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Illegal immigration into the United States is a problem of enormous concern. In an effort to curtail illegal immigration, the Immigration and Naturalization Service (INS) has conducted "factory raids" in selected urban areas. Considerable controversy has
developed among the circuit courts as to whether these factory raids violate the workers' fourth amendment rights. In *INS v. Delgado*, the United States Supreme Court ruled upon the constitutionality of factory raids conducted pursuant to statutory authority granting INS agents the power to interrogate any person they believe to be an alien. In so ruling, the Court upheld the questioning of an entire factory workforce without requiring individualized warrants, individualized consent, or a reasonable suspicion that INS conducted area control operations under the title "Project Jobs," which sought to create employment opportunities for United States citizens by removing illegal aliens currently holding those jobs. 1982 INS ANN. REP. 5 (1983).


7. 8 U.S.C. § 1357(a) (1982) provides in pertinent part that "[a]ny officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have the power without warrant—(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States. . . ." *Id.* Although this statute gives the INS power to interrogate, they may not surpass the established constitutional boundaries of the fourth amendment. 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. *Id.*

The fourth amendment protects people from unreasonable searches and seizures. A seizure has been defined as a situation in which an individual is restrained by "physical force or show of authority." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). Further, whenever a "police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16. A search occurs when a government agent invades the personal security of an individual without proper authority or that person's consent. *Id.* at 19. A "search" has been found in a variety of situations. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (automobile stopped and visually searched is a fourth amendment search); *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (police officer frisked individual for weapons); *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967) (administrative inspection of building for code violations). *But see* United States v. *Place*, 103 S. Ct. 2637, 2644-45 (1983) (police dog "sniff" of luggage at airport does not constitute a search).

8. *Delgado*, 104 S. Ct. at 1760. For two of the three factory surveys in *Delgado*, the INS obtained warrants upon a showing of probable cause that the factory employed many illegal aliens. *Id.* However, neither warrant specified any particular individuals suspected of illegal activity. *Sureck*, 681 F.2d at 627. Because the validity of the warrants was not ruled upon by the *Sureck* court, the Supreme Court in *Delgado* did not address the issue. *Delgado*, 104 S. Ct. at 1765 (Stevens, J., concurring).
the person questioned was an illegal alien. The Court did not require any of these traditional fourth amendment protections because it reasoned that the factory raids did not constitute a fourth amendment seizure of either the workforce or the individual workers.

In 1977, INS agents conducted three factory raids in the Los Angeles area in order to find illegal aliens. The INS agents entered each factory either with the owner's consent or with a search warrant. During each raid, several agents were stationed...
at the exits, while others moved methodically through the building to interrogate the workers. During the course of these investigations the agents found and arrested several illegal aliens.

Although Delgado was interrogated, he was not arrested because he was not an illegal alien. He and other workers sought declaratory and injunctive relief in the United States District Court for the Central District of California against future INS factory raids. The workers claimed that the agents' conduct violated their fourth amendment right to be free from unreasonable searches and seizures. The district court granted summary judgment to the INS, finding no constitutional impropriety. The United States Court of Appeals for the Ninth Circuit reversed, holding that the fourth amendment was violated because the entire workforce in each factory was unreasonably seized. The Ninth Circuit concluded that, in order to conduct factory raids, INS agents must have a reasonable suspicion that each worker questioned resided in this country unlawfully.

