont.); Wallace, Jameson, and Judge Oliver Koelsch.

¹⁴⁴ *United States v. Rocha-Lopez*, 527 F.2d 476 (9th Cir. 1976).

¹⁴⁵ *Id.* at 476-77.

repeated key language from its previous unpublished order. Judge Koelsch noted in his dissent that the record did not support “founded suspicion” in this case.¹⁴⁶

THE LATER CASES

All was not yet completed. A late 1975 memorandum from Judge Shirley Hufstedler indicated not only many *cases* but many *categories* of cases (she listed seven) that were yet to be decided.¹⁴⁷ To cover all issues, she suggested a published opinion for each of several categories and memorandum dispositions for the other categories and all non-lead cases. And there was to be another Supreme Court border search ruling and two more en banc matters, one of which had commenced in 1974 but was not resolved until early 1977,¹⁴⁸ and another that became necessary when, as had happened with *Gordon*, the first failed to produce an outcome on the issue it was intended to resolve.¹⁴⁹

The first of the en banc cases, *Martinez-Fuerte*, involved convictions of several defendants for transporting aliens, stopped at the seemingly ubiquitous San Clemente fixed checkpoint and diverted to a secondary area. The panel majority of Judge Duniway and District Judge Stanley Weigel (N.D. Cal.) affirmed the district judge’s order suppressing evidence from the ensuing interrogation and reversed the conviction.¹⁵⁰ Judge Duniway wrote that a warrant of inspection allowing stopping all cars without probable cause or even the Ninth Circuit’s “founded suspicion” test did not justify otherwise unreasonable searches and that, indeed, a traffic immigration checkpoint under an inspection warrant was constitutionally unreasonable.¹⁵¹ “Talking back” to a Supreme Court Justice, Judge Duniway indicated that he was troubled by Justice Powell’s proposal of an administrative inspection analogy for roving patrols, and he rejected as “unsatisfactory” Powell’s premise that an area warrant would justify a fixed checkpoint.¹⁵² Judge

¹⁴⁶ *United States v. Gonzalez-Diaz*, 528 F.2d 925 (9th Cir. 1976) (per curiam). For the Ninth Circuit “founded suspicion” cases and particularly the use of unpublished dispositions in such cases, see Michael Wepsiec & Stephen L. Wasby, *Ninth Circuit Border Searches: Doctrines and Inconsistencies* (2000) (unpublished manuscript) (on file with author).

¹⁴⁷ Memorandum from Shirley Hufstedler to Associates (Oct. 2, 1975).

¹⁴⁸ *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

¹⁴⁹ *United States v. Juarez-Rodriguez*, 498 F.2d 7 (9th Cir. 1974) (panel), *withdrawn*, 568 F.2d 120 (9th Cir. 1976).

¹⁵⁰ *United States v. Martinez-Fuerte*, 514 F.2d 308 (9th Cir. 1975), *rev’d*, 428 U.S. 543 (1976).

¹⁵¹ *Id.* at 314.

¹⁵² *Id.* at 318.

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Carter, dissenting, would, on the basis of the magistrate-issued warrant, have upheld the stop, the limited visual inspection, and the occasional resulting interrogation.¹⁵³ Reviving the question of what the Supreme Court had said in *Almeida-Sanchez*, he said the panel majority made it seem as if Justice Powell was alone, but “a breakdown of votes” showed that a majority of the Court (Justice Powell concurring and Justice White and colleagues in dissent) would support the government’s action here.¹⁵⁴

When *Martinez-Fuerte* reached the high court along with a Fifth Circuit case,¹⁵⁵ Justice Powell noted the Ninth Circuit panel’s focus on the constitutionality of the warrant of inspection under which the checkpoint was operating.¹⁵⁶ However, for the Supreme Court, the question was vehicle stops at fixed checkpoints for brief questioning, even when the stop was made without reason to believe the vehicles contained illegal aliens. Justice Powell said this question had been reserved in *Ortiz*, and the government had preserved it in the court of appeals.¹⁵⁷ Powell held for a 7-2 court (Justices Brennan and Marshall dissenting) that there was no Fourth Amendment violation in the challenged stops and questioning. When the Ninth Circuit received the case on remand, the panel affirmed the conviction and remanded the other two defendants’ cases for further proceedings under the Supreme Court’s ruling.¹⁵⁸

Juarez-Rodriguez, the en banc case that had begun first, was to lead to the same result as in *Gordon*—an evenly divided court, failing to provide a precedential ruling. After the Ninth Circuit’s *Bowen* en banc, a panel of Chief Judge Chambers, Judge Browning, and District Judge Fred Taylor (D. Idaho) had reversed another conviction in a short per curiam on May 21, 1974.¹⁵⁹ Citing the Ninth Circuit’s *Almeida-Sanchez* and *Bowen* rulings, the panel said that without founded suspicion and probable cause, the stop and search of defendant’s car at the San Clemente checkpoint violated Fourth Amendment rights. As the search

¹⁵³ *Id.* at 323 (Carter, J., dissenting).

¹⁵⁴ *Id.* Judge Carter did, however, concede that Justice Powell was not talking about fixed checkpoints but about roving patrols.

¹⁵⁵ *Sifuentes v. United States*, 517 F.2d 1402 (5th Cir. 1975), *rev’d*, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

¹⁵⁶ *United States v. Martinez-Fuerte*, 428 U.S. 543, 549 n.5, 562 n.15 (1976).

¹⁵⁷ *Id.* at 545.

¹⁵⁸ *United States v. Martinez-Fuerte*, 538 F.2d 858 (9th Cir. 1976).

