1987

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Barbara A. Susman

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THE IMMIGRATION REFORM AND
CONTROL ACT OF 1986 ("IRCA"): IMPACT
UPON EMPLOYER/EMPLOYEE FOURTH
AMENDMENT PROTECTIONS AGAINST
UNREASONABLE SEARCH AND SEIZURE

Barbara A. Susman*

I. INTRODUCTION

On November 6, 1986, an historic change in American immigration law occurred, when President Ronald Reagan signed into law the Immigration Reform and Control Act of 1986,¹ also known as

* Principal in the Chicago law firm of Susman & Associates, concentrating in the areas of customs, corporate immigration, and international trade law. Ms. Susman is a former Judicial Clerk to the Honorable Jane A. Restani, U.S. Court of International Trade (NY), and also interned for the U.S. Customs Service, Office of the Regional Counsel (Chicago), where she received a merit award for excellence in service. She is an active member of the American Bar Association, International Law Section and American Immigration Lawyers Association and a member of the Chicago Bar Association, Immigration and Naturalization Committee. She serves on the Illinois State Bar Association, International and Immigration Law Section Council. The author is a member of the Chicago Council on Foreign Relations and is appointed to its Committee on Foreign Affairs. She was recently appointed a Director on the Board of the International Trade Club (Chicago), and serves on the Board of Directors for the Panamerican Council.

the Simpson-Rodino Act. IRCA amends and adds to the Immigration and Naturalization Act of 1952. Probably one of the most revolutionary highlights of the Act is that it not only affects and creates new obligations for aliens of all kinds, but that it also impacts every U.S. employer and employee, whether a citizen, legal permanent resident or alien. Another major feature of IRCA is that it not only creates civil penalties, but also criminalizes different forms of prohibited conduct. In effect, the Act has introduced a new labor law, which promises to impose as much change upon American labor relations, hiring and human resource management as it will upon immigration patterns and practices in the United States.

This article will not attempt to provide an exhaustive monograph analyzing all previously decided cases or potential issues that might arise under IRCA, where Fourth Amendment concerns are involved. But rather, it will focus primarily upon IRCA and its impact upon and relationship to the Fourth Amendment. It will first describe the new procedures and requirements now to be satisfied under the employment verification system, the new civil and criminal sanctions prescribed by the Act and generally the sweeping changes wrought by the enactment of IRCA. It will then consider the past agency practices of the Immigration and Naturalization Service (INS) and prior case authority, which had delineated somewhat the outlines of pre-existing Fourth Amendment protections extended to employers and employees prior to the passage of IRCA. This will be followed by an analysis of presently untested and undeclared Fourth Amendment protections and concerns, as they might or should be under the Act.

2. Enactment of the new law came as a major surprise to most observers. The law had failed to achieve enactment in six sessions of Congress, over a period of ten years. On September 26, 1986, Representative Peter Rodino, Chairman of the House Judiciary Committee, pronounced the bill "dead," following a 202-180 House vote defeating a rule for floor debate. However, by October 9, debate, amendment and passage by the full House was facilitated by a compromise on farm labor provisions, making the bill more attractive to growers in the western United States. By October 17, a House-Senate joint conference committee version had achieved passage by both houses. For a detailed history of the steps leading to passage of the IRCA. See Interpreter Releases, Vol. 63, No. 42, Oct. 20, 1986.


4. The term "aliens" includes: temporary (nonimmigrant) aliens, permanent aliens (immigrants), unauthorized aliens or illegal aliens, and intending citizens. See infra notes 16-17, and accompanying text.

5. See infra notes 20-34 and accompanying text.

6. See infra notes 54-71 and accompanying text.

7. See infra notes 72-186 and accompanying text.

8. See infra notes 187-229 and accompanying text.
Finally, this article will conclude that IRCA's new procedures, exclusive far-reaching regulatory system, and severe criminal penalties and sanctions create new Fourth Amendment concerns and warrant stricter adherence to now heightened Fourth Amendment standards in all phases of government contact with employers and employees. In addition, IRCA should give rise to a heightened awareness of the need to restrict initial encounters between officers and individuals in the workplace. There are also problems associated with the Act's allowance of warrantless visits or the presence of INS or labor investigators on employers' premises for particular purposes designated by the Act. It is also necessary to focus on the need to restrict government officers' warrantless conduct, and highlight the need for a criminal probable cause basis for warrants, which should require individual specificity and particularity. In addition, the judiciary should become more demanding with regard to INS officials' authority to enter premises warrantlessly for reasons other than those specified in IRCA, INS authority to question employees on employers' premises without a warrant, and what conduct constitutes an unauthorized or unreasonable seizure.

II. THE IMMIGRATION REFORM AND CONTROL ACT OF 1986: THE NEW LAW

IRCA establishes, for the first time, a systematic mechanism that provides for: specific employer verification and recordkeeping requirements; INS warrantless record inspection authority; increased appropriations for enforcement activity; new penalties for unauthorized alien employees and both civil as well as criminal sanctions against employers who violate the new laws. This system is aimed at the ferreting out and removing illegal aliens throughout the U.S. by way of the workplace. In the enactment of IRCA, Congress selected employers as the primary tool for control of illegal immigration. The new obligations imposed upon employers, and the penalties for neglecting these obligations, are truly significant.

A. Prohibition of Unlawful Employment of Aliens

Generally, IRCA proscribes two principal areas of employer hiring: the actual hiring of illegal aliens and violation of paperwork requirements. IRCA makes it "unlawful for a person or other entity

9. IRCA does create other new areas of employer regulation and liabilities, such as discrimination against permanent resident aliens who are intending citizens; however, these areas are not relevant to a Fourth Amendment analysis and hence outside the scope of this article.
to hire, or to recruit or refer for a fee, for employment in the United States... an alien knowing the alien is an unauthorized alien... with respect to such employment, or an individual without complying with the requirements of the Act’s new employment verification system. The Act expressly exempts from coverage all hiring, recruiting and referring of individuals for a fee, which occurred prior to the date of its enactment, November 6, 1986. Consequently, an employer may continue to employ an alien who was hired before November 6, 1986, even with knowledge that the alien is unauthorized. However, an employee who was hired prior to November 7, 1986 shall lose his or her pre-enactment status if any one of the following events occur: the employee quits, is terminated by the employer, is excluded or deported from the United States or departs from the United States under an order of voluntary departure.

An “unauthorized alien,” for purposes of the new prohibition, is a person who is not lawfully admitted for permanent residence, not authorized by the INS to be employed in the United States, or has not maintained his/her nonimmigrant status which provided original authorization for employment in the United States.

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12. IRCA § 101(a)(3) provides:
Section 274A(a)(1) of the Immigration and Nationality Act shall not apply to the hiring, or recruiting or referring of an individual for employment which has occurred before the date of the enactment of this Act. See also 52 Fed. Reg. 16,224 (1987) (to be codified at 8 C.F.R. § 274a.7(a)).

13. 52 Fed. Reg. 16,224 (1987) (to be codified at 8 C.F.R. § 274a.7(b)(1)).

14. Id. at § 274a.7(b)(2). Termination under this subsection expressly includes, but is not limited to, situations in which the employee is subject to seasonal employment.

15. Id. at § 274a.7(b)(3).


17. Insofar as failure to maintain status, which would cause an alien to become "unauthorized," an alien might allow his/her visa to expire. See IRCA § 101(a), 8 U.S.C.A. § 1324a.(b)(1)(B) (West Supp. 1987) (“unexpired endorsement of the Attorney General authorizing the individual's employment in the United States”) (emphasis provided) or might change jobs where prior work authorization may no longer apply, see, e.g., 52 Fed. Reg. 16,226 (1987) (to be codified at 8 C.F.R. § 274a.12(a), (b)). Thus, failure to maintain status would include the situation where the alien changes employers at a time when the alien has an employer-specific nonimmigrant visa, and fails to obtain a new visa or work authorization for
Distinct penalties attach to each of the different categories of non-compliance. By far, sanctions for the employer's actual hiring of illegal aliens, particularly where the hiring evidences a pattern or practice or "harboring," in contrast to penalties for failure to maintain proper records, are the most severe in nature, and they range in severity based upon the degree, frequency and nature of the employer's conduct or noncompliance.

B. Employment Verification System (EVS)

IRCA forbids the hiring, recruiting or referring for a fee for employment of any individual, for failure to follow a specific procedure to verify that the person is authorized to accept or continue in such employment in the U.S. An important feature to this system is that the EVS requires these special verification procedures to be followed regardless of the actual immigration status of each individual being hired, recruited or referred for a fee; whether or not the individual is a U.S. citizen or an alien. Significantly, an employer that has complied in good faith with the EVS requirements, has an affirmative defense under the Act to alleged violations of the hiring or paperwork requirements.

The verification system requires the participation of both employers and employees in a record production, examination, attestation and keeping process. Both employer and employee must complete the INS form I-9 within three business days of the hire for the new employer. In either case, this alien would not be an "unauthorized alien" for purposes of the Act, and the hiring of such an individual with no attention to perfecting his/her immigration status would prevent compliance with the verification process and expose the employer to the risk of any of a number of sanctions, depending upon the circumstances. See infra notes 22-39 and accompanying text.

18. See infra notes 58-76 and accompanying text.
19. See id.
   DEFENSE.—A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.
52 Fed. Reg. 16,224 (1987) (to be codified at 8 C.F.R. § 274a.4) similarly provides:
   An employer or a recruiter or referrer for a fee for employment who shows good faith compliance with the employment verification requirements of section 274a.2(b) of this part shall have established a rebuttable affirmative defense that the person or entity has not violated section 274A(a)(1)(A) of the Act with respect to such hiring, recruiting, or referral.
individuals hired after November 6, 1986 and who continue to be employed after May 31, 1987. Completion of Form I-9 involves the processes of verification and attestation.

Employers must examine specified documents to be presented by the employee in order to establish both: (1) the individual's identity as well as (2) the individual's authorization to work in the U.S. Some documents establish both an individual's identity and authorization to work in the U.S. In other cases, employers will need to examine several documents in order to verify a person's identity as

274a.2).

22. 52 Fed. Reg. 16,222 (1987) (to be codified at § 274a.2(b)(1)(B)(ii)). The form I-9 must be completed before the end of the first working day, in the case of employment of an individual for a duration of less than three business days. Id. at § 274a.2 (b)(1)(iii).

23. Id. See supra note 12.

24. Employers are only required to examine certain specified documents under the EVS, and are not required to retain photocopies. However, IRCA permits the photocopying of all documentation presented by an individual in order to comply with EVS requirements. The Act specifically overrules other statutes that would otherwise forbid the photocopying by employers of certain documents, such as a naturalization certificate, for the exclusive purpose of verification. IRCA § 101, 8 U.S.C.A. § 1324a.(b)(4) (West Supp. 1987). See 52 Fed. Reg. 16,221 (1987) (to be codified at 8 C.F.R. § 274a.2(b)(3)).

The issue of whether or not an employer should make and retain photocopies of the documents presented and examined is open to some debate. On the one hand, retention of photocopies demonstrates that the subject documents were presented, and presumably examined. This in itself would seem to evidence a good faith attempt at compliance. On the other hand, it is possible that these same photocopies could give rise to further scrutiny and questioning into whether or how the employer in could have believed that attestation based upon these documents was in good faith, where such documents were fraudulent or deficient. The inquiry might then become any of a number of questions, such as, how "obvious" was the fraud or deficiency, how much the employer knew (about immigration and nationality documents, about compliance), or the relationship between the employer and employee.

25. Documents which establish both an employee's identity as well as authorization for employment are:

(1) United States passport;
(2) Certificate of U.S. citizenship;
(3) Certificate of Naturalization;
(4) An unexpired foreign passport, provided it has an unexpired endorsement of employment authorization by the INS or U.S. Consulate;
(5) Alien Registration Green Card, INS form I-551, (commonly referred to as the "green card").