The United States Supreme Court reversed. The Court ad-

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17. *Delgado*, 104 S. Ct. at 1760. See infra notes 50-56 and accompanying text.
18. *Delgado*, 104 S. Ct. at 1760. The workers were interrogated or questioned by INS agents who were armed, carried walkie-talkies, and displayed badges. Each worker was asked about his or her citizenship and, if the agent believed the reply, the worker was left alone. If the response did not satisfy the agent, the worker was asked to show his or her papers. *Id.* at 1760-61.
19. *Id.* at 1766 n.3 (Powell, J., concurring in result). See also supra note 14.
21. *Id.* The respondents in *Delgado* were four factory workers, Herman Delgado, Romana Correa, Francisca Labonte and Marie Miramontes. The first three worked at Southern California Davis Pleating Company, while the last respondent was employed at Mr. Pleat. All four respondents were either permanent resident aliens or citizens. *Id.*
22. *Id.* at 1761. The declaratory and injunctive relief sought was to enjoin the INS from questioning the respondents personally in the future. *Id.* The district court also denied respondents' prayers for injunctions pertaining to the warrants used and lack of individualized consent of the workers. Petition for Cert. at 45a-60a, INS v. Delgado, 104 S. Ct. 1758 (1984).
23. *Delgado*, 104 S. Ct. at 1761. See also supra note 7.
24. *Delgado*, 104 S. Ct. at 1761. The district court first granted partial summary judgment to the INS and dismissed the International Ladies' Garment Workers' Union from the action due to lack of standing. Because the Union lacked standing, the district court denied class certification. *Id.* Thereafter, the district court granted summary judgment for the INS, holding that either no seizure occurred or, if a seizure did occur, it was reasonable. Petition for Cert. at 47a-48a, INS v. Delgado, 104 S. Ct. 1758 (1984).
26. *Id.* at 644. The Ninth Circuit, in concluding that the INS must have individualized suspicion of illegal activity, expressly rejected the reasoning of the Third Circuit in *Babula* v. INS, 665 F.2d 293 (3d Cir. 1981) (which held that the INS only needs reasonable suspicion of illegal activity within the confines of the factory before conducting a raid).
dressed the issue of whether the INS factory raids, conducted without individualized suspicion, violated the fourth amendment. The Court found that, because the encounters between the agents and the workers were brief in nature, they did not constitute a seizure.28 The Court, therefore, held that the fourth amendment and its protections were not applicable to workers during a factory raid.29

The Court initially stated that the appropriate test to determine if a seizure occurs should be whether, “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”30 The Court applied this test and found that a reasonable person would have felt free to leave during the questioning, even though additional agents were stationed at the exits.31 Consequently, the Court held that no seizure took place.32

The Court primarily relied on two recent fourth amendment

28. *Id. See infra* notes 66-71 and accompanying text.


30. *Id.* at 1762 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)). This test was first laid down in *Mendenhall* and subsequently followed in *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion).

31. *Delgado*, 104 S. Ct. at 1764. This part of the Court’s opinion is perhaps the most perplexing. For instance, in United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971), a seizure was found to exist when two police officers stationed themselves on either side of the defendant’s car, even though he was physically free to drive away. *Id.* Further, Professor LaFave, after discussing the test the Court ultimately adopted in *Mendenhall*, stated that a seizure would be found if the police used “such tactics as pursuing a person who has attempted to terminate the contact by departing and encircling the suspect by many officers. . . .” 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2, at 54 (1978).


Justice Rehnquist's opinion concluded that no seizure took place. *Id.* at 1765. Justice Rehnquist had previously advocated the position that searches and seizures should be read narrowly, but he was not able to get a majority of the Court to agree with him. *See Reid v. Georgia*, 448 U.S. 438, 442 (1980) (per curiam) (Rehnquist, J., dissenting) (stating that police conduct did not constitute a seizure); United States v. Mendenhall, 446 U.S. 544, 555 (1980) (part II-A joined only by Stewart and Rehnquist, J.J.) (stating that no seizure took place). As of last term, however, Justice Rehnquist was able to convince a majority of the Court’s members. *See Oliver v. United States*, 104 S. Ct. 1735 (1984) (holding fourth amendment not applicable to open fields); United States v. Place, 462 U.S. 699 (1983) (police dog “sniff” of luggage at airport not a search).

Justice Rehnquist is also considered to be the leader of the conservative block of the Court which includes Chief Justice Burger and Justice O'Connor. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 237, 274 (1984) (discussion of the fourth amendment in light of the 1983 decisions). It has been suggested that this conservative block is moving closer to gaining a majority of the Court to adopt a general reasonableness test for all
cases in reaching this holding. First, the Court relied on Brown v. Texas to demonstrate a situation in which a seizure clearly occurred. In Brown, the police stopped the defendant because he was standing in an alley located in a high crime district. The officers frisked Brown and took him into custody solely because he refused to identify himself. The Brown Court found this conduct to amount to an unreasonable seizure. Second, the Delgado Court relied on Florida v. Royer for the proposition that a law enforcement officer may permissibly request and examine a person's identification. Royer involved a Drug Enforcement Agency (DEA) operation in which agents asked Royer for identification and then asked him to accompany them to a small room. The latter conduct was considered to constitute an unreasonable seizure. Comparing these two cases, the Court concluded that the situation in Delgado was not as intrusive as that in Brown; rather, the situation

fourth amendment cases and obliterating the distinction between an arrest and a stop. Id.