¹⁵⁹ *United States v. Juarez-Rodriguez*, 498 F.2d 7 (9th Cir. 1974), *withdrawn*, 568 F.2d 120 (9th Cir. 1976).

had taken place after June 21, 1973, *Almeida-Sanchez*'s non-retroactivity "as applied to fixed alien checkpoints . . . need not concern us."¹⁶⁰

The case became en banc fodder because of a desire for full court consideration of a fixed checkpoint search after the date of *Almeida-Sanchez* but before May 9, 1974, the date of *Bowen*. In early May 1974, Judge Goodwin had agreed with suggestions by Judges Browning and Trask to take en banc a fixed checkpoint case, but he thought the court and council should discuss the matter.¹⁶¹ Between the initial panel action and this point, the court en banc had transferred the case to a panel of Judges Choy, Barnes, and Hufstedler. This action resulted from Chief Judge Chambers's suggestion that a lead case be taken from among those decided by three circuit judges (that is, with no district or out-of-circuit judges on the panel); Judges Herbert Choy, Barnes, and Hufstedler had been drawn by lot.¹⁶² Judge Browning withdrew his en banc suggestion when Judge Hufstedler filed her dissent to Judge Barnes's majority opinion for the panel. The case rested in this posture for almost two years without being filed, until Judge Hufstedler called for en banc hearing as "the guinea pig case of 'retroactivity' of *Ortiz* . . . affect[ing] dozens of cases which we have backed up on the court awaiting the determination of the panel."¹⁶³ Judge Goodwin then asked the court's judges whether they agreed with the proposed Barnes or Hufstedler opinions,¹⁶⁴ which differed basically on whether *Almeida-Sanchez* extended to fixed checkpoints (Barnes no, Hufstedler yes).¹⁶⁵

Here internal court procedure reared its head, illustrating the institutional mechanisms playing a part in intercourt dynamics. First, Judge Hufstedler circulated an order, with which many of her colleagues concurred, "to unsnarl some procedural snags to get this case sanitized for the Supreme Court"—to straighten out some mis-recording concerning the order transferring the case (and others) to the special panel and correcting an error as to who was on the en banc court, as Judge Oliver Koelsch had taken senior status and could not participate in

¹⁶⁰ *Id.*

¹⁶¹ Memorandum from Alfred T. Goodwin to Associates (May 2, 1974). Judge Trask had written to his colleagues, concurring with Judge Browning's suggestion, "to en banc (without argument) a post-*Almeida-Sanchez* situation at a fixed checkpoint, for clarification purposes." Memorandum from Ozell Trask to Associates (Apr. 29, 1974).

¹⁶² Memorandum from Richard Chambers to Associates (July 28, 1975).

¹⁶³ Memorandum from Shirley Hufstedler to Associates (Feb. 23, 1976). Judge Hufstedler put "retroactivity" in quotation marks because, as she stated in her draft dissent, she thought the case did not implicate retroactivity.

¹⁶⁴ Memorandum from Alfred T. Goodwin to Associates (Mar. 19, 1976).

¹⁶⁵ *See, e.g.*, memorandum from Stanley Barnes to Associates (Oct. 14, 1975).

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it.¹⁶⁶ The next development was a question raised by Judge Choy¹⁶⁷ and by Judge Hufstedler that was more crucial—whether the en banc court, rather than directly taking the case en banc, had the jurisdictional authority to transfer to the special panel cases already heard by another panel. The result was, as Judge Hufstedler put it, “a sorry procedural morass.”¹⁶⁸ Further court consideration, with the case still in limbo and issuance of the mandate stayed, led to a July 2, 1976, order withdrawing the case from the special panel, to be considered en banc.

Difficulties with this case were not yet over, however, in part as a result of the time necessary to resolve those procedural issues. By the time of the vote to en banc the case, Judge Barnes had also taken senior status, so Chief Judge Chambers assigned to panel member Judge Choy the writing of opinion for what had been the Barnes majority panel, and Choy wrote based in large measure on what Judge Barnes had stated. Further, on June 6, 1975, the Supreme Court decided *Martinez-Fuerte*, which led to some inconclusive disputation as to whether it affected the present case.

The *Juarez-Rodriguez* en banc court’s 6-5 decision (Choy for the majority, Hufstedler for the dissenters) was first announced on November 16, 1976.¹⁶⁹ Judge Choy said the question was whether *Almeida-Sanchez* applied to stops, without consent or probable cause, at permanent traffic checkpoints not at the border or its functional equivalent made after June 21, 1973 (Supreme Court *Almeida-Sanchez*) and before May 9, 1974 (Ninth Circuit *Bowen* en banc)—essentially whether *Ortiz* should be retroactive. He believed that language in *Ortiz* did not indicate that the Court had ruled on checkpoint searches or that *Almeida-Sanchez* held them invalid. Moreover, Judge Choy said that prior to *Bowen* no holding gave law enforcement adequate notice of the unconstitutionality of such fixed checkpoint searches; thus retroactive application would be improper. Judge Sneed disagreed with Judge Choy. Sneed thought the Supreme Court had had ample opportunity to hold that *Ortiz* was not retroactive to the period from June 21, 1973, to June 30, 1975, the date of *Ortiz* itself, and thus the Supreme Court had selected June 21, 1973, as the critical date. Judge Sneed’s vote had at first been considered to be with the majority but when that vote was added to the

¹⁶⁶ Memorandum from Shirley Hufstedler to Associates (May 12, 1976).

¹⁶⁷ Memorandum from Herbert Choy to Associates (May 27, 1976).

¹⁶⁸ Memorandum from Shirley Hufstedler to Associates (May 24, 1976). As she put it, “What a sorry bog we have found ourselves in by not taking the case en banc in the first place.”

¹⁶⁹ Because of its outcome, as with *Gordon*, there is no *Federal Reporter* citation for this case and the account of the opinion is drawn from the case files.

Hufstedler dissent, the court was divided evenly, 6-6, and, on January 10, 1977, the court amended its ruling to show affirmance by that division.