26. Documents which evidence only an individual's identity are:

(1) A driver's license or similar identification document issued by a state (the document must contain a photograph of its holder or other identifying information approved by the Attorney General), including: a state-issued driver's license or state-issued identification card containing a photograph (if no photograph appears on the license, then it must contain identifying information, such as: name, date of birth, sex, height, color of eyes, and address); school identification card with a photograph; voter's registration card; U.S. military card or draft record; identification card issued by federal, state or local government
well as employment authorization.\textsuperscript{27} In order to comply with the verification requirements, the employer must find that the document or combination of documents presented "reasonably appears on its face to be genuine."\textsuperscript{28}

Furthermore, the EVS requires that the employer, after examination of the above-described documents, attest, \textit{under penalty of perjury}\textsuperscript{29} that the employer has verified that the alien is not an unauthorized alien, by having examined that document or combination of documents which demonstrates identity and authorization for employment.\textsuperscript{30} The employee must also attest, \textit{under penalty of perjury}, and on the same I-9 form, that he/she is a citizen, a national, an alien lawfully admitted for permanent residence, or an alien authorized to work in the U.S.\textsuperscript{31}

Employers must retain the I-9 forms and make them available to the INS or the Department of Labor for a period of at least three years after the date of hire or one year after the date an individual's employment is terminated, whichever is later.\textsuperscript{32} Upon request by INS or Department of Labor officers, the employer must make the I-9 forms available for inspection at the location where the request for agencies or entities; military dependent's identification card; native American tribal documents; United States Coastal Guard Merchant Marine Card; or Driver's License issued by a Canadian government authority.

(2) Other documents to be approved by the Attorney General, in the case of individuals under 16 years of age or states that do not provide suitable identification documents, including: school record or report card; clinic doctor or hospital record; daycare or nursery school record.


27. Documents which evidence employment authorization are:
   (1) a social security card (other than one stating that employment is not authorized);
   (2) U.S. birth certificate or certificate of U.S. nationality at birth; or
   (3) other documents evidencing authorization of employment in the United States, to be approved by the Attorney General.


29. Perjury is "the intentional false statement under oath or affirmation in judicial or nonjudicial proceedings with knowledge of its falsity." M. Bassiouni, \textbf{Substantive Criminal Law} 420 (1978). Testimony or statements under oath must be given falsely and with knowledge that their nature is untrue. Perjury is a common law crime that requires a specific intent. "To testify rashly and inconsiderately according to belief, or inadvertently, or by mistake, is not perjury." J. Miller, \textbf{Miller on Criminal Law} 470 (1934).


31. \textit{Id.} at § 1324a.(b)(2).

32. \textit{Id.} at § 1324a.(b)(3).
production was made, within seventy-two hours of the request.\textsuperscript{33} It is also important to note that INS regulations expressly stipulate that "[n]o subpoena or warrant shall be required for such inspection" by the INS.\textsuperscript{34}

C. \textit{Unlawful Transportation of Aliens to the United States/ "Harboring"}

In addition to the new prohibitions discussed above, IRCA has opened up new areas of potential employer exposure to criminal liability for transportation, harboring or encouragement of illegal aliens to enter the U.S. in violation of U.S. immigration laws.\textsuperscript{35} The new Act has expanded both the conduct and the mental state that may constitute unlawful transportation, harboring, encouragement to enter in violation of U.S. immigration laws. This expansion increases the likelihood that more employers will fall into the scope of these now widened criminal provisions.

Historically, the harboring and transportation criminal provision of the INA\textsuperscript{36} has been aimed principally at the "coyotes," or professional "smugglers of humans." More recently, those involved in providing sanctuary to Central American refugees have also been targeted under this section.\textsuperscript{37} The proviso had long shielded employers from criminal liability for the "mere employment" of illegal aliens.

In the past, INA section 1324 carried with it the mitigating proviso, often referred to as the "Texas proviso," that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."\textsuperscript{38} This proviso was interpreted to require more than mere employment on the part of the employer, or "employment plus,"\textsuperscript{39} before the harsh criminal penalties of the harboring statute were triggered. IRCA eliminates this

\textsuperscript{33} 52 Fed. Reg. 16,223 (1987) (to be codified at 8 C.F.R. § 274a.8(b)(2)(ii)). If such records are maintained elsewhere, for example, at corporate "headquarters," the same period of time for production is allowed, but INS regulations apparently require that these be produced at the nearest Service office to the location. \textit{Id.}

\textsuperscript{34} \textit{Id.}


\textsuperscript{36} 8 U.S.C. § 1324.


\textsuperscript{38} 8 U.S.C. § 1324(a)(4).

Immigration Reform and Control Act proviso, thus opening a whole new area of concern, risk and interpretation to employers.\textsuperscript{40} The great potential for criminal liability in the new laws, distinctly lacking the "Texas proviso," will likely be the subject of much future debate and litigation and certainly must be considered in any Fourth Amendment analysis relating to the entry of immigration officers onto employers' premises.\textsuperscript{41}

It is now a potential criminal violation to bring or attempt to bring an unlawful alien into the United States "in any manner whatsoever."\textsuperscript{42} New Subsection 274(a) of the INA\textsuperscript{43} criminalizes an employer's action in knowingly bringing or attempting to bring an alien to the United States "in any manner whatsoever . . . regardless of any future action which may be taken with respect to such alien."\textsuperscript{44} Similarly, the new subsection proscribes the assisting of aliens who have come to, entered, or remained in the United States in violation of the law "knowingly or in reckless disregard" of the violation,\textsuperscript{45} and the encouragement or inducement of the alien to "come to, enter or reside in the United States . . . in violation of the law."\textsuperscript{46} At least one commentator has posited that on the face of the Act, it is at least arguable that "mere employment" may constitute conduct which "substantially facilitates an alien's remaining in the United States."\textsuperscript{47}

In addition, the prior level of intent standard under section 1324, "reasonable grounds to believe", has been supplanted by a "reckless disregard of the fact" standard. It is now a violation where the employer or defendant acts "knowing" or "in reckless disregard of the fact" that the alien either entered illegally or is in the U.S. illegally. Likewise, the Act proscribes encouraging or inducing "an alien to come to, enter or reside in the United States" either "knowing or in reckless disregard of the fact" that such coming to, entry, or residence is or will be in violation of law.\textsuperscript{48} Furthermore, the requirement that the employer-violator must either know or have rea-

\begin{itemize}
  \item \textsuperscript{40} The greater risk of and expanded definitions of criminal liability are apparent. The Service has already issued thousands of warning citations and notices of intent to fine. See Interpreter Releases, Vol. 65, No. 6, Feb. 8, 1988, at 133.
  
  \item \textsuperscript{41} See infra notes 85-91 and accompanying text.
  
  
  \item \textsuperscript{43} \textit{Id.}
  
  \item \textsuperscript{44} \textit{Id.}
  
  
  \item \textsuperscript{46} \textit{Id.} at § 1324(a)(1)(D).
  
  \item \textsuperscript{47} See Rosenberg, supra note 39, at 143. ("Certainly it can be argued that employment satisfies an alien survival needs, and thus, substantially facilitates an alien's remaining in the country.")
  
\end{itemize}
sonable grounds to believe that the alien's last entry into the United States occurred within the past three (3) years is eliminated under the Act.\(^4\)

Certain terms contained in the harboring provisions have been interpreted in the past. "Harboring" under section 1324 has been broadly defined in the past and includes any activity tending substantially to facilitate an alien's remaining in the United States illegally.\(^5\) Prior judicial interpretations of the legislative history have generally rejected the argument that "harboring" requires conduct which is secret or clandestine in nature.\(^6\) "Knowledge" has constituted in the past, knowing of the illegal status of the alien and knowingly concealing, harboring, or shielding the alien from detection. It has not required knowledge by the defendant that the conduct was illegal.\(^7\) "Inducing" an alien to enter the United States has in the past been defined so broadly that the offense is committed when the inducement to enter is made, (even if no entry is ultimately made).\(^8\)

D. Penalties Under the IRCA Provisions

The IRCA dramatically revamps current U.S. employment laws by imposing civil, equitable and criminal sanctions upon persons or entities which recruit, hire, or employ aliens who do not have work authorization.

1. Civil Penalties

An employer, recruiter or referrer for a fee may face civil penalties for violation of section 101 of the Act, prohibiting the employment of unauthorized aliens and imposing certain recordkeeping and verification requirements.\(^9\) In determining the level of the penalties to be imposed, a finding of more than one violation in the course of a single proceeding or determination will be counted as a single violation. However, a single violation will include penalties for each una-

\(^{49}\) See IRCA § 112 (1986).
\(^{50}\) United States v. Contu, 557 F.2d 1173 (5th Cir. 1977), reh. denied, 561 F.2d 831 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978).
\(^{51}\) See United States v. Acosta De Evans, 531 F.2d 428, 430 (9th Cir. 1976), cert. denied, 429 U.S. 836 (1976); United States v. Lopez, 521 F.2d 437, 441 (2d Cir.), cert. denied, 423 U.S. 995 (1975) (Act of 1952 amended the "conceal or harbor" conduct specified under the 1917 version of this subsection to include "shield from detection" as an additionally prohibited act).
\(^{52}\) United States v. Fierros, 692 F.2d 1291 (9th Cir. 1982), cert. denied, 462 U.S. 1120 (1983).
\(^{53}\) United States v. Kavazanjian, 623 F.2d 730 (1st Cir. 1980).
a. Civil Money Penalty for Paperwork Violations. The IRCA provides for an order for civil monetary penalty for violation of the “paperwork” or verification and recordkeeping provisions, as established by the EVS. It provides for the order of payment of a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. The Act further provides that in determining the amount of the penalty, consideration be given to: the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

b. Sanctions for the Knowing Hire, Recruitment or Referral of Unauthorized Aliens. An employer, recruiter or referrer for a fee found to have knowingly hired or to have knowingly recruited or referred for a fee an unauthorized alien for employment in the United States or to have knowingly continued to employ an unauthorized alien, may be subject to a variety of orders. An Administrative Law Judge (ALJ) may order the party to cease and desist from the illegal behavior. In addition, an ALJ may also order the offending party to pay civil fines according to a schedule based upon number of violations, ranging from $250 to $10,000 for each unauthorized alien. A pattern and practice of unlawful employment, recruitment or referral may also be enjoined.

55. Id.
56. Id.
57. Id.
58. 52 Fed. Reg. 16,225 (1987) (to be codified at 8 C.F.R. § 274a.10(b)(1)).
59. Id.
60. 8 C.F.R. § 274a.10(b)(1)(ii)(A)-(C) provides in pertinent part:
[a] respondent found . . . to have knowingly hired or to have knowingly recruited or referred for a fee unauthorized alien for employment in the United States or to have knowingly continued to employ an unauthorized alien, shall be subject to the following:
. . . [t]o pay a civil fine according to the following schedule:
(A) First violation—not less than $250 and not more than $2,000 for each unauthorized alien; or
(B) Second violation—not less than $2,000 and not more than $5,000 for each unauthorized alien; or
(C) More than two violations—not less than $3,000 and not more than $10,000 for each unauthorized alien.
61. Id.
2. *Criminal Penalties*

   a. *Unlawful Harboring, Transportation and Encouragement to Enter in Violation of the Law.* The "harboring" statute, prohibiting unlawful harboring, transportation and encouragement of aliens to enter into the United States, amending subsection (a) of INA section 274 and eliminating the "Texas proviso,"\(^{62}\) carries stiff criminal penalties for violation of its terms. Section 274(a) (2) penalizes any person who violates its terms knowingly or in reckless disregard of the fact that the alien is not authorized to work, for each transaction, regardless of the number of aliens involved. Criminal sanctions imposed for violation of the harboring statute include: fine "in accordance with title 18, United States Code, or imprisonment not more than one year, or both."\(^{63}\)