Justice Powell, concurring in the result, thought that, because the seizure issue was close, the Court should have assumed a seizure and then ruled upon the reasonableness of that seizure. Delgado, 104 S. Ct. at 1765 (Powell, J., concurring). Justice Powell concurred with the Court, however, because he found that if there was a seizure it had been reasonable. Id. at 1767.

Justice Brennan's dissenting opinion criticized the "studied air of unreality," in the majority's conclusion that no seizure occurred. Id. Justice Brennan stated that the majority's view was unrealistic because it was based on a faulty premise. The court's faulty premise was insistence "upon considering each interrogation in isolation as if respondents had been questioned by the INS in a setting similar to an encounter between a single police officer and a lone passerby that might occur on a street corner." Id. at 1769.

Further, the dissent would have found the seizure unreasonable because it was not based upon specific and objective facts. Id. at 1771. In reaching this conclusion the dissent adhered to the standard that requires an agent or officer to have a particularized suspicion that the individual has acted illegally. Id. The agents did not have any specific articulable facts that would suggest that any of the respondents had acted unlawfully. Id. Moreover, Justice Brennan considered the seizure to be unreasonable because it was not carried out pursuant to a neutral plan. Id. at 1774. A neutral plan would be enacted by a central office, not by the field officers, and would require enough facts to make each raid reasonable. See Note, Individualized Suspicion in Factory Searches—The "Least Intrusive Alternative," 21 AM. CRIM. L. REV. 403, 409 (1984) (addressing whether neutral limitations meet the fourth amendment's reasonableness standard).

33. Delgado, 104 St. Ct. at 1762.
35. Id.
36. Id. at 48-49.
37. Id. at 49.
38. Id. at 53.
40. Id. at 501.
41. Id. at 501-02.
42. Id. at 502. However, the Court was not clear as to what point during the encounter constituted a seizure.
was analogous to the permissible request for information in Royer.\textsuperscript{43} Consequently, the \textit{Delgado} Court held that the interrogations only amounted to brief encounters and not seizures.\textsuperscript{44}

The majority's reasoning in \textit{Delgado} is unconvincing for three reasons. First, the Court's conclusion that no seizure occurred is without merit in light of the circumstances surrounding the factory raids.\textsuperscript{45} Second, the Court's "no seizure" finding is inconsistent with the Court's development of prior fourth amendment case law.\textsuperscript{46} Third, the Court failed to consider other effective, less intrusive techniques available to the INS.\textsuperscript{47}

A major flaw in \textit{Delgado}'s reasoning is the Court's finding that the workers should have felt free to leave when a reasonable interpretation of the facts indicates otherwise. Although the Court stated that a seizure occurs when a government agent, "by means of physical force or show of authority, has restrained the liberty of a citizen,"\textsuperscript{48} it still concluded that each worker was free to leave.\textsuperscript{49} The Court reached this conclusion even though several immigration agents entered the factory, sealed the exits, and interrogated the entire workforce.\textsuperscript{50} The Court determined that a reasonable person would not feel restrained when government agents merely ques-

\begin{footnotesize}
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\item[43.] \textit{Delgado}, 104 S. Ct. at 1762-63. The inconsistent nature of this analogy is analyzed more thoroughly at infra notes 58-62 and accompanying text.
\item[44.] \textit{Delgado}, 104 S. Ct. at 1764.
\item[45.] As Justice Brennan concluded, the circumstances surrounding the INS factory raid clearly indicated that a seizure took place. \textit{Id.} at 1770. The surrounding circumstances included the fact that the agents were armed, carried walkie-talkies and handcuffs, wore badges, entered the factory en mass, and blocked the exits to prevent escape. \textit{Id.} Justice Brennan found that the show of authority evidenced by the number of agents employed, and enhanced by placing agents at the doors, created such a high degree of subjective intrusion and was so overwhelming that each respondent was seized. \textit{Id.} at 1769. \textit{See also} infra notes 48-56 and accompanying text.
\item[46.] \textit{See infra} notes 63-82 and accompanying text.
\item[47.] "Less intrusive alternatives" refers to the availability to the INS of other enforcement techniques that are not as likely to infringe upon an individual's fourth amendment rights. Note, \textit{Individualized Suspicion in Factory Searches—The "Least Intrusive Alternative,"} 21 AM. CRIM. L. REV. 403, 418-19 (1984). The Court has expressed that once a seizure is found and a balancing test applied, the seizure will probably be considered unreasonable if the enforcement technique utilized is not the "least intrusive alternative" available. Florida v. Royer, 460 U.S. 491, 500 (1983); Delaware v. Prouse, 440 U.S. 648, 659 (1979). \textit{See} United States v. Villamonte-Marquez, 103 S. Ct. 2573, 2580 (1983) (upheld random stops of vessels because no practical less intrusive means existed). \textit{See also infra} notes 89-99 and accompanying text.
\item[48.] Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (emphasis added).
\item[49.] \textit{Delgado}, 104 S. Ct. at 1764. In reaching this conclusion, the Court's analysis seemed to neglect any consideration of the "show of authority" presented in the factory. \textit{See also supra} note 32.
\item[50.] \textit{Delgado}, 104 S. Ct. at 1770 (Brennan, J., dissenting).
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tioned him. Further, the Court erroneously concluded that the agents who were placed at the doors were obviously there to guarantee that all workers would be questioned, and not to prohibit them from leaving.