Even before their final order, the judges realized that they had gone to considerable lengths to resolve an issue but had come up empty. As Judge Duniway put it, “Having decided it in a manner that doesn’t amount to a precedent, we are no better off than we were before.”¹⁷⁰ But what to do? “[T]ake another one of the cases en banc, assuming we can find one,” said Judge Hufstedler, who pointed out that it was necessary to find a case in which a senior judge had sat on the panel and could thus sit on the en banc court to make a court of thirteen judges, which could not divide evenly.¹⁷¹ Judge Duniway then noted, however, that when Chief Judge Chambers took senior status, the number of active judges would be only eleven, facilitating a result in which the court would not be evenly divided.¹⁷² In searching for cases, Judge Browning found *United States v. Escalante*, which was still pending before the panel of Judges Chambers, Browning, and Taylor, which had first heard *Juarez-Rodriguez*, and Browning reported that if the court took the case en banc, Judge Chambers would opt out of the en banc, providing an odd-numbered en banc court.¹⁷³

The *Escalante* panel had suspended submission of the case and then, on May 21, 1974, issued a very brief unpublished memorandum reversing the district court, citing *Almeida-Sanchez* and *Bowen*.¹⁷⁴ When Judge Browning’s suggestion that the *Escalante* case replace the failed *Juarez-Rodriguez* en banc was accepted, Browning, now chief judge, assigned the opinions to those who had written in *Juarez-Rodriguez*.¹⁷⁵ As the judges now had information about the voting of judges who had participated in *Juarez-Rodriguez*, it quickly became clear that the determining vote would be that of the court’s newest member, Judge J. Blaine Anderson, who had not participated earlier,¹⁷⁶ and it was suggested that Judge Anderson should vote first. When he sided with Judge Choy’s view,¹⁷⁷ Judge Goodwin assigned Judge Choy the court’s proposed majority opinion, and the final opinion, filed on May 31,

¹⁷⁰ Memorandum from Ben C. Duniway to Associates (Dec. 6, 1976).

¹⁷¹ Memorandum from Shirley Hufstedler to Associates (Dec. 3, 1976).

¹⁷² Memorandum from Ben C. Duniway to Associates (Dec. 6, 1976).

¹⁷³ Memorandum from James R. Browning to Associates (Dec. 14, 1976).

¹⁷⁴ *United States v. Escalante*, No. 74-1075 (9th Cir. May 21, 1974).

¹⁷⁵ Memorandum from James R. Browning to active judges (Jan. 6, 1977).

¹⁷⁶ See memorandum from Herbert Choy to Associates (Jan. 7, 1977).

¹⁷⁷ Memorandum from J. Blaine Anderson to Associates (Jan. 27, 1977).

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1977,¹⁷⁸ held that *Almeida-Sanchez* did not apply to permanent checking searches between that ruling and the *Bowen* en banc.

Judge Choy's majority view was that the Supreme Court's *Ortiz* ruling "neither indicates that the Court at any time previously had ruled on checkpoint searches, nor even implies that *Almeida-Sanchez* held checkpoint searches invalid."¹⁷⁹ It was *Ortiz* that for the first time held *Almeida-Sanchez* applicable to checkpoints not at the border; prior to the Ninth Circuit's *Bowen* ruling, there was "no holding giving law enforcement agencies adequate notice of the unconstitutionality of fixed checkpoint searches conducted without probable cause or consent."¹⁸⁰ In short, until *Ortiz* and *Bowen*, there had been no adequate notice to law enforcement. Judge Hufstедler dissented for several judges to say what she had proposed to say earlier in *Juarez-Rodriguez*: "No retroactivity issue is presented by *United States v. Ortiz*"¹⁸¹ and that case announced no new doctrine, so it should be applicable to the cases at issue.¹⁸² The Supreme Court denied review.¹⁸³

TYPES OF INTERACTION

In the interaction between the Ninth Circuit and the Supreme Court over border searches, there were, of course, many more cases that did not reach the Supreme Court. But what were the types of interactions between the two courts? A number of these aspects became evident in the post-*Almeida-Sanchez* dynamics, and they are identified here without suggesting what would lead to particular effects or whether certain types of effects would increase after particular judicial rulings.

Before proceeding to some analysis, we note some additional instances in which the Supreme Court's rulings interacted not only with the Ninth Circuit decisions discussed thus far but with other circuit precedents, including those on the "founded suspicion" necessary for a stop. In one case, a panel of liberal judges Walter Ely and Shirley Hufstедler and a district judge ruled that "founded suspicion" justifying

¹⁷⁸ *United States v. Escalante*, 554 F.2d 970 (9th Cir. 1977) (en banc).

¹⁷⁹ *Id.* at 972.

¹⁸⁰ *Id.* at 972-73.

¹⁸¹ *Id.* at 973 (Hufstедler, J., dissenting).

¹⁸² One of Judge Goodwin's law clerks, Mickey Bierman, had disagreed with the Choy opinion and spoke of the problems involved in holding *Ortiz* non-retroactive. Memorandum from Mickey Bierman to Judge Goodwin (n.d.). On the memorandum's face, the judge had written, "I agree with Bierman J," and he joined the Hufstедler dissent, as he had in *Juarez-Rodriguez*.

¹⁸³ *Escalante v. United States*, 434 U.S. 862 (1977), *denying cert. to* 554 F.2d 970 (9th Cir. 1077) (en banc).

the stop was lacking. They noted that “[t]he Government has attempted to save this border patrol rover case from the impact of *Almeida-Sanchez v. United States*” and the Ninth Circuit’s own *Brignoni-Ponce* en banc “on the ground that the border agent had a founded suspicion justifying his making an investigatory stop under the authority of *United States v. Bugarin-Casas* (9th Cir. 1973) 484 F.2d 853.”¹⁸⁴ In another case, in which the majority held there was founded suspicion, Judge Hufstедler wrote separately to say she had to concur “under the compulsion of the founded suspicion cases in this Circuit” but went on to observe, “I am unable to reconcile the rationale of *Almeida-Sanchez* . . . forbidding stops and searches of vehicles at nonborders without probable cause, and our founded suspicion cases permitting stops of vehicles beyond the border on less than probable cause.”¹⁸⁵