   More severe criminal penalties are imposed for conduct falling into the following categories: a second or subsequent offense, an offense committed for the purpose of commercial advantage or private financial gain, or an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry.\(^{64}\) Sanctions for these more serious types of conduct are: fine "in accordance with title 18 United States Code, or imprisonment not more than five years, or both."\(^{65}\)

   b. *Criminal Penalties for Pattern and Practice Violations.* Any person or entity engaging in a pattern or practice of violations involving the hiring, recruiting or referring for a fee of unauthorized aliens\(^{66}\) or to continue employing an alien who is or has become unauthorized with respect to employment will be subject to criminal sanctions,\(^{67}\) where such conduct constitutes a pattern or practice of unauthorized alien employment.\(^{68}\)

   "Pattern or practice" means "regular, repeated and intentional activities," and not "isolated, sporadic or accidental acts."\(^{69}\) The meaning derives from extensive judicial construction of other federal statutes.\(^{70}\)

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62. See notes 23-26 and accompanying text.
64. Id.
65. Id.
67. Id.
68. Id.
70. See, e.g., the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et seq., the Fair Housing
c. Penalties for Perjury. As discussed above, a basic feature of the new EVS requires both employer as well as employee to attest to the veracity of their statements made in the INS forms. Intentional false statements may trigger appropriate criminal punishment.71

III. PRE-IRCA FOURTH AMENDMENT PROTECTIONS FOR EMPLOYERS AND EMPLOYEES AGAINST INS SEARCH AND SEIZURE OF ALIENS

A. INS Authority to Search and Seize Illegal Aliens

The authority granted to INS in order for its conduct of enforcement activities in the areas of search and seizure is primarily comprised of the following three areas: (1) border patrol authority for external boundaries; (2) INS authority to interrogate without warrant; (3) INS authority to attest.72 During this analysis it is important to keep in mind the separate types of searches which INS enforcement activities have generally given rise to in the past: (1) patrol of the nation's borders, and (2) area control operations and urban searches.73

1. Borders or "Functional Equivalent"

INS Border Officers have special authorization, pursuant to section 287(a)(3) of the INA without warrant, within a reasonable distance74 from any external boundary of the United States, to board and search for aliens, any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought to the United States, as well as to board and search any of the above listed vehicles or conveyances for aliens.75 Under normal circumstances this provision does not apply to employers' premises.

Immigration Border Officers are also authorized in section 287(a)(3) of the INA "within a distance of twenty-five miles from..."
any . . . external boundary [of the United States] to have access to private lands, but not dwellings for the purpose of patrolling the border to prevent the illegal entry of aliens into the U.S. While this section permits warrantless access to private lands (excluding dwellings) within twenty five (25) miles of an external boundary, such access must be for the limited purpose of patrolling the border to prevent illegal entry of aliens into the United States. It does not expressly authorize random or roving warrantless searches of private lands at points where illegal entry can not be prevented. Thus, section 287 provides greater authority to INS to search for illegal aliens at the border or its functional equivalent, but does not confer any additional extraordinary authority to Border Patrol in relation to searches of or entrance onto employers’ premises, regardless of their location.

The INS Border Patrol may conduct warrantless searches only at the frontier or its functional equivalent. Functional equivalency is determined by whether it is likely that traffic which did not cross the border would arrive at that particular point. Examples of functional equivalents are: an established station near the border, a point

76. Id. Immigration Regulations define “external boundary” as: “the land boundaries and the coast line of the United States, including the ports, harbors, bays and other enclosed arms of the sea along the coast, and a marginal belt of the sea extending three geographic miles from the outer limits of the land that encloses an arm of the sea.” 8 C.F.R. § 287.1(a)(1) (1987).

77. It is noted here that it appears that § 287(d) created by IRCA, 8 U.S.C.A. § 1357(d) (West Supp. 1987), would overrule any warrantless access to private lands constituting a farm or other agricultural operation or similar “open fields” within 25 miles from the borders of the U.S., that might otherwise have been permissible pursuant to 287(a)(1), 8 U.S.C. § 1357(a) (1970), insofar as it expressly proscribes warrantless entry by the INS into “open fields.” See infra notes 157-59 and accompanying text.

78. It is interesting to note that one commentator has observed: “. . . searches at the border have never been predicated upon the authority contained in section 287, but flow directly from the concept of sovereignty.” Fragomen, Jr., supra note 73, at 91.

79. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). The Supreme Court for the first time limited the scope of the term “border search,” and thereby restricted the use of roving immigration patrols to search vehicles for aliens, by holding such warrantless searches were only permissible at the border or its functional equivalents. The Court held that, absent probable cause or consent, the search of the plaintiff’s car on a road that at all points lies at least twenty miles or more north of the U.S.-Mexico border, was in violation of the Fourth Amendment right to be free of unreasonable search and seizure. Id. at 272-73. The Court stated:

The search in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent. The search thus embodied precisely the evil the Court saw in Camara when it insisted that the ‘discretion of the official in the field’ be circumscribed by obtaining a warrant prior to the inspection.

Id. at 270 (citing Camara v. Municipal Court, 387 U.S. 523 (1967)).
marking the confluence of two or more roads that extend from the border, or an airport receiving nonstop flights from abroad.\textsuperscript{80}

The Second Circuit in \textit{United States v. Barbera},\textsuperscript{81} provided further example of what is not a functional equivalent. In \textit{Barbera}, the court found that where immigration officers had boarded a public bus in the vicinity of the border and had for no ostensible reason interrogated the defendant, a passenger on the bus, the arrest was unlawful since it had not occurred at the border or a functional equivalent thereof. It follows that an employer’s premises, a plant, a restaurant, or other commercial enterprise, even if very close to the border, is not covered by the concept of “functional equivalent.”\textsuperscript{82}

2. \textit{INS Authority to Interrogate and Arrest Without Warrant}

In contrast, the application of subsections 287(a)(1) and (2) of the INA are not limited to INS Border Patrol alone, but rather extend to all INS officers, so authorized. Subsections 287(a)(1) and (2) generally provide for the warrantless power to interrogate and arrest aliens for certain reasons or where certain conditions exist. Section 287 of the INA provides:

\begin{quote}
(a) [a]ny officer of the Service authorized under regulations prescribed by the Attorney General... the power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States;

(2) to arrest any alien... in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest...
\end{quote}

The language of the statute is unqualified, and there is no facial requirement that the officer must have probable cause for such an inquiry. It was not until the early 1970’s that this broad discretion was first judicially curbed.\textsuperscript{84}

In view of the fact that the INS Border Patrol and other officers are not legally vested with any additional or extraordinary authority to enter employers’ premises in order to search for or interrogate

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{80} \textit{Id.} at 272-73.
  \item \textsuperscript{81} 514 F.2d 294 (2d Cir. 1975).
  \item \textsuperscript{82} It is noted that these “border” cases should not be read in isolation. But rather many principles established in these cases are better established than in other contexts and should be considered and applied, where appropriate in other areas, such as urban or factory searches.
  \item \textsuperscript{83} INA § 287, 8 U.S.C. § 1357(a) (1970) (emphasis added).
  \item \textsuperscript{84} \textit{See} United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972). \textit{See also} Fragomen, Jr., \textit{supra} note 73, at 95 ("prior to several years ago, fourth amendment rights of aliens were exceedingly constrained").
\end{itemize}
\end{footnotesize}
illegal aliens, the remainder of this discussion will focus on the general Fourth Amendment limitations upon INS officers' authority to enter employers' premises in order to interrogate, search for and seize unlawful aliens.

B. Fourth Amendment Limitation on INS Authority to Search for or Otherwise Seize Aliens on Employers' Premises

It is imperative to note at the outset of this discussion that the state of the law regarding the pre-IRCA scope of Fourth Amendment protections in the immigration context is far from clear or settled. It has been said that the Fourth Amendment's mandates of reasonableness and specificity and the statutory requirement of belief of alienage in section 287 of the INA are polar opposites. In order to satisfy the reasonable requirement of the Fourth Amendment, a seizure must be based upon an individualized reasonable suspicion of criminal activity, while compliance with section 287 on its face only requires that the agent need believe that the person to be questioned is an alien. Rather than consider the constitutionality of section 287, the courts have instead attempted to reconcile it with the Fourth Amendment, which has resulted in the application of a two-tier analysis.

The first tier of the analysis is derived from INA section 287(a)(1). That section allows an agent to question anyone believed to be an alien about his or her right to remain in the United States, and effectively permits stops based upon mere suspicion of alienage, i.e., ethnicity. The second tier of the analysis corresponds with INA section 287(a)(2), which permits an agent to detain anyone he reasonably believes to be in the country illegally and to arrest such person if the agent believes he is likely to escape.

An absolute prerequisite to the INS' ability to interrogate individuals pursuant to section 287 as to their right to be or remain in the United States is that the Service must be lawfully on an em-

85. U.S. CONST. amend. IV provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

86. See Note, supra note 73, at 502.
89. See supra note 83 and accompanying text.
90. See supra note 73, at 502.
91. See supra note 83 and accompanying text.
employer's premises. For these purposes, the INS may only be lawfully on the employer's premises pursuant to either: (1) valid search warrant, or (2) owner's voluntary consent. These two areas will be discussed further below.

1. Initial Encounter and Two-Tier Analysis: Limitations on INS Authority to Interrogate

Despite the "without warrant" language of section 287, judicial decisions in recent years have placed some limitations on the power of immigration officers to conduct preliminary inquiries for the purpose of locating law violators. In United States v. Brignoni-Ponce, the Supreme Court ruled that such interrogations generally must be supported by reasonable suspicion that the person interrogated is an alien. Significantly, the Court expressly reserved the question of whether the officers must also have a reasonable belief that the interrogated person is illegally in the U.S. The Court of Appeals for the Seventh, Ninth and D.C. Circuits have held that a reasonable suspicion of alienage is all that is required for the INS to merely question a person concerning his right to be in the United States, as distinguished from detention of the individual, which would not be so authorized.

In Cheung Tin Wong v. INS, in discussing section 287(a)(1) interrogations, the D.C. Circuit indicated that a mere foreign appearance by itself could not give rise to authority to detain an individual for questioning. The Court enunciated the principal that when a reasonable suspicion that a person is an alien turns into a reasonable belief that he is in the country illegally, an investigator is authorized to engage in "forcible detention of a temporary nature for the purpose of detailed interrogation." If no reasonable suspicion of

92. 422 U.S. 873 (1975).
93. Id. at n.9.
94. Illinois Migrants Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977) modifying 540 F.2d 1062 (7th Cir. 1976); Cheung Tin Wong v. INS, 468 F. 2d 1123 (D.C. Cir. 1972); ILGWU v. Sureck, 681 F.2d 624 (9th Cir. 1982). But see Marquez v. Kiley, 436 F. Supp. 100 (S.D. N.Y. 1977) ("area control" selective interrogation; declaratory judgment issued that INS needed reasonable suspicion that persons interrogated were both aliens and illegally present in the U.S.).
95. 468 F.2d 1123 (D.C. Cir. 1972).
96. The D.C. Circuit stated:
   We do not intend to in any way suggest that the appearance of being Oriental is in any respect "suspicious," and we wish to state in unequivocal terms that we could never condone stopping or questioning an individual simply because he looked to be of Oriental descent. Id. at 1127 (emphasis supplied).
97. Cheung Tin Wong, 468 F.2d at 1126-27; Au Yi Lau v. INS, 445 F.2d 217 (D.C.
illegal alienage exists, no further detention or forceful questioning may be applied, because it would likely result in an unreasonable seizure violative of the Fourth Amendment.\textsuperscript{98}

Similarly, in \textit{United States v. Brignoni-Ponce},\textsuperscript{99} the Supreme Court held that the Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. In \textit{Brignoni-Ponce}, the Court held that the Fourth Amendment barred the stopping and questioning of individuals about their citizenship on less than a reasonable suspicion. The court found the INS' actions inconsistent with Fourth Amendment protections where the only ground for suspicion that the occupants of a vehicle near the border were aliens consisted of their Mexican appearance.\textsuperscript{100}

The primary area in which the Service has not deferred to the case law and analysis discussed above are in its procedures for interrogations conducted mainly at places of business and restaurants.\textsuperscript{101} The Service has demonstrated in the past that it believes once the officer has received permission from the employer to enter the premises, any person thereon may be interrogated.\textsuperscript{102}