The Court neglected to take into account, however, that one of the agents admitted that the exits were blocked to prevent escape and, in fact, one worker was prevented from leaving. Nevertheless, the Court attempted to justify its holding by reasoning that an isolated incident alone does not prove that the agents were actually placed at the exits to prevent egress. This type of reasoning places the workers in an inescapable position. In theory, the Court's "reasonable man" should have felt free to leave. In reality, however,

51. Id. at 1764. However, as Professor LaFave points out, the mere fact that an officer approaches an individual is "a show of authority to which the average person encountered will feel obliged to stop and respond. Few will feel they can walk away or refuse to answer." 3 W. LAFAVE, supra note 31, at 50 (quoting Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976)). See generally Note, The Requirement of Individualized Suspicion: An End to INS Factory Sweeps?, 59 CHI.-KENT L. REV. 1069, 1089 (1983) ("[A] rule which says that a casual encounter can occur between the INS, armed with a badge and a gun to enforce immigration laws, and an alien, without the alien feeling detained is unrealistic.").

52. Delgado, 104 S. Ct. at 1763.

53. Id. at 1770 (Brennan, J., dissenting). See also TARNISHED GOLDEN DOOR, supra note 10, at 83 (interviews held with INS officials, who concede that exits are blocked to prevent employees from leaving); Comment, INS Surveys, supra note 2, at 641 ("Typically, other INS agents remain stationed at exits and entrances to prevent any escapes by workers.").

54. Delgado, 104 S. Ct. at 1764 n.6.

55. Id. This conclusion is not supported by the record. See supra note 53.

56. This "reasonable man" standard stems from the objective test the Court applied to determine whether a seizure occurred. Delgado, 104 S. Ct. at 1762. That test requires that in order for a seizure to be found, a reasonable person should not feel free to leave. Id. The test was first announced in United States v. Mendenhall, 446 U.S. 544 (1980), and then reiterated in Florida v. Royer, 460 U.S. 491 (1983) (plurality opinion adopted by the majority).

Professor LaFave has suggested two possible interpretations of this objective test. First, a traditional application of the test would result in a seizure during almost any encounter since a reasonable person would not feel free to walk away from an officer's inquiry. 3 W. LAFAVE, supra note 31, at 53. Second, LaFave suggested that the inherent pressures involved in police encounters could be recognized as a legitimate interference with the individual. Id. Then, a seizure would only be found if the officer added to those inherent pressures by engaging in menacing conduct significantly beyond that which is accepted in social intercourse." Id.

The Delgado Court seems to have implicitly adopted LaFave's second interpretation. 5 J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 147-152 (1984) (discussing Florida v. Royer). In Mendenhall, the Court indicated some examples of conduct above and beyond the encounter itself that might prove that a seizure occurred. Some of the circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person... or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.
none of the workers could actually leave. In order to avoid subjecting oneself to an intrusive interrogation, a worker would have to test the agents' authority in order to convince the Court that he was not free to leave. Such a stringent requirement should not be mandated by the Court, especially when the surrounding circumstances show that a seizure occurred.\(^5\)

The Court also relied upon the analogy between the INS activities in *Delgado* and a request for identification, as in *Florida v. Royer*, to find that no seizure occurred.\(^6\) The Court's emphasis on *Royer*, however, is misplaced. In *Royer*,\(^5\) the Court found that a request for identification in a public place, such as an airport, does not alone amount to a fourth amendment seizure.\(^6\) The factory raids in *Delgado*, however, took place in a private setting\(^6\) and were accompanied by a strong showing of authority which created tre-

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57. When an objective standard is used, it is clear that a frustrated attempt to leave would be proof that a reasonable person did not feel free to leave. However, a clear show of authority should also be enough. Because one of the factors the Court has put forth to determine whether a seizure occurred is "the threatening presence of several officers," a seizure should have been found. *Mendenhall*, 446 U.S. at 554.