I. *Direct Action*. At times, after a Supreme Court ruling, the court of appeals **acted directly**. For example, the Ninth Circuit disposed of a 1974 case by finding the stop of defendant’s car unlawful under both *Almeida-Sanchez* and the *Bowen* en banc, so that the discovered marijuana from the stop and search should have been suppressed.¹⁸⁶ Another panel dealing with a stop and search at a fixed checkpoint after *Almeida-Sanchez* said that without the fruit of the search, successful prosecution was not possible, requiring reversal with instructions to dismiss the indictment.¹⁸⁷

Despite an apparent inclination to wait for the Supreme Court, the court of appeals did not suspend judgment in all instances where questions related to *Almeida-Sanchez* were before the Supreme Court and resolved some cases directly on grounds other than those involved in the Supreme Court’s ruling. In one case, the judges, while noting that such questions were indeed pending, said they need not delay their disposition reversing a conviction.¹⁸⁸ The panel judges, using an unpublished disposition, said that they assumed that the initial stop and search for aliens was valid but agreed that when the search commenced, there was no probable cause to search for contraband and the statute authorized searches only for aliens. Because the search could not be upheld as a “border search,” the agents had to have probable cause.

¹⁸⁴ *United States v. Madriz-Villaneuva*, No. 74-1293 (9th Cir. July 1974). The *Bugarin-Casas* case held that founded suspicion existed when officers saw a low-riding station wagon with a compartment that could hide aliens.

¹⁸⁵ *United States v. Whitmarsh*, No. 74-1881 (9th Cir. Nov. 1, 1974).

¹⁸⁶ *United States v. Luna*, No. 74-1115 (9th Cir. May 21, 1974).

¹⁸⁷ *United States v. Thompson*, No. 74-1352 (9th Cir. Jan. 22, 1975).

¹⁸⁸ *United States v. Lopez*, Nos. 73-1866, 73-1867 (9th Cir. Jan. 28, 1974).

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There were also convictions affirmed as clearly involving a border search and thus not covered by *Almeida-Sanchez*.¹⁸⁹ Other affirmances resulted when the defendant failed to raise the *Almeida-Sanchez* issue at trial, particularly after that decision was decided; this was especially obvious when the point had not been raised at the time of a trial six months after the Supreme Court had ruled.¹⁹⁰ Still other efforts to bring cases within *Almeida-Sanchez* were unavailing, and simply claiming that a case was a “border search” did not become a talisman for undoing convictions. For example, a panel, finding that a search was of abandoned property or a justifiable border search, said that unattended golf carts in a no-man’s-land desert area twenty-six miles from a golf course provided probable cause for any officer.¹⁹¹ In still another instance, the court, explicitly accepting *Almeida-Sanchez*, affirmed because only “reasonable suspicion” was necessary to require a car to halt and for the officer to make the inquiry, which provided probable cause.¹⁹²

II. *Action on Petition for Rehearing.* In some instances, the Supreme Court’s ruling was **applied to the filing of a petition for rehearing (PFR)**, including some PFRs filed on the basis of the Justices’ decision. Examples were unpublished decisions allowing filing of a rehearing petition because the facts of the case were within *Almeida-Sanchez*¹⁹³ or even when, according to the judges, the case was probably distinguishable from *Almeida-Sanchez*.¹⁹⁴ In other cases, the court granted the government’s petition for rehearing, vacated its prior disposition, and affirmed a conviction because of the Supreme Court’s 1975 ruling in *Peltier*,¹⁹⁵ providing examples of how the court of appeals changed its position after the Supreme Court’s ruling in that case. Two other memorandum dispositions were likewise withdrawn and convictions affirmed on the authority of *Peltier*.¹⁹⁶ In another instance, a

¹⁸⁹ *E.g.*, United States v. Sanchez, 73-1142 (9th Cir. Aug. 28, 1973).

¹⁹⁰ United States v. Ratcliff, 74-1931 (9th Cir. Sept. 10, 1974); *see also* United States v. Castenada-Campos, No. 73-1824 (9th Cir. Aug. 8, 1973).

¹⁹¹ United States v. Getchel, No. 73-1868 (9th Cir. Aug. 8, 1973).

¹⁹² United States v. Perez-Ramos, No. 73-1811 (9th Cir. Aug. 8, 1973).

¹⁹³ United States v. Flores-Ramos, No. 73-1040 (9th Cir. Mar. 19, 1973).

¹⁹⁴ United States v. Rios-Aguirre, 73-1030 (9th Cir. 1973). Distinguishing another case, a panel rejected an attempt to assimilate the facts in a case to *Almeida-Sanchez*. United States v. Hernandez-Padilla, No. 73-2225 (9th Cir. 1973).

¹⁹⁵ United States v. Rummonds, No. 73-1751 (9th Cir. Oct. 23, 1975); United States v. Mammari/United States v. Hutchings, Nos. 73-2340, 73-2391 (9th Cir. Oct. 22, 1975).

¹⁹⁶ United States v. Ganelin, No. 73-2669 (9th Cir. Nov. 7, 1975), and United States v. Sanchez-Sanchez, No. 73-2343 (9th Cir. Nov. 7, 1975).

panel had reversed a conviction on the authority of *Almeida-Sanchez* and the circuit's own ruling in *Peltier* and had remanded for consideration of *Wilson v. Porter*,¹⁹⁷ the court's leading ruling on "founded suspicion" to make a stop.¹⁹⁸ After receiving the government's PFR, the court called for a response from defendants, one of whom filed a stipulation that the Supreme Court's ruling in *Peltier* meant the PFR should be granted and the conviction affirmed on the basis of that decision. And the court did just that.¹⁹⁹

When, in still another case, a defendant did not respond to the government's PFR, the court granted rehearing, withdrew its earlier disposition, and affirmed the conviction in another unpublished ruling.²⁰⁰ When a panel had initially reversed a conviction because the court's own *Peltier* en banc decision had applied *Almeida-Sanchez* retroactively to roving border patrols, the court of appeals granted a government petition for rehearing because of the Supreme Court *Peltier* ruling and vacated its prior order. Affirming the conviction was compelled because the Supreme Court had held *Almeida-Sanchez* not applicable to pre-June 21, 1973, searches.²⁰¹

In addition to applying Supreme Court rulings after a PFR filing, court of appeals panels recalled mandates and invited the parties to brief the retroactivity question, which in effect extended the period in which a PFR could be filed.²⁰² This had the effect of recognizing both the application of *Almeida-Sanchez* itself and a major question not answered directly by the Supreme Court's ruling—the retroactivity matter. One of these cases later became the *Gordon* en banc case.²⁰³

III. Remand After Supreme Court Ruling. Some panels **remanded cases for district court consideration of the effect of the Supreme Court's ruling**, regularly using unpublished dispositions to do so. Indicative of the remands after Supreme Court rulings was one case a panel sent back

¹⁹⁷ 361 F.2d 412 (9th Cir. 1966).