In this regard, the reasoning of the case of \textit{United States v. Bar-
Immigration Reform and Control Act

bera\textsuperscript{103} should be kept in mind. In Barbera, Service border patrol conducted a “roving patrol” of a bus stopped at a station near the Canadian border. The Second Circuit held on appeal that the “immune” border search and interrogation principle was inapplicable. Further, the court held that while the Service officer’s presence in the public vehicle was permissible, the initial interrogation (very first question) could only be made if there was “founded suspicion” that the appellee was an alien. The principle established in the Barbera case can be applied in any case in which the INS has lawful entry. As in Barbera, even though the officer had access to the public place (a public bus), his power to begin to interrogate a specific individual could be invoked only upon obtaining “founded suspicion” that the person is an alien. Even before the enactment of IRCA, the rule set forth in Barbera should apply to any person about to be interrogated at his place of employment by a Service official or Border Patrol. At least one commentator has suggested that the employer has no right to consent to interrogation of his employees since it is the employees’ Fourth Amendment rights that are in question.\textsuperscript{104}

A further consideration to the concept of “voluntary consent,” which may authorize permissible entry onto an employer’s premises, is presented by the case of United States \textit{v.} Mendenhall.\textsuperscript{105} In Mendenhall, the Supreme Court recognized that a seizure can be effected not only by physical force, but also by a show of official authority that effectively compels an individual to submit to the intrusion.\textsuperscript{106} Thus, it is possible that an employer may provide “consent” to INS entry onto premises, and that this same consent might be invalid, based upon a variety of objective factors.\textsuperscript{107} Nevertheless,

\begin{itemize}
  \item \textsuperscript{103} 514 F.2d 294 (2d Cir. 1975).
  \item \textsuperscript{104} See Fragomen, Jr., \textit{supra} note 73, at 115; \textit{but see} Matter of Chen, 12 I & N Dec. 603 (1968) (interrogation of restaurant employees on owner’s premises with owner’s consent found proper); Matter of King and Yang, 16 I & N Dec. 502 (1978) (reasonable basis for interrogation of restaurant employees with owner’s consent, combined with past history of employment of illegal aliens and anonymous tip). See Oklahoma Press Publishing Co. \textit{v.} Walling, 327 U.S. 186 (1946) (although both corporations and individuals enjoy Fourth Amendment protections, the rights granted to corporations are not as extensive).
  \item \textsuperscript{105} 446 U.S. 544 (1980) (plurality opinion of Justices Stewart and Rehnquist).
  \item \textsuperscript{106} \textit{Id.} at 553-54; \textit{see also} LaDuke \textit{v.} Nelson, 762 F.2d 1318 (9th Cir. 1985). The Court previously alluded to this principle, that a nonconsensual stop can ultimately lead to an illegal seizure, in Terry \textit{v.} Ohio, 392 U.S. 1, 19 n.16 (1968).
  \item \textsuperscript{107} The Mendenhall Court set forth the following meaningful factors indicative of a seizure, irrespective of alleged consent:
    \begin{itemize}
      \item (1) threatening presence of several officers;
      \item (2) display of weapons by the officer;
      \item (3) some physical touching of the individual; and
      \item (4) use of language or a tone of voice indicating that compliance with the request
    \end{itemize}
in the general case, unless significant seizure factors or a show of authority are present, otherwise voluntary contact between an individual and a law enforcement officer does not, as a matter of law, constitute a seizure.\textsuperscript{108} Consequently, under \textit{Mendenhall}, absent the proper foundation, the INS officer is "merely questioning,"\textsuperscript{109} and no invasion of an individual's privacy exists that would trigger the Fourth Amendment's requirement of a particularized and objective justification.\textsuperscript{110}

In \textit{INS v. Delgado},\textsuperscript{111} the Supreme Court considered similar issues utilizing the two-tier framework, specifically in the context of a "factory survey" or a "factory sweep." In \textit{Delgado}, the INS conducted three "factory surveys" at garment factories in Los Angeles, California in 1977; two pursuant to search warrants and one pursuant to the owner's consent.\textsuperscript{112} Based upon these surveys, two United States citizens and two U.S. permanent residents claimed that their Fourth Amendment rights to be free from unreasonable search and seizure had been violated.\textsuperscript{113}

The \textit{Delgado} Court avoided the issue of the level of suspicion required to stop persons and question them as to their right to remain in the United States. But rather, the Court essentially concluded that no seizure or detention of any individual had taken place, so that the individual detentive or forcible questioning tier of the analysis, reasonable suspicion, did not need to be entertained.\textsuperscript{114}

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\textsuperscript{108} \textit{Mendenhall}, 446 U.S. at 554-55.

\textsuperscript{109} \textit{Id.}


\textsuperscript{111} See Note, supra note 73, at 491.

\textsuperscript{112} 466 U.S. 210 (1984).

\textsuperscript{113} The majority noted, as did Justice Powell in his concurring opinion, that "the INS had obtained either a warrant or consent from the factory owners before entering the plants to conduct the surveys." \textit{Id.} at 222, n.1 (Powell, J., concurring). Since the district court's holding that a seizure which violated the Fourth Amendment had occurred, it did not need to reach the search warrant issue; which was therefore not before the high court. Had the search warrant issue been challenged, the warrants may have been stricken for failure of specificity or particularity. They had not named or described specific persons. Certainly there is an even stronger possibility that these warrants would have been found constitutionally infirm, had this case been decided today, subsequent to the passage of the IRCA. \textit{See infra} notes 187-225 and accompanying text.

\textsuperscript{114} \textit{Delgado}, 466 U.S. at 219 ("the only way the issue of individual questioning could be presented would be if one of the named respondents had in fact been seized or detained.") \textit{Id.}
The *Delgado* decision has been read to *implicitly* augment the INS' power to "merely question" under the first tier of the analysis, as *Delgado* would seem to permit INS to question anyone as to their immigration status, without requiring suspicion of alienage, provided the encounter is "voluntary."\(^{116}\)

Regardless of the *Delgado* Court's refusal to find a seizure on the facts before it, the Court did discuss the further facts necessary to support a finding of seizure. The Court indicated that a seizure would be found where mere questioning is followed by a refusal to respond, and then followed by any further detentive conduct on the part of the agent. As *Delgado* does not address the issue of reasonable suspicion, it does not answer the question of whether the refusal to respond to the questions of INS agents will, in and of itself, supply the appropriate level of reasonable suspicion of illegal alienage to justify further detentive questioning.\(^{116}\) However, it might be fairly adduced from the Court's reasoning that refusal to respond, without more, should not give rise to the reasonable suspicion sufficient to justify any further detentive action.

2. **Warrant Requirements**

As relates to both commercial premises and homes, the Supreme Court has held that warrantless searches are generally unreasonable.\(^{117}\) The businessman, like the occupant of a residence:

> has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The business man, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority to enter by a warrant.\(^{118}\)

INS's right to "enter commercial premises, *with a proper warrant*,

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115. *Id.* at 217-18. *See Note, supra* note 73, at 503. ("Proliferation of such an analysis can only result in continued and increased deprivation of fourth amendment protection from unreasonable seizures of persons having characteristics in common with, and who work next to, aliens in certain business establishments").

116. One commentator posits that this issue may present a veritable "catch-22" situation. If the individual merely refuses to respond, he/she might supply the appropriate level of reasonable suspicion of illegal alienage to justify further intrusive conduct; on the other hand, if the person does respond, he/she may simply fall within a "classic consensual encounter" under *Delgado* standards and, as a result, will have to tolerate the intrusion. *See Note, supra* note 73 at 509.


for the purpose of searching out a suspected violation of the immigration laws derives from its general statutory power to seek out and question suspected illegal aliens.\textsuperscript{119}

The validity of an administrative subpoena is dependent on standards developed under the Fourth Amendment governing unreasonable searches and seizures. In general, it has been said that an administrative subpoena must not be so broad as to be in the nature of a fishing expedition.\textsuperscript{120} The Supreme Court has liberally interpreted most agencies' subpoena power, giving validity to the subpoena whenever it is not unreasonable.\textsuperscript{121}

In any administrative subpoena situation, there are generally three broad types of responses: (1) refusal to comply and a motion to quash the subpoena as being served without appropriate power or that it is overly broad, or that the items it seeks are not relevant; (2) informal negotiation with representatives of the agency issuing the subpoena to narrow its scope and limit the number of documents produced or extend the time for production; or (3) immediate and total compliance without any informal contact with the issuing agency.

a. Blackie's House of Beef, Inc. v. Castillo. In Blackie's House of Beef, Inc. v. Castillo,\textsuperscript{122} the D.C. Circuit Court considered the validity of two separate warrants used to search the plaintiff-employer's restaurant. Each warrant was considered in separate lower court decisions and was referred to by the D.C. Circuit as Blackie's I\textsuperscript{123} and Blackie's II.\textsuperscript{124} The D.C. Circuit's decision in Blackie's is important because: (1) the decision confirmed the warrant requirement as a precondition to any right that the INS may search or seize illegal aliens on employer's premises, absent employer's consent, in accordance with Almeida-Sanchez v. United States;\textsuperscript{125} and (2) the court explicitly decided that, since the INS searches were the product of "hybrid administrative law enforcement activities in a non-criminal context,"\textsuperscript{126} a relaxed standard of probable cause less than that required in criminal cases was sufficient for


\textsuperscript{122} 659 F.2d 1211 (1981).


\textsuperscript{125} 413 U.S. 266 (1973).

\textsuperscript{126} Blackie's, 659 F.2d at 1222 (emphasis supplied).
warrants relating to INS enforcement activity.

In *Blackie's*, the Service had collected various types of evidence indicating that illegal aliens were being employed at the Blackie's House of Beef, Inc. restaurants. After the responsible INS agent had twice been denied the owner's permission to enter the restaurant premises, he presented the assembled evidence accompanied by affidavits to a federal magistrate, requesting the issuance of a search warrant to assist the INS in its search for and arrest of "the individuals subject to arrest pursuant to Title 8, United States Code, Section 1357." In *Blackie's I*, the magistrate issued a standard form warrant allowing the INS, within five days of the warrant's issuance, to search the "entire premises of Blackie's House of Beef." INS premised the warrant in *Blackie's I* on Rule 41 of the Federal Rules of Criminal Procedure (FRCP). INS agents exe-

127. In 1976, the INS began to receive information that illegal aliens were employed at Blackie's. One such indication was a sworn statement by an illegal alien who had been apprehended by the INS and was in the process of undergoing deportation hearings. This informant swore that he had worked at Blackie's and, furthermore, that he had personal knowledge that approximately 20 other illegal aliens were currently employed there . . . Another such affidavit was executed by an apprehended alien claiming to have worked at Blackie's. In addition to verifying the information provided in the first affidavit, the second informant indicated that "there were many Hispanics employed there and that the names of two illegal aliens who worked there were Rogelio and Pedro" . . . Other information included three anonymous telephone calls in which informants notified the INS that Blackie's was employing illegal aliens . . . Finally, INS officers apprehended two illegal aliens who were carrying wage statements from Blackie's . . . The latter of the two swore by affidavit that Blackie's was employing illegal aliens from El Salvador and Africa, and supplied the first names of three such employees. *Blackie's*, 659 F.2d at 1213-14.

The INS in *Blackie's* further submitted firsthand evidence obtained from a "stake out" of Blackie's during working hours. The INS agent involved swore to his belief that many of the employees were illegal aliens because of their attire and apparent inability to speak any language but Spanish. A different INS agent surveyed Blackie's during working hours and observed numerous persons of Hispanic descent. In addition, the supporting evidence also included a news article containing essentially an admission of hiring illegal aliens by the manager of Blackie's. Included among all of this information were names of suspected illegal aliens working at Blackie's, their descriptions of person and clothing, and identification of where suspects might be hiding. *Id.* at 1215.