Moreover, a seizure should have been found since,

[b]y stationing agents at each door of the factory and by displaying immigration badges, the INS clearly made a show of force and authority constituting a seizure for fourth amendment purposes. Undoubtedly, a person who knew or suspected that there were guards at all doors would not feel free to leave.

Note, *The Requirement of Individualized Suspicion: An End to INS Factory Sweeps?,* 59 CHI.-KENT L. REV. 1069, 1088 (1983). Because the *Delgado* Court did not recognize a sufficient show of authority, it would seem that a worker would have to prove that he could not leave by attempting to leave. However, that standard could never be met because a worker who subjectively believed that he could not leave would never attempt to leave.


59. *Royer*, 460 U.S. at 491-92. (Justice White delivered a plurality opinion, however, a majority of the Court supported this statement).

60. *Id.* at 496-97.

61. The distinction between the private and public setting refers to the subjective intrusion created by the encounter. In an airport, an individual might reasonably expect to be approached by customs or other law enforcement officers. However, in a private factory, a worker would not expect to be harassed by government agents and would be considerably more embarrassed by the encounter since it takes place in front of his co-workers and friends.

Further, the fourth amendment protects an individual's reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 350 (1967) (FBI agents attached an electronic recording device to telephone used by plaintiff). Since an individual should have a greater expectation of privacy at work than in a car, a seizure should have been found. *Delgado*, 104 S. Ct. at 1774 (Brennan, J., dissenting). *See also* *See v. City of Seattle*, 387 U.S. 541, 543 (1967) (equating commercial property with residential property in terms of administrative warrant requirements).
mendous fear among the workers. The INS raids in Delgado, being more intrusive than a mere request for identification, should have led the Court to the conclusion that Delgado and his co-workers were seized within the meaning of the fourth amendment.

Aside from the Court's misinterpretation of the facts, the Delgado Court should have found that INS factory raids constituted a seizure so that future law enforcement activities would continue to be subject to traditional fourth amendment protections. The primary purpose of the fourth amendment is to protect individuals from unreasonable governmental intrusions. To effectuate this purpose, the Court has long recognized that police activity must be closely supervised in order to prevent it from infringing upon the individual's personal privacy. However, police activity, no matter how intrusive, will not be effectively scrutinized when the Court defines a seizure as narrowly as in Delgado.

Because any citizen-government encounter could be considered an unreasonable search and seizure, the Delgado Court erred in exempting the initial stage of an encounter from the definition of a seizure. In Terry v. Ohio, the Supreme Court emphatically rejected the argument that a separate category of police actions, la-

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62. The subjective intrusion, described supra note 61, can also be seen when the governmental action generates concern or fright on the part of the individual being approached. United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976). The factory raids in Delgado took the workers by surprise and caused "widespread fear and anxiety among most workers." Delgado, 104 S. Ct. at 1773 (Brennan, J., dissenting). Further, a factory raid "usually disrupts the business operations as workers often shout 'la migra' (the immigration) and attempt to hide or run." Comment, INS Surveys, supra note 2, at 641 n.53. See also TARNISHED GOLDEN DOOR, supra note 12, at 83 (discussion of the pandemonium that occurs during a factory raid).

63. Terry v. Ohio, 392 U.S. 1, 9 (1968). The Terry Court also noted that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Id. (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

64. Terry, 392 U.S. at 9.

65. The purpose of the fourth amendment is to protect citizens from governmental action that is unreasonable. Id. Consequently, the underlying premise must be that all governmental action is capable of being unreasonable.

66. 392 U.S. 1 (1968). Terry involved a police officer who, while questioning an individual on the street, grabbed him, spun him around and frisked him. Id. at 7. The Terry Court established that certain police activity short of traditional arrest need not be supported by probable cause. Id. at 20.