¹⁹⁸ *United States v. Gonzales-Rosales/United States v. Beltran-Gutierrez*, Nos. 73-1533, 72-1534 (9th Cir. 1974).

¹⁹⁹ *United States v. Gonzalez-Rosales/United States v. Bertran-Gutierrez*, Nos. 73-1533, 73-1534 (9th Cir. Apr. 6, 1976); *United States v. Stark*, No. 72-3004, 538 F.2d 343 (9th Cir. 1976) (table).

²⁰⁰ *United States v. Smith*, No. 72-3106 (9th Cir. Mar. 29, 1976).

²⁰¹ *United States v. Carpenter*, No. 74-1403 (9th Cir. Oct. 22, 1975).

²⁰² See memorandum from James Carter to Associates and senior judges (July 20, 1973), and memorandum from Richard Chambers to Shirley Hufstедler, Associates (July 23, 1973), indicating such action in *United States v. Flores-Ramos*, No. 73-1040 (9th Cir. July 6, 1973).

²⁰³ *United States v. Gordon*, No. 73-1524; see memorandum from Stanley Barnes to Associates (Aug. 23, 1973).

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to the district court for a ruling on the validity of a “stop” in light of the Supreme Court’s decisions in *Ortiz*, *Bowen*, and *Brignoni-Ponce*.²⁰⁴ As well, immediately after the Supreme Court had decided *Martinez-Fuerte*, several Ninth Circuit panels remanded cases to the district court for reconsideration in light of it, adding in one, “It is indicated that the district court will wish to vacate its suppression order and proceed with the trial of the case.”²⁰⁵

Many such remands took place concerning *Almeida-Sanchez*,²⁰⁶ including the then not-yet-reached question of its retroactivity.²⁰⁷ In one such remand, the panel said that the district court “will wish to consider whether it is a case on inland checkpoints in the slipstream of *Almeida-Sanchez* . . . or whether it can rest on grounds independent of the law of the validity of required stops at fixed or semi-fixed checkpoints for a search for aliens.” The court also suggested that the case be held for the pending *Bowen* en banc ruling after the Supreme Court had vacated the panel ruling there and remanded for further consideration.²⁰⁸ Another panel sent a roving patrol case back to the district court on the theory that the Supreme Court’s decision might have made a difference because, on the record before the panel, one could conclude only that the district court relied on the Ninth Circuit’s *Almeida-Sanchez* ruling, but it “might have ruled differently had it had the benefit of the decision of the Supreme Court reversing” that ruling.²⁰⁹

With respect to some cases containing an issue as to *Almeida-Sanchez*’s applicability to fixed checkpoints, it was suggested that “the proper course is to remand such cases to the district court to determine whether a search at the relevant checkpoint was the ‘functional equivalent’ of a border search” under Justice Stewart’s opinion.²¹⁰ In one such case, the panel’s author argued that the government’s position made it unnecessary to remand for such determinations, but, during the time when judges were seeking cases to take en banc, he circulated his proposed opinion to the full court and withheld filing it “until all

²⁰⁴ *United States v. DeEvans*, No. 74-2358 (9th Cir. Nov. 8, 1975).

²⁰⁵ *United States v. Arechiga-Moran*, No. 75-3383 (9th Cir. July 28, 1976); *see also* *United States v. Wise*, No. 75-3014 (9th Cir. July 28, 1976); *United States v. Diaz-Perez*, No. 74-2153 (9th Cir. July 28, 1976).

²⁰⁶ *E.g.*, *United States v. Baca*, No. 73-2048 (9th Cir. Sept. 10, 1973); *United States v. Lindsay*, No. 73-2205 (9th Cir. Sept. 10, 1973).

²⁰⁷ *United States v. Carpenter*, No. 73-2010 (9th Cir. Sept. 10, 1973).

²⁰⁸ *United States v. Holley*, No. 73-1079 (9th Cir. Feb. 28, 1974).

²⁰⁹ Memorandum from Alfred T. Goodwin to J. Clifford Wallace, District Judge Matthew Byrne, Sr., Associates (July 16, 1973) (re *United States v. Gonzales-Rodriguez*, No. 73-1533, and *United States v. Beltran-Gutierrez*, No. 73-1534).

²¹⁰ Memorandum from James R. Browning to Associates (Aug. 15, 1973).

members of the court have had time to look into the matter and express their own views on the subject.”²¹¹

IV. *Remand in Light of Ninth Circuit Ruling.* The court of appeals also **remanded in light of its own rulings.** It did this, for example, after its *Bowen* en banc ruling. Indeed, at least one judge, admitting he had been “guilty already of joining in reversal of some *Almeida-Sanchez* cases” on the basis of the court’s *Bowen* ruling, suggested that the cases be remanded, not reversed, because “[t]he Supreme Court usually gives us this consideration.”²¹² Roving border patrol cases on appeal at the time of *Almeida-Sanchez* were remanded for reconsideration under the Ninth Circuit’s own follow-up en banc ruling in *Peltier*.²¹³ Here, the judges had more in mind than a routine look at a new case; when they remanded, they added, “It seems to be indicated that the judgment should be vacated and, if the government has no additional evidence, the indictment dismissed.”²¹⁴ Likewise, in deciding two cases on permanent checkpoint border searches in which aliens had been found, a panel vacated one for reconsideration under *Almeida-Sanchez* and *Bowen* because the court’s *Bowen* ruling had applied *Almeida-Sanchez* to permanent checkpoints,²¹⁵ but it directly affirmed the other because of *Bowen*’s holding that *Almeida-Sanchez* would not be applied to searches that took place before June 21, 1973.²¹⁶