128. Ulysses "Blackie" Auger was owner and operator of Blackie's House of Beef, Inc., which operated the Blackie's House of Beef Restaurant and Deja Vu Cocktail Lounge located in Washington, D.C.

129. This statute sets forth the authority granted to immigration officers and employees.

130. On the warrant the word "property" was marked out and the word "persons" inserted in the text of the warrant, which provided that "there is probable cause to believe that the *persons* so described are being concealed on the person or premises above described." *Id.* at 1214.

131. *Id.*

132. Rule 41, *Fed. R. Crim. P.*, authorizes the issuance of warrants in aid of *criminal*
cuted the warrant, entering Blackie’s Restaurant during the dinner hour.\textsuperscript{133} Fifteen employees were seized, at least 10 of whom proved to be subject to deportation as illegal aliens.\textsuperscript{134}

The second warrant in \textit{Blackie’s II} was sought and issued after the District Court in \textit{Blackie’s I} had struck down the first warrant. Unlike the first, the second was not a “form warrant,” and was not based on Rule 41 of the FRCP. Rather, the second warrant promised INS’ authority to search on sections 1357\textsuperscript{135} and 1103\textsuperscript{136} of the INA. The second warrant was entitled “Order for Entry on Premises to Search for Aliens in the United States Without Legal Authority.” The second warrant contained certain limitations,\textsuperscript{137} but broadly permitted the search to include “any locked rooms on the premises in order to locate aliens in the United States without legal authority.”\textsuperscript{138} Fourteen illegal aliens were found on the premises during this second raid.\textsuperscript{139}

The D.C. Circuit’s decision in \textit{Blackie’s} consolidated the appeals of the lower court rulings in \textit{Blackie’s I} and \textit{Blackie’s II}.\textsuperscript{140} The Circuit Court addressed the issues presented by \textit{Blackie’s I}: whether the INS may rely on Rule 41 of the FRCP to obtain a search warrant; and by \textit{Blackie’s II}: (1) the authority of the INS to seek, and of the District Court to grant authority by warrant for access to commercial premises to question persons believed to be illegal aliens; and (2) the level of probable cause required for such a warrant. In deciding the second issues in \textit{Blackie’s II}, the court also resolved the question in \textit{Blackie’s I}.

The D.C. Circuit in \textit{Blackie’s} based its decision on three principles: (1) “Congress, in passing the Immigration and Nationality Act, contemplated a vigorous enforcement program that might include investigations.

\textsuperscript{133} The warrant had been issued on March 27, 1978, and was executed on March 30, 1978. 659 F.2d at 1214.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.} at 1215. \textit{See supra note 129.}

\textsuperscript{136} INA § 1103 covers the powers and duties of the Attorney General and the INS Commissioner relating to the administration and enforcement of the immigration laws.

\textsuperscript{137} It directed the INS to enter the premises at a certain entrance, limited the INS’ search to daylight hours and within ten days of the order, and required a return within ten days after completion of the search. \textit{Id.} at 1215-16.

\textsuperscript{138} \textit{Id.} at 1216.

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} On two separate occasions, Blackie’s House of Beef, Inc. challenged each of the two warrants, seeking injunctive relief and damages, and on each occasion, the District Court held each warrant invalid, as violative of the Fourth Amendment requirement that “no Warrant shall issue, but upon probable cause, . . . particularly describing . . . the persons or things to be seized.” \textit{Id.} at 1211-12.
INS entries onto private premises for the purpose of questioning "any alien or person believed to be an alien," and of detaining those aliens believed to be in this country illegally";\textsuperscript{141} (2) "since an INS search is conducted pursuant to a civil administrative mandate, the warrant issued to permit such a search may therefore be evaluated under a standard of probable cause different from that applied to criminal warrants";\textsuperscript{142} and (3) "the warrant in Blackie's II was properly tailored both to protect the fourth amendment rights of Blackie's and to aid the enforcement interests of the United States."\textsuperscript{143} The Circuit Court sustained the lower court's decision invalidating the first warrant, which was predicated on FRCP 41, because of the civil nature of the immigration search activity and the fact that criminal Rule 41 was not suited to a civil investigation.\textsuperscript{144}

In its conclusions, the Court relied heavily on the reasoning of \textit{Marshall v. Barlow's, Inc.},\textsuperscript{145} in which the Supreme Court discussed the type of warrant sufficient to support a routine inspection conducted by OSHA in fulfillment of its regulatory responsibilities. The Court reasoned: \textit{Probable cause in the criminal sense is not required.}\textsuperscript{146}

In \textit{Blackie's}, the D.C. Circuit pointed out that courts have balanced the government's interest in enforcing the immigration laws against the privacy interests of those whom the INS seeks to investigate.\textsuperscript{147} In \textit{Illinois Migrant Council v. Pilliod},\textsuperscript{148} the Northern District Court of Illinois stated:

The fourth amendment prohibits unreasonable seizures. Therefore, once it is determined that a "seizure" has occurred, the question arises whether it is reasonable. This requires balancing the public

\begin{itemize}
\item \textsuperscript{141} \textit{Blackie's}, 659 F.2d at 1218.
\item \textsuperscript{142} \textit{Id.} at 1218-19 (citing \textit{Marshall v. Barlow's, Inc.}, 436 U.S. 307 (1978) (emphasis supplied)).
\item \textsuperscript{143} \textit{Id.} at 1219.
\item \textsuperscript{144} \textit{Id.} at 1217.
\item \textsuperscript{145} 436 U.S. 307 (1978).
\item \textsuperscript{146} The court indicated that:
\begin{quote}
[f]or purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an... inspection are satisfied with respect to a particular [establishment]."
\end{quote}
\item \textsuperscript{147} \textit{Blackie's}, 659 F.2d at 1221.
\item \textsuperscript{148} 531 F. Supp. 1011 (N.D. Ill. 1982).
\end{itemize}
interest in effective law enforcement against the individual's interest in remaining free of arbitrary or oppressive governmental intrusions. The general requirement for a reasonable seizure is probable cause.

However, the Blackie's court reasoned that the immigration context calls for "a more flexible definition of probable cause to comport with the multiplicity of 'hybrid' administrative law enforcement activities in a non-criminal context." The Circuit Court in Blackie's found that the lower court's "fundamental error lay in requiring that the INS meet the same level of probable cause as is appropriate in the case of criminal warrants."

The decision in Blackie's did not differentiate between the search of a restaurant or other establishment with both public and private areas. This left unclear whether an INS officer has the right to enter into the public areas of a restaurant, whether as a patron or in his professional capacity, and intrude on its patrons by interrogating, without a warrant, a person he or she believes to be an alien. In this regard, based upon the Barbera case, the officer must arguably have, at a minimum, reasonable suspicion in the first instance. Appearance or difficulties with the English language are generally not great enough indicators to constitute the requisite reasonable suspicion for detentive questioning. However, as will be argued below, because of the possibility that INS officers may interrogate employees in public areas of the employer's premises, the best view would be to require warrants based on criminal probable cause standards for searches in both private as well as public areas of an employer's premises.

In Blackie's, the warrant issued to INS restricted official conduct inside the premises. The search could only be conducted where aliens were likely to be hiding, and it was uncontroverted that aliens were in fact hidden. It further limited INS to questioning only those employees whom INS agents reasonably believed to be aliens. Furthermore, the warrant proscribed the INS from searching Blackie's files or books. The court apparently was influenced by the reasona-

149. Id. at 1016 (citing with approval United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 392 U.S. 1, 20-21 (1968)).
150. Id.
151. Blackie's, 659 F.2d at 1222.
152. Id. at 1228.
154. See supra notes 94-97 and accompanying text.
155. Blackie's, 659 F.2d at 1226.
bleness of the warrant issued, particularly in combination with the evidence that had been collected of the presence of aliens working in Blackie’s restaurant.

Under the former laws and existing case law, a factor contributing to the probable cause standard adopted for INS and other agency related warrants is the fact that the Supreme Court has in the past held that detention and deportation of illegal aliens is not criminal law enforcement activity.\textsuperscript{166} INS warrants are “issued to aid the agency in the enforcement of its statutory mandate, not to aid police in the enforcement of criminal laws.”\textsuperscript{167} However, at the time of the decision in Blackie’s, and as highlighted by that court, there were no existing sanctions of any kind, criminal or otherwise, imposed by law upon a knowing employer of illegal aliens.\textsuperscript{168}

b. International Molders’ and Allied Workers’ Local Union No. 164 v. Nelson. The case of International Molders’ and Allied Workers’ Local Union No. 164 v. Nelson\textsuperscript{169} is the latest case involving the question of the validity and effect of a warrant issued by a United States magistrate permitting the INS to raid an employer’s workplace arising under pre-IRCA facts and circumstances. The International Molders’ case originally arose out of a series of approximately fifty workplace raids conducted by the INS and Border Patrol in Northern California during the week of April 26, 1982. The plaintiffs\textsuperscript{170} challenged the raid as violative of the Fourth and Fifth

\textsuperscript{156} See, e.g., Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); Blackie’s, 659 F.2d at 1218-19.

\textsuperscript{157} Blackie’s, 659 F.2d at 1218.

\textsuperscript{158} Id. at 1218 (emphasis added).

\textsuperscript{159} 674 F. Supp. 294 (N.D. Cal. 1987).

\textsuperscript{160} The named plaintiffs were several businesses subjected to INS raids, individual workers allegedly detained or seized in these same raids, and a labor union representing some of these workers. In the earlier decision in International Molders’ & Allied Workers Local Union v. Nelson, 102 F.R.D. 457 (N.D. Cal. 1983), the Court had certified the additional plaintiff class to consist of:

all persons of Hispanic or other Latin American ancestry, residing or working within the jurisdiction of the San Francisco District Office of the United States Immigration and Naturalization Service (INS) and/or the Livermore Border Patrol Sector, who have in the past, are now, or may in the future be subjected to the policies, practices, and conduct of INS and/or the Border Patrol during the course of INS area control operations directed at places of employment other than open fields.

Id. at 460 (citations omitted).

In addition to the employer-plaintiff, the Court found that all individual employee plaintiffs present at Petaluma Poultry Company (PPC) during the raid were proper plaintiffs and entitled to contest the validity of the warrant in question. The Government argued that PPC as employer was exclusively entitled and had standing to pose such a challenge.
Amendments to the Constitution. In this context, plaintiffs asserted that INS employed "warrants of inspection" as open licenses generally to interrogate and seize employees.\(^1\) The plaintiffs' sixth amended complaint before the Court at the time of hearing was limited to only one occasion of a raid conducted pursuant to a general warrant.\(^2\) Therefore, the Court's decision as well as this discussion are limited to the one raid at issue.\(^3\)

In *International Molders',* the Government argued that the warrant was valid, properly supported by a specific and reliable affidavit, and that actions taken pursuant to the warrant were justified. Plaintiffs countered by arguing that the warrant was inadequately supported, itself invalid, and that the subsequent seizure of illegal aliens by use of the invalid warrant was illegal.\(^4\) The Court in *International Molders'* agreed with the plaintiffs, granting their motion for partial summary judgment.\(^5\) The Court found the warrant constitutionally infirm, and its execution violative of the Fourth

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\(^1\) Hofstra Labor and Employment Law Journal, Vol. 5, Iss. 1 [1988], Art. 1

\(^2\) Plaintiffs alleged:

that in a typical raid, the INS would block the exits from the work area and systematically question primarily hispanic workers about their immigration status. Although the warrant might refer to no more than four specific individuals, the INS would use the "general warrant" to interrogate and to seize employees or any other suspects en masse resulting in the arrest or detention of as many as seventy persons in a single workplace raid.


\(^3\) In earlier pleadings, the plaintiffs had referred to eight separate incidents of raids. *Id.*

\(^4\) This incident was the raid on PPC. Therefore, for purposes of ruling on the question of validity of INS general warrants, the Court looked to only this one controversy. *Id.*

\(^5\) *Id.*

\(^6\) The court also denied the defendant's motion for partial summary judgment. *Id.* at 303.
Amendment. The Court invalidated the warrant as to all but the five (5) named individuals (employees of the Petaluma Poultry Company (PPC)), to whom it found the warrant sufficiently particularized.