Traditional arrest refers to a situation in which "an offense has been or is being committed," thereby giving an officer the grounds or probable cause required to take the suspect into custody. 3 W. LAFAVE supra note 31, at 19 (emphasis supplied). See also J. CREAMER, THE LAW OF ARREST, SEARCH AND SEIZURE 56-57 (3d ed. 1980); Terry, 392 U.S. at 16. Prior to Terry, any seizure of an individual required probable cause. However, Terry established that a seizure which does not result in a traditional arrest or "a trip to the station
beled "stops," should be beyond the reach of the Constitution. The Terry Court rejected this notion because its effect would be "to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen." The Delgado Court, however, ignored this cautionary warning by labeling the INS action a brief encounter. In essence, this type of reasoning could potentially engulf most of the initial interaction between a citizen and a law enforcement officer. The unfortunate result may be, as in Delgado, that government agents acting unreasonably will not be subject to fourth amendment scrutiny because the Court has summarily determined that no seizure has occurred. Instead, the Court should have viewed the seizure issue broadly so that almost all governmental intrusions would be subject to traditional fourth amendment protections. The Court's prior treatment of fourth amendment case law supports a broader definition of a seizure than the Delgado Court supplied. Indeed, this broad view can be in-
ferred from the Court's treatment of both drug enforcement\textsuperscript{74} and border patrol cases.\textsuperscript{75}

Drug enforcement cases, implicating the fourth amendment, usually concern the DEA's operations at major airports.\textsuperscript{76} Those cases support the proposition, as the \textit{Delgado} Court correctly noted, "that police questioning, by itself, is unlikely to result in a fourth amendment violation."\textsuperscript{77} In each of those cases, however, the DEA agents' conduct constituted a seizure,\textsuperscript{78} and therefore the activity was tested according to established fourth amendment principles. Likewise, in cases concerning border patrol activities,\textsuperscript{79} every vehicle stopped, whether at a permanent checkpoint\textsuperscript{80} or by a roving patrol,\textsuperscript{81} was assumed to have been seized.\textsuperscript{82} The \textit{Delgado} Court

\begin{flushleft}Ct. at 1762. In no case within the past two decades, however, has the Court dealt with a fourth amendment seizure case and found no seizure.

Furthermore, it has been noted that "[n]o matter how minor the intrusion, the government conduct must still be scrutinized under fourth amendment standards. A minor intrusion will militate toward a judicial finding of reasonableness under the fourth amendment, but it does not exempt the conduct from all scrutiny." 1 W. \textit{RINGEL}, \textit{SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS} § 2.2, at 2-3 (rev. ed. 1984).

74. \textit{See} Florida v. Royer, 460 U.S. 491 (1983) (seizure deemed unreasonable when defendant was asked to accompany agents to a small room); Reid v. Georgia, 448 U.S. 438 (1980) (stop of individual in airport without reasonable suspicion was an unreasonable seizure); United States v. Mendenhall, 446 U.S. 544 (1980) (woman seized in airport, but seizure was reasonable).

75. \textit{See} United States v. Cortez, 449 U.S. 411 (1981) (border agents had particularized suspicion that the vehicle contained illegal aliens; hence, seizure was reasonable); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (stop of car at permanent checkpoint away from border is a seizure, but it was reasonable); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (roving patrol stop is a seizure and is unreasonable since not based on articulable facts that lead to a reasonable suspicion of illegal alienage); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (roving patrol stop not at border or its functional equivalent, without reasonable suspicion, is an unreasonable seizure).

76. \textit{See} supra note 74. In order to prevent drug trafficking, the DEA stations agents at major airports to watch for people that may fit a "drug courier profile." When the agents spot someone fitting this profile, they approach him for questioning. Florida v. Royer, 460 U.S. 491, 493-94 (1983).

77. \textit{Delgado}, 104 S. Ct. at 1762.

78. \textit{See} supra note 74.

79. \textit{See} supra note 75.

80. A permanent checkpoint is a roadblock operated by the Border Patrol Division of the INS at which all vehicles slow down for a brief visual inspection, and certain vehicles are directed to a secondary inspection area for a closer inspection. \textit{See also} Bell, \textit{Immigration Searches}, 9 \textit{SEARCH & SEIZE L. REP.} 66 (1982) (discussion of INS border patrol activities).

81. A roving patrol is an INS activity whereby agents stop vehicles on roads that lead to the border. However, for a roving patrol stop to be deemed a reasonable seizure, it must be based upon a reasonable suspicion of illegal activity. \textit{See} United States v. Brignoni-Ponce, 422 U.S. 873, 875-76 (1975). \textit{See also} Bell, supra note 80.