Cases were also remanded because the questions they raised required further lower court action independent of what the Supreme Court might say. Thus in one case, when the court’s *Bowen* and *Brignoni-Ponce* en bancs applying *Almeida-Sanchez* to fixed checkpoints were “now before the Supreme Court on *certiorari*” and the related *Martinez-Fuerte* inspection warrant case was also pending, the judges said that “ordinarily we might either take this case under submission or remand it to the district court, awaiting the decision of the Supreme Court.”²¹⁷ Instead, remand was in order because another Ninth Circuit case had distinguished between certain observations of a moving vehicle

²¹¹ Memorandum from Alfred T. Goodwin to Judge Walter Ely, District Judge William East, Associates (June 12, 1974) (re *United States v. Nava-Bibayoff*, No. 74-1099/*United States v. Esquer-Rivera*, No. 74-1110).

²¹² Memorandum from Richard Chambers to Associates (May 22, 1974).

²¹³ *United States v. Flores-Ramos*, No. 73-1040 (9th Cir. June 5, 1974); *United States v. Rummonds*, No. 73-1751 (9th Cir. June 5, 1974).

²¹⁴ *United States v. Carderon-Trejo*, No. 73-2049 (9th Cir. Aug. 28, 1974).

²¹⁵ *United States v. Saldana-Hernandez*, No. 73-3395 (9th Cir. June 7, 1974).

²¹⁶ *United States v. Rice*, No. 73-2997 (9th Cir. June 7, 1974).

²¹⁷ *United States v. Vbirros*, No. 74-2874 (9th Cir. Jan. 27, 1975).

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and those at a “stop,” and at oral argument, counsel had asked for an opportunity to distinguish that case, and the parties had also agreed at oral argument that they had not argued another important point related to whether defendant’s flight created probable cause; remand was thus in order.

V. *Holding Cases Pending Supreme Court Action.* Some panels **held cases until the Supreme Court acted.** For example, judges waited until the Supreme Court decided *Almeida-Sanchez* and then handed down their decisions. One such panel, quoting Justice Powell’s concurring opinion, affirmed a conviction because *Almeida-Sanchez* was *not* controlling as the search was at a fixed checkpoint,²¹⁸ and a slightly different panel took identical action two days later.²¹⁹ The court of appeals might also defer action for a case the Supreme Court was only *considering*, as one could see when the Ninth Circuit held cases open pending the Supreme Court’s rulings in *Bowen* and *Ortiz*. A Ninth Circuit judge reported eight cases in which, after acting (affirming or reversing) on the basis of the court of appeals’ own rulings, the panel had “withheld the mandate pending action by the Supreme Court in Bowen and Ortiz.”²²⁰

In a case involving a pre-*Almeida-Sanchez* San Clemente checkpoint stop lacking probable cause, a panel observed that, under the circuit’s own *Bowen* decision,²²¹ the district judge had not erred in denying the defendant’s motion to suppress. However, the panel nonetheless stayed the mandate until the Supreme Court rulings in *Bowen* and *Ortiz*.²²² The same panel, pointing both to *Bowen* and to the panel ruling in *Juarez-Rodriguez*, also stayed the mandates on finding that the trial judge had rightly granted a motion to suppress.²²³ All such activity was part of what a law clerk suggested, that one case “should be held until the court determines the ambit of the Supreme Court’s rule in *Almeida-Sanchez*.”²²⁴ And in one of the many cases after *Almeida-Sanchez*, a panel held a case pending the Supreme Court ruling *and* the circuit’s own case as to its retroactivity, *United States v. Peltier*,²²⁵ and

²¹⁸ *United States v. Hendrix*, No. 73-1523 (9th Cir. July 9, 1973).

²¹⁹ *United States v. Ragusa*, No. 73-1314 (9th Cir. July 11, 1973).

²²⁰ Memorandum from Ben C. Duniway to Associates (July 21, 1975).

²²¹ *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974) (en banc) (per curiam).

²²² *United States v. Holley*, No. 74-2997 (9th Cir. Feb. 20, 1975).

²²³ *United States v. Lewis*, No. 74-2875 (9th Cir. Feb. 20, 1975).

²²⁴ Memorandum from Don Friedman (law clerk) to Judge Goodwin (Aug. 24, 1973) (re *United States v. Tolbert*, No. 73-1941).

²²⁵ 500 F.2d 985 (9th Cir. 1974) (en banc), *rev’d*, 422 U.S. 531 (1975).

then used those opinions to reverse the conviction,²²⁶ as did panels in a number of other instances.²²⁷ A panel ordered another deferral while *Martinez-Fuerte*²²⁸ was awaiting Supreme Court decision, and then the panel reversed a district court's suppression of evidence.²²⁹

VI. *Remand for District Court to Hold Case Pending Supreme Court Action.* In addition to holding a case until after a Supreme Court decision, some panels remanded for district courts to do so **in anticipation of a Supreme Court ruling.** Superseding a March 1973 judgment, the court of appeals remanded to allow a defendant to file a motion to vacate his conviction because the case was likely to be covered by the Supreme Court decisions in *Ortiz*, *Bowen*, and *Brignoni-Ponce*.²³⁰ Mixing deferral with its remand, the panel suggested further that the district court would want to postpone action until after the Supreme Court had acted.²³¹ Another panel took similar action a few days later, remanding to the district court to hold the matter open and to rule in the eventual light of the Supreme Court's decisions in those cases.²³² When a Ninth Circuit panel reversed a conviction on the authority of the circuit's ruling in *Martinez-Fuerte*, it also remanded for the district court to hold the case open pending the Supreme Court rulings in *Bowen* and *Ortiz* as well as the appeal from *Martinez-Fuerte* itself.²³³

VII. *Anticipation of Certiorari Grant.* Deferral also took place **when the court of appeals believed that the circuit's decision was likely to be taken to the Supreme Court and granted review.** For example, a panel, although originally having reversed a conviction for an offense committed prior to *Almeida-Sanchez*, ordered the decision withheld pending the Supreme Court's decision in *Bowen* and *Peltier*.²³⁴ Once the Justices decided in the latter that *Almeida-Sanchez* should not be

²²⁶ *United States v. Hornbecker*, Nos. 72-2692, 72-2724 (9th Cir. May 17, 1974).