The warrant used to gain entry to PPC was issued on April 23, 1982. The U.S. Magistrate issuing this warrant stated that there was "reasonable cause to believe" that five named individuals "and others" were illegally in the United States and could be found at this employer's premises during normal working hours. The warrant granted the INS broad authority to search for and to seize illegal aliens.

The sole basis for the issuance of the warrant in question was a single affidavit sworn to by an INS officer. It was clear that the officer's affidavit in support of the warrant was not even based on personal knowledge. Rather, it consisted of seven ill-supported or outdated pieces of information derived from cullings from INS files. Employment records at PPC did indicate that five employees of PPC were illegal aliens, but no grounds were set forth for a belief that other illegal aliens were also employed there.

The Court first noted that the standard to test the validity of a warrant is whether the warrant and supporting affidavit contain sufficient specificity and reliability to prevent the exercise of unbridled discretion by law enforcement officers. "The purpose of this re-

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166. Id. at 295.
167. The warrant authorized the INS: to search within a period of ten (10) days the place named above for the persons specified, and others suspected of being illegal aliens, serving this warrant and making the search in the daytime (8:00 a.m. to 5:30 p.m.), and if such persons are found there to seize them, leaving a copy of this warrant and receipt for the persons taken, and prepare a written inventory of the person seized and promptly return this warrant and the written inventory before Magistrate Richard S. Goldsmith, as required by law. Id. at 295-96.
168. Judge Aguilar in International Molders' found this fact along with the lack of personal knowledge on the part of the INS officer supplying the affidavit, and the lack of substantiation of underlying information to be of great weight in finding the warrant defective. These factors also led the court to distinguish the warrant at issue there from the warrant considered in Blackie's. Id. at 301-02 (describing impressive array of affidavits and evidence assembled to support INS warrant application in Blackie's case). See Blackie's, 659 F.2d at 1213-15.
169. Two items were three and one-half year old references to a single incident in the past wherein illegal aliens were discovered at PPC. One of the tips received indicating the presence of illegal aliens at PPC was anonymous and general. The only other tip was received from the Petaluma Police Department, but this in turn was admittedly based upon "numerous anonymous calls" none of which the police corroborated. International Molders', 674 F. Supp. at 301.
170. International Molders', 674 F. Supp. at 296 (citing Delaware v. Prouse, 440 U.S. 648, 653-55 (1979); see also U.S. v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986) ("The description [in the warrant] must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized.")
quirement is 'to prevent the agents from having uncontrolled discretion to rummage everywhere in search of seizable [persons] once lawfully within the premises.' The court also cited the principle that evidence presented in a warrant application must be particularized enough to allow a "neutral and detached" magistrate or court to make an independent determination that probable cause exists for the seizure of a particular person. In addition, the Court indicated that the questions of whether a warrant is adequate and based on probable cause are to be decided on the face of the warrant and its supporting affidavit, and the facts upon which the probable cause determination is based "must appear within the four corners of the warrant affidavit."

Judge Aguilar made two distinct findings regarding warrant validity as to the five named individuals on the one hand, and all "others suspected of being illegal aliens" on the other hand. The Court found that the affidavit, including the INS' records regarding the five named illegal aliens, provided sufficiently specific and reliable information from which a neutral magistrate could find probable cause for the seizure of the five named employees suspected of illegal presence in the U.S. Therefore, the Court specifically found the warrant to be constitutionally valid insofar as it permitted the search for and arrest of the five named individuals.

171. International Molders', 674 F. Supp. at 296 (citing International Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d at 552-53 (quoting U.S. v. Condo, 782 F.2d 1502, 1505 (9th Cir. 1986)). See Marron v. United States, 275 U.S. 192, 196 (1927) ("requirement that warrants shall particularly describe things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.")

172. International Molders', 674 F. Supp. at 296 (citing Illinois v. Gates, 462 U.S. 213, 239 (1983) ("[an] affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause . . . [the magistrate's] action cannot be a mere ratification of the bare conclusions of others"); see also U.S. v. Rubio, 727 F. 2d 786, 795 (9th Cir. 1984) ("The magistrate must be provided with sufficient facts from which he may draw the inferences and form the conclusions necessary to a determination of probable cause.")


174. The affidavit stated that an October, 1978 raid on PPC uncovered seventeen (17) illegal aliens employed by the company. Fifteen of the seventeen failed to appear for INS interviews, allegedly because of warnings of potential deportation provided by PPC. The affidavit further stated that on November 5, 1981, an anonymous informant reported that PPC was employing approximately thirty illegal aliens, many of whom had been arrested and deported previously. Id. at 297.

175. There was also independent verification of prior deportation coincident with the prior raid on PPC, of one of the five named aliens, through INS records. INS had also subpoeaeced PPC's personnel files, which revealed that the five individuals named in the warrant had records of illegal status and prior apprehensions. Id.
While the Court applied the same legal standards to the seizure of others suspected of being illegal aliens as it did to the seizure of the five named individuals, it focused especially on the "general" or "open-ended" nature of the warrant as applied to "all others". The Court specifically adopted the terminology of "general" or "open-ended" warrants to be applied to warrants of this variety. Relying on the Ninth Circuit's ruling in *International Molders* and its own original decision, the Court concluded once again that the warrant unconstitutionally authorized seizure of persons without probable cause and was patently invalid. The Court permanently enjoined the defendants from seeking or employing such warrants in the future.

176. The INS argued that the warrant used to enter PPC's premises was a "warrant of inspection," and designed to permit inspection, not seizure. However, the Court found it to be properly described as a "general warrant." The Court explained:

>[the general aspect of the warrant is that it does not name all of those to whom it was intended to apply; instead, the warrant mentions five specific individuals and refers to 'others.' Furthermore, the warrant authorized far more than inspection. If the INS found the specified individuals or 'others suspected of being illegal aliens, the INS was authorized to seize them."

177. The Court concluded that both in intent and practice the INS' warrants were aimed at seizure of illegal aliens, and to describe them as "warrants of inspection" would be a misrepresentation. *Id.* at 298.

The Court stated: "[n]o matter how the INS wishes to recast, recharacterize, or otherwise misrepresent the warrant, it remains true that the warrant was fundamentally a license for the INS to seize people simply because they were 'suspected of being illegal aliens,' whatever that means." *Id.*


180. The court stated:

>As this and other circuits have ruled on numerous occasions, a "lack of probable cause cannot be made up in hindsight by a hypothetical variation in the basis on which a search was conducted." *U.S. v. Branch*, 545 F.2d 177, 186 n.24 (D.C. Cir. 1976), quoting *U.S. v. Cunningham*, 424 F. 2d 942, 943 (D.C. Cir. 1970), cert. denied, 399 U.S. 914 (1970); see also *Llaguno v. Mingey*, 739 F.2d 1186, 1191 (7th Cir. 1984) ("The officers needed probable cause before they entered the house." (emphasis in original)), vacated on different grounds after rehearing en banc, 763 F.2d 1560 (7th Cir. 1984), cert. dismissed, ___ U.S. ___, 107 S. Ct. 16, 92 L.Ed. 2d 783. *International Molders*, 674 F. Supp. at 298-99.

181. "Notwithstanding the conclusion that the instant warrant was for seizure, the Court went on to consider the warrant as a warrant of inspection, since there remained the possibility that the warrant could be upheld in part as a warrant of inspection." *Id.* at 299. In order to make this determination, the court pointed out that the correct standard to be applied is that articulated in *Blackie's*. The Court emphasized that despite the fact that the lower court finding that the warrants authorized seizures was "amply supported by the record," the circuit panel found it "unnecessary . . . to decide whether the hybrid probable cause standard that Blackie's applied to entry
Despite the Court's finding that Blackie's was inapposite to the case before it, the Court went on to distinguish International Molders' from the Blackie's case on three principal grounds: 182 (1) the Court indicated that the warrant is distinguishable from the warrant in Blackie's based on the facts of each case; 183 (2) the Court further indicated that the warrant was deficient under the legal standard identified in Blackie's; 184, and (3) the warrant in International Molders' needlessly threatened the Fourth Amendment rights of individuals present in the targeted workforce. 186

The Court concluded once again that the warrant used to raid PPC was a seizure warrant. The warrant did not authorize the INS merely to "inspect," but rather to seize. 188 Moreover, the Court found that even under the pertinent relaxed "hybrid" criterion of Blackie's, the unlimited warrant was still deficient. Absent checks to place limits on unbridled INS discretion, the Court found that the warrants should apply to warrants that, on their face, authorize seizure of suspected illegal aliens."

Id. at 299 (citing International Molders', 799 F.2d at 552, n.5. The Court once again concluded that the warrant was a warrant for seizure). Id.

182. Id. at 299. The court noted that Blackie's has been adopted by the Ninth Circuit and that it was controlling law in the case. See International Molders', 799 F.2d at 553.

183. Although the Court clearly believed that the factual difference that the warrant in Blackie's made no reference to seizure, in contrast to the warrant in International Molders', was determinative of the absolute factual distinction between the two cases, it ignored this distinction and continued its analysis in deference to the Circuit Court. The Court stressed that, beside the first difference, the distinction between the warrants centered on the affidavits supporting them. In Blackie's, the INS assembled an extensive array of information, see 659 F.2d at 1222. In contrast, only one affidavit based on other than personal knowledge was used in International Molders'. See 674 F. Supp. at 301. The Court found that "[b]oth in terms of quality and quantity, the supporting material for the warrants in the two cases is radically different," and on this factual basis alone the cases are distinguished. International Molders', 674 F. Supp. at 301.

184. The Court found the radically different factual distinctions to have significant legal implications. According to the Court, the most obvious of these being that the warrant simply failed to meet even the relaxed standard in Blackie's. See International Molders', 674 F. Supp. at 301-02.

185. The Court found on the balance of interests that is supposed to characterize the trade off between the Government's need to enforce the law and the individual's right to freedom and privacy, that the magistrate assigned disproportionate weight to the Government's position. While the Blackie's standard is not the traditional "probable cause" of the ordinary search warrant, the Court found that the application for a warrant must have sufficient specificity to enable the judge to make an independent determination of whether the standard for issuance has been satisfied. The Court concluded that under the Blackie's standard, "the warrant and supporting affidavit did not contain 'sufficient specificity and reliability to prevent the exercise of unbridled discretion by law enforcement officials. Id. at 302 (citing International Molders', 659 F.2d at 1225).

186. Upon the finding of "others suspected of being illegal aliens," the warrant authorized seizure—without any inquiry into whether the suspicion was correct. Id. at 303.
warrant and affidavit simply did not provide enough information.

IV. POST-IRCA FOURTH AMENDMENT PROTECTIONS FOR
EMPLOYERS AND EMPLOYEES AGAINST UNREASONABLE SEARCH
AND SEIZURE

The Immigration and Reform Act of 1986 (“IRCA”), does not
expressly alter the power or limitations thereon of immigration of-
ficers to search private employers’ premises for illegal aliens. How-
ever, IRCA now subjects employers of illegal aliens to criminal pros-
escution and injunctive action. Criminal penalties may range from
imprisonment up to six months and/or fines of up to $3,000 for each
unauthorized alien for regular violations; up to $10,000 for each un-
authorized alien for pattern and practice violations. Employers also
now risk civil as well as criminal violations and penalties for failure
to maintain required records, irrespective of whether illegal aliens
are actually employed.187

The INS has traditionally conducted enforcement activities in
two contexts: patrol of the nation’s borders or their “functional
equivalent,” e.g., an airport; and area control operations.188 IRCA
has added to this enforcement through establishment of the EVS,
which will elicit corresponding employer visits, allowing inspection
and determination of compliance with paperwork obligations and
will also further detection of unlawful alien employment.