82. The border patrol cases are all considered to be seizures, possibly because the "stop" of an automobile is a constraint in itself in that it restricts the movement of the vehicle and the passengers therein. However, an analogy can
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should have adopted a broad view so that all citizen-government encounters would be assumed to constitute a seizure, and would therefore be subject to fourth amendment protections.83

In finding that no seizure existed, the Delgado Court declined to decide what fourth amendment standard should be applicable during factory raids.84 If the Court had correctly found a seizure, it would then have had to have chosen either the requirement of individualized suspicion of illegal activity,85 or the requirement of reasonable suspicion that some illegal aliens are on the premises.86 Given the Court's past search and seizure decisions, it would probably have chosen the requirement of individualized suspicion of illegal activity87 because that has proven to be a workable standard for the INS88 and because it would require the INS to use procedures

be drawn between an automobile stop and a factory raid in that a worker within the factory feels trapped in the building the same as a driver or passenger may feel constrained within a car. Comment, INS Surveys, supra note 2, at 644-45 n.66.

83. See supra notes 74-75.  
84. See supra note 5.  
85. International Ladies' Garment Workers' Union v. Sureck, 681 F.2d 624, 634-35 (9th Cir. 1982), rev'd sub nom. INS v. Delgado, 104 S. Ct. 1758 (1984). This standard would require that an INS agent have a reasonable suspicion that the alien had acted unlawfully. Id.  
86. Babula v. INS, 665 F.2d 293, 296 (3d Cir. 1981). The Babula court held that a factory raid was a seizure. However, that court found the seizure to be reasonable because the INS agents had a reasonable suspicion that illegal aliens were present at the factory. Id.  
87. Compare Illinois Migrant Council v. Pilliod, 531 F. Supp. 1011 (N.D. Ill. 1982) (individualized suspicion) and Laduke v. Nelson, 560 F. Supp. 158 (E.D. Wash. 1982) (individualized suspicion) with Babula v. INS, 665 F.2d 293 (3d Cir. 1981) (reasonable suspicion within the "milieu"). The requirement of individualized suspicion has been applied in every Terry-type seizure case except for Martinez-Fuerte. United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (requiring only reasonable suspicion that "aliens" are in the vehicle). Because a factory raid is more like a roving patrol than the fixed checkpoint in Martinez-Fuerte, the Court would require individualized suspicion. See supra note 62 (describing the subjective intrusion involved in a factory raid, which is just like the subjective intrusion involved in roving patrol stops). Furthermore, many commentators who have considered the standards favor the individualized suspicion standard. See Catz, Fourth Amendment Limitations on Nonborder Searches for Illegal Aliens: The Immigration and Naturalization Service Meets the Constitution, 39 OHIO ST. L.J. 66 (1978) (dragnet procedures impermissible and ineffective); Fragomen, Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment, 13 SAN DIEGO L. REV. 82 (1975) (INS agent should have reason to believe the individual is an illegal alien); Comment, INS Surveys, supra note 2; Note, The Requirement of Individualized Suspicion: An End to INS Factory Sweeps?, 59 CHI-KENT L. REV. 1069 (1983); Note, The Factory Raid: An Unconstitutional Act?, 56 S. CAL. L. REV. 605 (1983) (discussion of unconstitutional questioning).  
88. Due to the temporary and then permanent injunctions issued against the Chicago INS activities in Illinois Migrant Council v. Pilliod, 531 F. Supp. 1011 (N.D. Ill. 1982) (for a complete case history, see supra note 5), the Chicago INS has continued to increase its apprehension rates with other methods of operation. Comment, INS Surveys, supra note 2, at 668-69. Furthermore, the
that are considerably less intrusive\textsuperscript{69} than the INS procedures used in Delgado.\textsuperscript{90} Had the Court found a seizure,\textsuperscript{91} or merely assumed that a seizure occurred,\textsuperscript{92} it would have been difficult to conclude anything except that the seizure was unreasonable.\textsuperscript{93}

The requirement of individualized suspicion of illegal activity would not unduly hinder INS activity.\textsuperscript{94} Instead of conducting factory raids, the INS could establish a fixed checkpoint at the entrance to the factory parking lot making the procedure consistent with the permanent checkpoints that the Court has upheld in the past.\textsuperscript{95} Alternatively, the INS could procure employee rosters from the factory owner,\textsuperscript{96} and then determine which workers are not authorized to be in this country.\textsuperscript{97} The agents could question all suspected individuals without subjecting those who are lawfully present to harassment.\textsuperscript{98} Another option would be to conduct factory surveys, without placing agents at the exits, and only questioning workers suspected of being illegal aliens.\textsuperscript{99} With the availability

\textsuperscript{69} New York INS office voluntarily stopped conducting factory surveys and has been performing well without them. \textit{Id.} at 669 n.209.