²²⁷ *See, e.g., United States v. Zarate-Briceno*, No. 73-2114 (9th Cir. July 18, 1974).

²²⁸ *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

²²⁹ *United States v. Enriquez*, 554 F.2d 1071 (9th Cir. 1977) (table).

²³⁰ *United States v. Rios-Aguirre*, No. 73-1030 (9th Cir. Jan. 15, 1975). In its earlier memorandum disposition affirming (9th Cir. Mar. 19, 1973), the court had said one could probably distinguish the case from *Almeida-Sanchez* but that the defendant could ask for a rehearing.

²³¹ *Rios-Aguirre*, No. 73-1030 (9th Cir. Jan. 15, 1975).

²³² *United States v. Sanchez-Pedraza*, No. 74-2786 (9th Cir. Jan. 24, 1975).

²³³ *United States v. Palmanteer*, No. 74-2945 (9th Cir. Apr. 28, 1975).

²³⁴ *United States v. Gutierrez*, No. 73-3134 (9th Cir. July 14, 1975); *see also United States v. Zarate-Briceno*, No. 73-2114 (9th Cir. Dec. 10, 1975); *United States v. Slosser*, 72-2404 (9th Cir. Oct. 14, 1975) (vacating the prior disposition and affirming the conviction).

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retroactive, the panel granted rehearing and affirmed the conviction.²³⁵ And, having ruled that defendant's motion to suppress should have been granted on the basis of the court's own *Bowen* ruling²³⁶ and another case,²³⁷ the judges stayed the mandate pending the filing of a certiorari petition in *Bowen* or until sixty days after filing of the memorandum disposition. Likewise, when the government conceded that those two cases supported the district court's grant of a motion to suppress because the stop at the San Clemente checkpoint came after *Almeida-Sanchez* and was invalid because it was without founded suspicion or probable cause, the court also stayed the mandate pending the Supreme Court's ruling in *Bowen* and the related *Ortiz* case.²³⁸ After the Ninth Circuit had held *Almeida-Sanchez* retroactive in *Peltier*, a Ninth Circuit panel applied it to strike down a conviction where the statute and regulation in *Almeida-Sanchez* "provided the sole underpinning" for the challenged search and stop.²³⁹ The panel nonetheless stayed the mandate until the Supreme Court disposed of the pending *Peltier* certiorari petition.²⁴⁰

CONCLUSION

In this story of the aftermath of the *Almeida-Sanchez* case, there was no simple single arrow from a Supreme Court ruling to a single case below, but multiple arrows—at first, the Supreme Court ruling *plus* its accompanying GVR decisions, plus its later rulings—striking a host of potentially affected cases, and there were overlapping sets of cases in play on the status of fixed checkpoints and on the question of *Almeida-Sanchez*'s retroactivity. The dynamics became yet more complex as the Ninth Circuit dealt with the first stage of the aftermath of *Almeida-Sanchez*, particularly by deciding *Bowen* en banc. Thus there is no single chronological line to be followed easily, as both the court of appeals and the Supreme Court were deciding multiple cases in parallel and intersecting ways.

²³⁵ *Gutierrez*, No. 73-3134 (9th Cir. July 14, 1975).

²³⁶ *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974) (en banc) (per curiam).

²³⁷ *United States v. Juarez-Rodriguez*, 498 F.2d 7 (9th Cir. 1974), *withdrawn*, 568 F.2d 120 (9th Cir. 1976).

²³⁸ *United States v. Olmstead*, No. 74-2759 (9th Cir. Dec. 30, 1974); *see also* *United States v. Olmdahl*, No. 74-2450 (9th Cir. Dec. 30, 1974); *United States v. Jarvis and Murphy*, No. 74-2502 (9th Cir. Dec. 30, 1974); *United States v. Atkinson*, No. 74-2040 (9th Cir. Sept. 26, 1974).

²³⁹ *United States v. Duran*, No. 74-1841 (9th Cir. Aug. 19, 1974).

²⁴⁰ The Justices subsequently overturned the Ninth Circuit ruling in *United States v. Peltier*, 422 U.S. 531 (1975).

Although not cast in terms of the Supreme Court's *impact*, this Article suggests the great effect that the Supreme Court does have on the U.S. court of appeals. Despite the possibility that lower federal courts may thwart the U.S. Supreme Court by avoiding its rulings or at least their full implications, the evidence here is quite to the contrary, with the Ninth Circuit having followed the Supreme Court's lead and having largely deferred to it. The courts of appeals maintain considerable autonomy because of the small likelihood that the Justices will accept any of their cases for review, but they have that autonomy primarily in areas of law in which the Supreme Court has not spoken. Once the Justices speak, the lower courts most often follow.

On the basis of the Court's initial ruling in *Almeida-Sanchez*, the court of appeals acted directly: convictions were affirmed, or, more importantly, reversed. Many others were sent back to the district court for "reconsideration in light of" the Supreme Court's action. Other cases were held for further developments that would facilitate their resolution, so that multiple panels would not each have to do the same work. And we see the court of appeals determining which cases would be most appropriate to decide en banc, to provide the cleanest resolution of the issues on which other cases depended.