Under current law, it should be kept in mind that, while Con-
gress has expressed an interest in vigorous enforcement (public inter-
est), all affected private parties have greater obligations, and are
open to greater intrusions. Individual employers certainly have more
at stake, involving the new verification and recordkeeping compli-
ance requirements, as do citizen and legal permanent resident em-
ployees, insofar as the increased scrutiny and awareness of alienage,
may give rise to increased intrusions.189

Moreover, IRCA has opened up new areas of potential em-
ployer exposure to criminal liability for transportation, harboring or
encouragement of illegal aliens to enter the U.S. in violation of U.S.
immigration laws.190 In the past, the criminal law relevant to the

187. See supra notes 54-70 and accompanying text.
188. See supra note 73.
189. It should generally be kept in mind that in enacting IRCA, Congress was sensitive
to the possibility of discrimination based on national origin or citizenship status. See IRCA
§ 274B, 8 U.S.C. § 1324b.(a) (discrimination based on national origin or citizenship status is
an “immigration-related employment practice” under IRCA). In so providing, Congress has
implicitly acknowledged the possibility of increased intrusion.
harboring of aliens (8 U.S.C. section 1324) carried with it the mitigating proviso that “employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.” IRCA eliminates this proviso, thus opening a whole new area of concern and interpretation to employers. The greater potential for criminal liability in the absence of the “Texas proviso”, must be kept in mind, is likely to be the subject of much future debate and litigation, and certainly must be factored into any warrant/probable cause analysis relating to immigration officers’ entry onto employers’ premises.

It should be pointed out here that the new immigration law of 1986 expresses as a “sense of Congress” the:

increase in the border patrol and other inspection and enforcement activities of the Immigration and Naturalization Service and of other appropriate Federal agencies in order to prevent and deter the illegal entry of aliens into the United States and the violation of the terms of their entry. . . .”

The Immigration Service has in the past placed emphasis upon enforcement. However, while increased inspection activity is encouraged—as well as funded under the new Act—Congress has expressed no desire to carve out exceptions to or to reduce constitutional protections in this area. In fact, it would seem that now more than ever these protections are acutely needed, as will be discussed below. Major issues to be addressed under the new Act are: the authority of INS officers to enter employers’ premises now warrantlessly for any purpose other than to inspect and ensure paper compliance under the new EVS; in addition, the degree of specificity required in such warrants must also be considered and re-examined.

V. ANALYSIS

It seems clear that the introduction of criminal sanctions for employers should lead the judicial system to require criminal probable cause for the issuance of a warrant to search commercial premises in the future. Although such a search might still be conducted pursuant to a civil administrative mandate, in the case of civil investigation or violations under IRCA, the criminal repercussions to which the employer is now subject and may be simultaneously or

191. See supra at notes 62-65 and accompanying text for a discussion of “Texas proviso.”

192. IRCA § 111(a)(1).

193. See Note, supra note 73, at 519.
subsequently subjected, should elevate the standard of review for warrants or enforcement of administrative subpoenas to that of criminal probable cause in all cases.\textsuperscript{194} A higher degree of probable cause would more adequately protect the commercial operator’s Fourth Amendment rights, and also presumably further restrict the availability of enforceable warrants, by requiring stricter adherence to clearer, more rigorous particularity and specificity requirements.

Because of the nature of these criminal sanctions applicable against employers, it is argued that the same standard of criminal probable cause would similarly be required for INS officers to search for illegal aliens in public areas of an employer’s premises, as well as in private areas, regardless of the proximity of the employer’s establishment to the border. Moreover, the criminal probable cause standard should also be necessary regardless of the “label” of or type of the warrant, \textit{i.e.} inspection or seizure. It would appear that in the immigration law context, little difference exists between warrants of inspection or seizure, as inspection that successfully identifies potentially unauthorized workers will in most cases lead to seizure.\textsuperscript{196}

Arguably, any entry onto employer premises by INS for any purpose other than the checking of I-9 verification forms and employer compliance with recordkeeping requirements should require a valid warrant based upon satisfaction of a standard of criminal probable cause. Unless the employer has provided consent,\textsuperscript{196} the INS agents inspecting EVS compliance should not be able to question any employees on the premises or otherwise search for other evidence outside of the records they are authorized to inspect. In order to exceed their grant of authority to inspect an employer’s paperwork files, INS agents should be required to obtain a warrant based upon criminal probable cause for authorization to seek out and question any employees on the premises, since employers may now be crimi-

\textsuperscript{194} It should be remembered that even in the area of inspection and noncompliance with the new EVS, while penalties are civil for “non-pattern and practice” violations, misstatements on the I-9 forms carry with them possible risk of criminal perjury, should an intentional falsehood be detected. \textit{See supra} notes 29-31 and accompanying text.

\textsuperscript{195} The Justice Department’s express policy is that a warrantless arrest is permitted if the immigration officer believes that the individual is likely to escape before a warrant can be obtained. \textit{See Justice Memorandum, supra} note 98 at 16 (citing INA § 287(a)(2),(4), 8 U.S.C. § 1357(a)(2),(4) (1970)). An officer finding an alien with an altered resident alien card can make the arrest without a warrant. Other types of behavior on the part of the alien, such as attempted flight or nervousness suggesting the search for an opportunity to flee may be used as a basis to a warrantless arrest. \textit{See Justice Memorandum at 16. However a warrantless arrest is unlawful where the officer has no reason to believe that the individual is likely to escape. Id. (citing U.S. ex rel. Martínez-Angosto v. Mason, 344 F.2d 673 (2d Cir. 1965)).}

\textsuperscript{196} \textit{See infra} notes 197-98 and accompanying text.
nally liable for knowing or reckless employment of these individuals. Criminal probable cause necessarily requires strict scrutiny by the courts for a warrant or enforcement of an administrative subpoena, and particularity and specificity with respect to names and facts should be required.

The issue of employer consent to INS inspection in the context of legal entry and permissible search and seizure action is also of heightened concern after IRCA. It is suggested the employers' counsel keep the issue in mind when advising employers whether or not they should consent. It is certainly clear that employers are under no obligation to consent to INS employee inspection. If the attorney is counseling after the employer has already consented, the question of whether the consent was given voluntarily must be explored. In this regard, the Mendenhall factors\textsuperscript{197} provide some guidance as to indicia of facts that may invalidate the employer's consent.\textsuperscript{198} It is here posited that Mendenhall should be read broadly and that the list of factors should be expanded on a case by case basis.

Another related question, yet to be answered, is: whether employees may sue their employer for violation of their constitutional rights where these rights have been infringed as a direct result of the employer's having consented to INS entry, inspection, and questioning.

Moreover, it would also appear that the recordkeeping and verification process outlined by Congress provides a satisfactory and arguably exclusive method by which INS officials, including Border Patrol officers, may now pursue their enforcement activities without warrant on employer premises. It could be posited that, in setting up such an integrated, extensive, preemptive system of regulation, Congress has established an exclusive method by which INS officials should enforce the new laws, with respect to employers and the work place. In effect, the EVS creates and provides a built-in system of personnel evidence and documentation that can be used to construct a proper record for legal affidavits and warrants.\textsuperscript{199} This extensive regulatory system would not only support the criminal probable

\begin{enumerate}
\item[197.] See \textit{supra} notes 107 and 113 and accompanying text.
\item[198.] See \textit{supra} notes 111-16 and accompanying text.
\item[199.] It is here noted then when IRCA was first enacted, some immigration experts questioned the personnel or rigorousness that the INS would dedicate to investigations or verification checks in its enforcement of the employer provisions. See M. Roberts and S. Yale-Loehr, \textit{Employers as Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform Control Act}, 21 \textit{Int'l Law} 1013, 1053 (1987) [hereinafter "\textit{Junior Immigration Inspectors}"] However the INS has already issued thousands of warning citations and notices of intent to fine. See Interpreter Releases, Vol. 65, No. 6, February 8, 1988, p. 133.
\end{enumerate}
caused standard and the warrant requirement, but would also seem to support requiring even stricter scrutiny of the reasons for issuance and enforcement of a search warrant.

It could be argued that Congress has relegated INS enforcement activities to the terms of the new act: namely, that through the strict requirements of employer verification and recordkeeping, INS has a clear, legislatively mandated system of detection. Greater violations should be spotted through enforcement of the EVS, and employers will have the opportunity under this system to adjust their employment habits and procedures, or else risk mounting civil and criminal penalties and possibly criminal sanctions for unauthorized alien employment, "harboring" or pattern and practice violations.

Certainly the above analysis may appear stronger at first blush as it relates to private areas of employers' premises, but in view of the severe potential criminal sanctions to which employers may now be subject under the new laws, a warrant based on the criminal standards of probable cause would also seem necessary, based upon the same reasoning, for any search, seizure or questioning amounting to forcible or detentive interrogation on the public areas of employers' premises as well.

In this regard, the particular location or space of the employer's premises should not be a major consideration in the Fourth Amendment analysis. But rather, at least a minimal reasonable expectation of freedom from fear of intrusion by private persons or government should be uniformly held, regardless of location, in the sense that the same conduct basically offends in the same way, irrespective of where it takes place. Moreover, this rationale is entirely consistent with the reasoning and decision in the Barbera case, in which the Second Circuit required "founded suspicion" that a person is an alien as a prerequisite to the INS investigator's right to question on a public bus.

The new "harboring statute" presents numerous novel issues and problems. First, the elimination of what had commonly come to be known as the "Texas proviso" gives rise to the question of what was the intended and will be the actual impact of this modification.

200. In his dissent, Justice Marshall stated that, "[i]f in light of our shared sensibilities, those activities are of a kind in which people should be able to engage without fear of intrusion by private persons or government officials, we extend the protection of the Fourth Amendment to the space in question . . . ." Oliver v. United States, 466 U.S. 170, 191 (1984).

201. 514 F.2d 294 (2d Cir. 1975).

202. See Fragomen, Jr., supra note 73, at 115.

203. See supra notes 35-53.
It is here noted that in its least harmful sense, the deletion of the proviso could be viewed as a symbolic gesture.\footnote{204} It would seem inconsistent with the overall scheme and purposes of IRCA to impose the severe criminal penalties of the new statute for mere employment alone. This would argue for the requirement of some concept of "employment plus," whether or not based upon the prior law. It is here suggested that the prior law provides a good model for "employment plus,"\footnote{205} and that despite the change in language, certain particular, unusual or extraordinary circumstances, where the employer has specifically facilitated the alien's travel to or maintenance of the alien in the United States, should be required to be present before these provisions would be triggered.\footnote{206}

Moreover, the state of mind standard has been relaxed, so that this feature alone will open up wider the potential net of violators to include not only knowing employers, but also reckless employers.\footnote{207} It is also here noted that even a mere pattern and practice of violative employer conduct toward numerous unrelated unauthorized aliens would not seem likely to trigger the new harboring provisions, as pattern and practice violations are already provided for elsewhere in the Act.\footnote{208}

Recklessness in modern statutes is a form of "general intent" and is based on a degree of conduct in the performance of an act. "A person is reckless or acts recklessly when such person 'consciously disregards a substantial and justifiable risk which, by the standards of a reasonable person, substitute a gross deviation from standard conduct.'"\footnote{209} It should be noted that it is the conscious awareness of the risk which "implies disregard of the rules of diligence and heedlessness of the consequences . . . of such a character as to show an utter disregard of the safety of others under circumstances likely to cause injury."\footnote{210} In spite of the new relaxed and less than specific...
knowledge standard, an employer must, at a minimum, be con-
sciously aware of the risks that he may be in violation of the U.S.
immigration laws before he/she would be deemed to have the mini-
mal reckless mental state.

Despite efforts by the INS to educate business owners, there are
going to be many who possess little information or understanding
about the immigration laws in general, and even less awareness of
specific new provisions. After all, it seems unlikely that the Act’s
intent was to make every employer an expert in the numerous tech-
nicalities of the immigration laws. On the other hand, certain ba-
sic compliance will no doubt be immediately mandated.

It is therefore critical that employers learn to and proceed to
comply with the new EVS requirements. Good faith compliance will
at least ensure employers an affirmative defense in prosecution under
the new laws. The open problematic question seems to be: to what
extent will employers be blamed for inconsistencies in documenta-
tion, and other good faith compliance problems?