\textsuperscript{90} In requiring individualized suspicion of illegal alienage, the only people questioned will be those suspected of unlawful activity. Therefore, citizens and resident aliens will not be needlessly harassed.

\textsuperscript{91} \textit{Delgado}, 104 S. Ct. at 1760. \textit{See also supra} note 18.

\textsuperscript{92} \textit{See supra} notes 48-62 and accompanying text.

\textsuperscript{93} Generally, the fourth amendment requires every seizure to be reasonable. Reasonableness in this context is determined by "balancing the government's interest in conducting the search [or seizure] against the intrusion which the search [or seizure] entails." 1 W. Ringel, \textit{Searches \& Seizures, Arrests and Confessions} § 1.4, at 1-15 (rev. ed. 1984).

\textsuperscript{94} \textit{See Comment, INS Surveys, supra} note 2, at 669 (discussion of successful INS activities in Chicago under individualized suspicion standard).

\textsuperscript{95} United States \textit{v. Martinez-Fuerte}, 428 U.S. 543 (1976). \textit{Martinez-Fuerte} upheld the use of permanent checkpoints away from the border. \textit{Id.} The Martinez-Fuerte Court reasoned that permanent checkpoints had a lesser degree of subjective intrusion than roving patrol stops. \textit{Id.} at 558. \textit{See also supra} note 87. Hence, the use of a permanent checkpoint stop outside a factory in lieu of a factory survey would be upheld.

\textsuperscript{96} The INS can get employee rosters from the employer either by consent, administrative warrant, or subpoena. \textit{Comment, INS Surveys, supra} note 2, at 669.

\textsuperscript{97} Once the INS has compiled the employee records, it merely has to compare that information with the vast statistical data that the INS has itself, or to which it has access, via interagency cooperation. 1982 INS ANN. REP. 2, 19 (1983). The INS constantly boasts about new cooperative efforts with other government agencies and departments. \textit{Id.} at 2. From that comparison the INS can identify which employees in a given factory are not authorized to be in this country and question them only.

\textsuperscript{98} Once the agents have a list of suspected individuals, they could observe the workers when they punch in at the time clock in the morning in order to determine which of the employees are the suspected individuals.

\textsuperscript{99} By not placing agents at the exits, the INS conduct would be considerably less intrusive since a reasonable worker would likely feel free to leave.
of less intrusive alternatives, the INS's present activities, such as those used in Delgado, should not be further tolerated.

The Delgado Court has set a dangerous precedent by labeling the interaction between an INS agent and a worker a brief encounter rather than a seizure. The INS, and other government agencies, may now use techniques, such as factory raids, without being subject to the restraints of the fourth amendment. The holding in Delgado may operate as an unwanted impetus for law enforcement agents to act in a manner that will infringe the personal security of large groups of citizens and resident aliens. Law enforcement agents will be free to act without any limit on their discretion, under the guise that the encounters are merely brief. The Court should protect the constitutional rights of citizens to the greatest possible extent rather than promote intrusive governmental enforcement techniques. Labeling the interaction between the INS agents and factory workers as a brief encounter is clearly a misnomer. These interactions should properly be identified as intrusive and unwarranted seizures.

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However, even without agents at the exits, the factory raids could still be considered too intrusive.

The Simpson-Mazzoli bill is another less intrusive alternative currently being considered by Congress. The bill contains a provision that would make it unlawful to employ illegal aliens and would impose a fine on the employer for knowingly employing such people. House Barely Enacts Its Version of Simpson-Mazzoli Bill, 61 INTERPRETER RELEASES 486, 488 (1984) (analyzes all aspects of the bill and hypothesizes that the bill may pass in the near future). Even if the Simpson-Mazzoli bill fails to pass, Congress is still in a better position to enact new methods of enforcing immigration laws rather than the Supreme Court granting the INS the power to act unreasonably.

100. If the INS continues to conduct factory raids in the same manner as in Delgado, then none will be considered seizures. This type of unchecked power given to a government agency could prove dangerous. The impact of Delgado is that the INS may now conduct a factory survey at larger factories, such as automotive or steel plants, that employ thousands of workers only a small percentage of whom are illegal aliens.

101. Law enforcement agents will thus be able to act freely and find justification at a later time. This type of activity has been labeled a "pretext search." 3 W. LAFAVE, supra note 31, § 9.4(f). Pretextual searches or seizures should not be condoned by the Court; however, the Delgado Court seems to have done just that.