That the court of appeals held cases for decision points to an especially important, and particularly noteworthy, aspect of Supreme Court effect: the lower court's *anticipatory deference* to the Supreme Court. Such deference held constant across competing judicial ideologies (or "agendas"), as both "liberals" and "conservatives" wanted key issues, such as whether a ruling on roving patrols applies to fixed checkpoints or what was a fixed checkpoint or which rulings were retroactive, resolved by the court of appeals so those matters could go to the Supreme Court for final resolution, as the judges knew they would.

The dynamic interaction between the two courts resulted in short-term delay in handing down judgments in particular cases when panels held cases for decision pending en banc rulings or new Supreme Court decisions in a string of border search rulings. Yet, despite apparent delay, there is a sense in which cases moved along more quickly overall. Not only were a number of cases heard en banc before final panel action—not the usual situation—but the court acted to send cases more quickly to the Supreme Court by moving to en banc hearing more rapidly. Indeed, some judges argued for speeding cases to the Supreme Court by not tying them up for an extended time in the en banc process, as they knew that the Justices would have the final word and that these issues were quite "certworthy."

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As this story is not only about a lead Supreme Court ruling but also about several other decisions by the Justices and multiple court of appeals en banc rulings within roughly a five-year span, one might ask, almost forty years later, how typical is this story. One answer is, “We don’t know,” both because materials that would reveal the sorts of dynamics portrayed here have not been accessible and in large measure because such dynamics have not been the focus of scholars, who have looked at the effect of single cases on results in cases below. In many areas of the law, the Supreme Court decides a case and then does not accept another case on the subject for quite some time, unlike the situation portrayed here as to the law of border searches. In areas of the law in which there are relatively fewer cases, such as antitrust, one can imagine a major Supreme Court antitrust ruling having effects on U.S. court of appeals decisions, but there are simply not that many antitrust cases proceeding in the lower courts at any one time in which immediate and substantial effects would be registered. Or, after enactment of a widely challenged statute, a single ruling might cause some lower courts to have to alter some of their rulings after the Supreme Court overturned their position on the law, as the Ninth Circuit had to do when new inter-circuit conflict developed after Congress passed the Sentencing Guidelines Act and the Supreme Court upheld it in *Mistretta v. United States*.²⁴¹

There are, however, areas of law in which a larger number of cases are at various stages of working their way through the court of appeals, such that even one Supreme Court ruling will have the range of effects seen here. Some aspects of substantive criminal law would be among them, as would, certainly, aspects of criminal procedure, including effectiveness of counsel, aspects of search and seizure beyond those covered here, and federal habeas corpus procedure, rulings in all of which would potentially affect every one of state prisoners’ many efforts to test their state convictions in federal court. Another such high-volume area would be immigration law, where the increase in appeals from agency rulings, most obviously in the Second Circuit and the Ninth Circuit, has led to creation of means such as special screening panels to deal with that volume.

The aftermath or “backwash” from the Supreme Court’s ruling in *Almeida-Sanchez* well illustrates the dynamic interaction between the Supreme Court and a U.S. court of appeals, as well as the latter’s closely related internal dynamics as it coped with the effects of *Almeida-Sanchez* and its progeny. The post-*Almeida-Sanchez* period also provides a look

²⁴¹ *Mistretta v. United States*, 488 U.S. 361 (1989).

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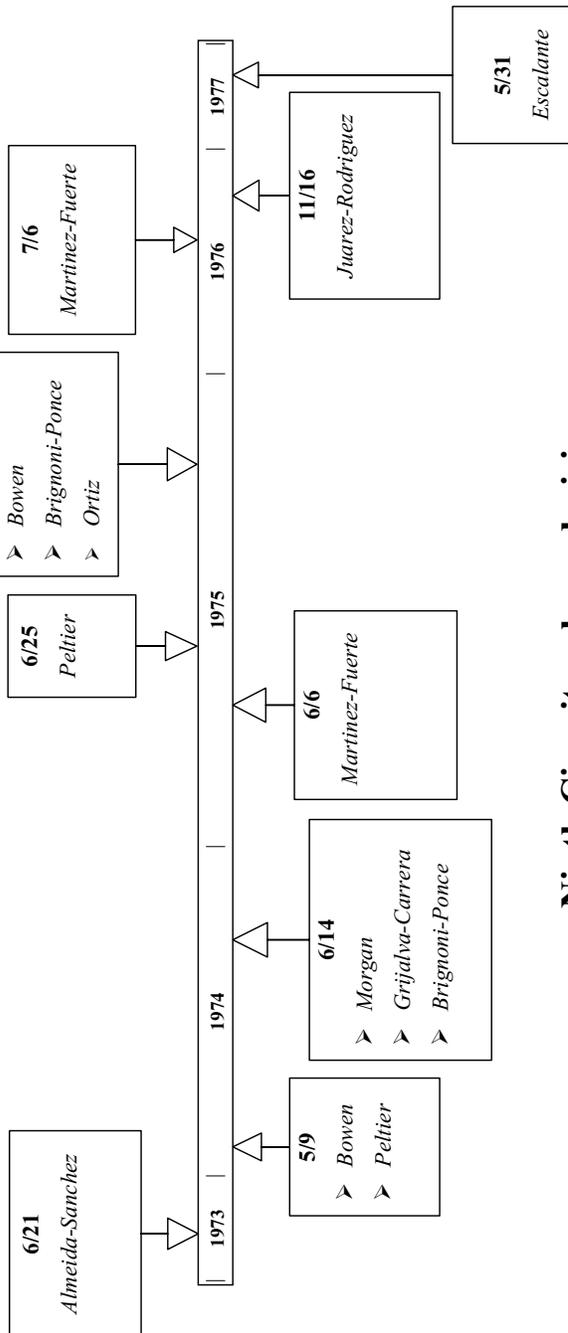
Inter-Court Dynamics

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at interaction among court of appeals judges as they decide whether to hear a case en banc and the reasons why cases are heard en banc. One also sees substantial use of unpublished dispositions, as the Ninth Circuit began its regular use of them during this period.

Timeline

U.S. Supreme Court decisions



Ninth Circuit en banc decisions