N.E.2d 105 (1927)).

211. “Surveys conducted by the U.S. Chamber of Commerce, the Dallas Times Herald
and Robert Half International, as well as statistics from the Department of Labor, offer some-
what contradictory evidence as to the percentage of employers who are aware of and compli-
ing with their obligations under the new law.” Interpreter Releases, Vol. 65, No. 6, February
8, 1988, p. 133. Department of Labor (“DOL”) statistics reveal that one-third of all employers
questioned by DOL inspectors were ignorant of the law. Seventy-five percent of attorneys
questioned in the Dallas Times Herald survey. Id. at 134. In general, the new laws apply to
employers of all sizes. See G. Morales & R. Winterscheidt, Immigration Reform and Control
Act of 1986—An Overview, 3 LAB. LAW 717 (1987) (“This new legislation... for the first
time requires all employers to become familiar with the immigration law and policy.”)

212. Cf. Junior Immigration Inspectors, supra note 199 at 1013 (“These provisions cre-
ate major new responsibilities for businesses and in effect deputize them as junior immigration
inspectors.”) But see, A Corchado, Border Troubles: New Immigration Law Riles Small Busi-
Trouble”] (“... employes all over the country... are being forced to keep such books and
to become unwilling INS agents.”)

213. It is noted that the INS began issuing citations for an employer’s first offense of
knowingly hiring an illegal alien on June 1, 1987. On June 1, 1988, fines will replace paper
citations for first offenses. See Interpreter Releases, Vol. 65, No. 6, February 8, 1988, at 133.

214. See supra notes 20-23 and accompanying text.

215. Recently, the Wall Street Journal reported the following:

In San Antonio and Austin, Texas, recently, INS agents simultaneously
swooped into six stores of the Taco Cabana restaurant chain for an early morning
raid. They nabbed nearly two dozen workers and searched through the employer’s
personnel and payroll records. Along with their warrants, the agents carried an affi-
davit alleging fraudulent documents were being sold in Mexico specifically to obtain
jobs at Taco Cabana.

Patrick Thomas, the company’s lawyer, denies that the chain had anything to
do with such documents. But he concedes, “There is a document problem, a hornen-
dous document problem.”
It would appear, in light of IRCA and case law, that in the border area, as in non-border areas of the country, INS' authority to interrogate on private property, including commercial property, can only be derived from the issuance of a warrant or special circumstances. Further support of this appears in the new laws under IRCA, as Section 287(d) of the Act is amended to require INS officers and employers to obtain a properly executed warrant in order to enter onto a farm or other outdoor agricultural operations, for the purpose of questioning suspected aliens as to their rightful presence in the U.S.\textsuperscript{216} This section expands the protection of individuals against unreasonable searches by extending Fourth Amendment protection in the case of immigration searches of farms and open fields. The section invalidates the application of the Supreme Court decision in \textit{Oliver v. United States},\textsuperscript{217} which permitted immigration searches of farms and open fields. \textit{Oliver} involved a warrantless search by police officers of private land for evidence of marijuana propagation. The Court's finding, that an \textit{Oliver} search is constitutional under the Fourth Amendment cannot now be used in immigration search cases.\textsuperscript{218}

It should be noted that private suits alleging trespass against immigration officers individually have, in the past, not been success-

\begin{verbatim}
Taco Cabana expects to receive a notice of "intent to fine" from the INS. But back at INS headquarters in Washington, a spokesman won't confirm that.
D. Solis, "Immigration Law Cuts Illegal Border Crossing, But It's No Panacea," Wall St. J., Nov. 6, 1987, at 1, col. 1. See Border Trouble, supra note 212, at 12 ("to avoid fines, some employers . . . quietly condone the use of false documents, which are proliferating due to the harsh impact the new immigration laws are having on their businesses"). See also, H. Kestin, \textit{Papers Please "Hey No Problem"}, \textit{FORBES}, January 25, 1988, at 84. (describes document-vending as a profession in Los Angeles; provides further examples of immigration related documentation fraud)
\end{verbatim}

216. IRCA § 116, 8 U.S.C. § 1357 (amending INA § 287). The text of the new law is as follows:

\begin{verbatim}
SECTION 116.
RESTRICTING WARRANTLESS ENTRY IN THE CASE OF OUTDOOR AGRICULTURAL OPERATIONS
Section 287 (8 U.S.C. 1357) is amended by adding at the end of the following new subsection:
(d) Notwithstanding any other provision of this section other than paragraph (3) of subsection (a), an officer or employee of the Service may not enter without the consent of the owner (or agent thereto) or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States.
218. \textit{See also} Taylor v. Fine, 115 F. Supp. 68, 71 (S.D. Calif. 1953) (amendment also overrules Taylor principle that open fields are outside of the scope of the protection against unreasonable searches and seizures).
\end{verbatim}
It can be further observed that so-called "constitutional torts," or *Bivens* actions, have also proven unsuccessful. However, these private rights of action against INS officers individually should be kept in mind as potential limitations on their conduct and the exercise of their authority in future enforcement under IRCA. Now that the proverbial "stakes have been raised," it may be time to reassess potential remedies in these areas for infringement of Fourth Amendment rights.

Moreover, perhaps it is time to challenge the constitutionality of INA section 287, authorizing warrantless interrogation and arrest of suspected aliens. In the past, the tension between INA section 287 and the Fourth Amendment to the U.S. Constitution was more obvious or understandable. Alienage generally carried no implication of criminal activity. In contrast, alienage now clearly carries with it the onus, the risks and the penalties of criminal activity. No employer or employee should be subjected to warrantless interrogation, which may itself be or become a seizure.

In any case, perhaps the new criminalization of alienage also will impact the results, if not the reasoning, in cases such as *INS v. Delgado.* While *Delgado* pre-IRCA precedent would appear to allow "mere questioning" by the INS of anyone as to their immigration status without suspicion of alienage, provided the encounter was "voluntary," it would now appear that something more should be required. Hence a new focus and emphasis upon the "reasonable sus-

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219. *Id.* In *Taylor,* immigration officers approached the plaintiff's ranch in the course of execution of their enforcement duties, and asked some Mexican laborers working there if they were legally in the United States, and upon admissions from some Mexicans there, took laborers into custody. The district court in that case stated:

[i]f it were possible to submit officers of the United States Immigration Service to harassment every time they search for illegal entrants, if they could be subjected to suits even for nominal damages, the landowners ... would be erecting barriers against the United States Government, and, in effect, telling the officers of the Government, 'Do not enter, no matter what federal laws are violated.'

*Id.*

220. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). The *Bivens* cause of action is a judicially created implied federal cause of action for damages against federal officers in their personal capacities for injuries caused by constitutional torts. *Bivens* was brought directly under the Fourth Amendment; but the term has come to identify any constitutionally implied cause of action for damages.

221. See supra notes 85-88 and accompanying text.

222. See Note, supra note 73, at 502.

223. See United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest).


225. See Note, supra note 73, at 503.
The "founded suspicion" requirement in such cases as Barbera, setting forth the "founded suspicion" requirement is certainly in order.

The Supreme Court in Delgado suggested the open possibility that refusal to respond to INS agents' questions may supply the appropriate level of reasonable suspicion of illegal alienage to justify further detentive questioning. It is suggested that the question of whether this could have been the law prior to IRCA is now somewhat mooted in view of the severe criminal penalties applicable to both employers and employees for violations of certain new provisions under IRCA. As a result, it is here asserted that silence on the part of employer and employee would now certainly seem to be a legitimate choice consistent with the Fourth Amendment, and based on, among other rights, the Fifth Amendment protection against self-incrimination.

Under the new laws, it is here suggested that this possibility is further closed by the possibility that Miranda warnings may now be required, where an individual is detained or otherwise placed within INS custody. First, as for employers, in the face of arrest for alleged criminal violations under IRCA, Miranda warnings would certainly be necessary, consistent with other arrest contexts. As for employees, as it may now be criminal to be an unauthorized worker, and because of possible uncertainties of whether an individual is, in fact, an authorized worker or unauthorized alien, it is unclear, but certainly more impressive than in the past, that Miranda warnings are now necessary.

227. U.S. CONST. amend V provides:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
228. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that before a person in custody may be subjected to interrogation, he "must be adequately and effectively apprised of his rights." In particular

he must first be informed in clear and unequivocal terms that he has the right to remain silent . . .

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court.

... (A)n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . .

(I)t is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. 
might be administered at the time of detention or arrest.229

VI. CONCLUSION

In sum, employers and employees are protected by the Fourth Amendment guarantees against unreasonable search and seizure. Although INS Border Officers have authority to access private lands within twenty-five miles from the external boundaries of the U.S., this authority is limited to the "patrolling of the border to prevent the illegal entry of aliens."230

Moreover, although INS officers and its Border Patrol have broad powers to ferret out aliens, a warrant obtained on the basis of probable cause is necessary to inspect commercial enterprises for aliens, except where the employer has voluntarily consented.231 To date, case law regarding the issue of probable cause has indicated that a flexible "civil" standard has been used in connection with warrants of inspection,232 and criminal specificity has been required in other cases.233 However, in light of IRCA, a criminal law standard of probable cause would appear manifestly appropriate now, in any case. It is here argued that this standard should hold true for both public as well as private areas of commercial premises, and should include all varieties of warrants, regardless of, designation or nomenclature. In this regard, International Molders’ was correctly decided under pre-IRCA law, but should now be read more expansively. The D.C. Circuit Court’s decision in Blackie’s, in contrast, no longer provides a proper foundation for analysis after the enactment of IRCA. The impact of IRCA should toll the death knoll of the “general” or “open-ended” warrant and should signal the demise of the traditional “area control operations” or “factory sweeps.”

In order to minimize exposure to new liabilities under the IRCA, and to ensure INS adherence to fundamental Fourth Amendment standards, business owners should be counseled to withhold,

229. Cf. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Prior to Schneckloth, which decided that Miranda warnings were not required, it was unclear whether an individual detained on immigration law grounds had to be informed of his/her right to withhold consent to either a search or a seizure. But see, Mathis v. U.S. 391 U.S. 1 (1968) (where a criminal prosecution is contemplated the full Miranda warnings must be given before any questioning may occur once the suspected alien is in custody.).


231. Even where the employer has consented, there is still room for argument that the new criminal liabilities imposed upon unlawful aliens would now require separate valid consent from each employee as well.


under most circumstances, consent to an INS request to enter the premises to engage in inspection or search activity (for other than compliance with the EVS program) or to question their employees. This will require the INS to obtain a valid search warrant in order to effect entry; and will further require, at a minimum, a showing of individualized reasonable suspicion that illegal aliens are on the premises. Even where an owner provides consent for INS entry onto premises (for purposes other than inspection of forms 1-9 under the EVS), perhaps there are greater Mendenhall concerns, and greater reason to question the voluntariness of an employer's consent, now that enforcement has been stepped up, and the penalties increased. If the INS is compelled to obtain a search warrant, the validity of the warrant is then open to challenge in any subsequent litigation.

A pre-IRCA commentator has pointed out the attractiveness of bringing this issue to the surface, "in light of the unsettled state of the law." Now more than ever under the new rules of IRCA, it is important that these issues are raised, challenged and clarified, as IRCA has, at this stage and in the areas of Fourth Amendment safeguards, only muddied already cloudy waters. It is hoped that the strong provisions of IRCA will help to push these issues to the fore, and will provide the additional impetus necessary to resolve both old and new questions.

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234. This will have the further effect of curtailing "factory sweeps." See Note, supra note 73, at 519.
235. Incredibly, ninety percent of all business owners consent to the INS' entry without requiring the INS to obtain a valid search warrant. Note, supra note 73, at 482, n.71, and 519 (citing International Ladies' Garment Workers' Union v. Sureck, 681 F.2d 624, 627 (9th Cir. 1982), rev'd sub nom. INS v. Delgado, 466 U.S. 210 (1984)).
236. Note, supra note 73, at 520.