

# CRS Report for Congress

## Protecting the U.S. Perimeter: “Border Searches” Under the Fourth Amendment

Updated June 27, 2008

Yule Kim  
Legislative Attorney  
American Law Division



Prepared for Members and  
Committees of Congress

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## Summary

Many border security initiatives were developed after the events of September 11, 2001.<sup>1</sup> Because security initiatives often contain a search and seizure component, Fourth Amendment implications may arise. The Fourth Amendment establishes that a search or seizure conducted by a governmental agent must be reasonable, and that probable cause supports any judicially granted warrant. The Supreme Court has interpreted the Fourth Amendment to include a presumptive warrant requirement on all searches and seizures conducted by the government, and has ruled that any violations of this standard will result in the suppression of any information derived therefrom. The Supreme Court, however, has also recognized situations that render obtaining a warrant impractical or against the public’s interest, and has accordingly crafted various exceptions to the warrant and probable cause requirements of the Fourth Amendment.

Few exceptions to the presumptive warrant and probable cause requirements are more firmly rooted than the “border search” exception. Pursuant to the right of the United States to protect itself by stopping and examining persons and property crossing into the country, routine border searches are reasonable simply by virtue of the fact that they occur at the border. Courts have recognized two different legal concepts for authorizing border searches away from the actual physical border: (1) searches at the functional equivalent of the border; and (2) extended border searches. Courts have determined that border searches usually fall into two categories — routine and non-routine — though this bifurcation may no longer apply to vehicle searches. Generally, the distinction between “routine” and “non-routine” turns on the level of intrusiveness. Routine border searches are reasonable simply by virtue of the fact that they occur at the border and consist of only a limited intrusion, while non-routine searches generally require “reasonable suspicion” and vary in technique and intrusiveness. Though related to a border search, the suspicionless screening of passengers boarding an airplane is based on a different Fourth Amendment exception.

This report addresses the scope of the government’s authority to search and seize individuals at the border pursuant to the constitutional framework that encompasses the border search exception to the warrant and probable cause requirements of the Fourth Amendment. This report also describes the varying levels of suspicion generally associated with each type of border search as interpreted by the courts. In addition, this report highlights some of the border security recommendations made by the 9/11 Commission and legislative actions taken in the 108<sup>th</sup>, 109<sup>th</sup>, and 110<sup>th</sup> Congresses. This report does not address interior searches and seizures performed by immigration personnel since they are not traditional “border searches” in the Court’s view. It will be updated as warranted.

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<sup>1</sup> This report was originally prepared by Stephen R. Vina. Yule Kim has rewritten and updated the report. He is available to answer questions about the issues.

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# Protecting the U.S. Perimeter: “Border Searches” Under the Fourth Amendment

## Introduction

United States border policy seeks to balance legitimate cross-border commerce and travel with the right of the sovereign to protect itself from terrorist activities, illegal immigrants, and contraband. The events of September 11, 2001, refocused attention on where the balance should be, and new security initiatives were developed. Congress has acted on many of the recommendations of the 9/11 Commission, and those recommendations and other proposals continue to receive congressional attention.

Security initiatives, however, often contain a search and seizure component that implicate Fourth Amendment protections. The Fourth Amendment mandates that a search or seizure conducted by a governmental agent be reasonable, and that probable cause support any judicially granted warrant. Although the Supreme Court has interpreted the language of the Fourth Amendment as imposing a presumptive warrant requirement on all searches and seizures conducted by governmental authority, the Court has recognized exceptions. Few exceptions to the usual Fourth Amendment requirements are more firmly rooted in the history of the United States than the “border search” exception. Based on the inherent authority of a sovereign nation to regulate who and what comes within it, routine border searches are reasonable simply by virtue of the fact that they occur at the border.

Routine searches are usually very limited intrusions into a person’s privacy, generally consist of document checks or a patdown or the emptying of pockets, and do not require suspicion of criminal activity to be conducted. Similarly, limited inspections of cars generally do not require suspicion. Furthermore, upon a “reasonable suspicion” of smuggling or other illegal activity, government officials may generally conduct a non-routine border search. Non-routine searches may include destructive searches of inanimate objects, prolonged detentions, strip searches, body cavity searches, and X-ray searches. Although there is support to require a stronger suspicion requirement for some non-routine border searches, courts have interpreted Supreme Court precedent as warning against the development of multiple gradations of suspicion in the context of non-routine border searches.

## Statutory Authorization

There are two statutory provisions that confer border search powers on agents of the United States: R.S. § 3061, which allows customs officials to conduct searches of persons, vehicles, and mail at the border, and Section 287 of the Immigration and Nationality Act (INA), which gives immigration officers broad powers to interrogate, detain, and search individuals and vehicles. Both statutes have been interpreted to authorize searches and arrests without warrant or probable cause. However, the exercise of these powers still must comport with the requirements of the Fourth Amendment.

**Customs Officials.** R.S. § 3061,<sup>2</sup> also found in 19 U.S.C. § 482, is the statutory provision that authorizes customs officials to conduct searches for unlawfully imported materials. The provision specifically confers upon customs officials who are authorized to board and search sea vessels the additional power to search “any vehicle, beast, or person,” on which an official suspects there is merchandise subject to U.S. duties or that has been introduced inside the United States contrary to law.<sup>3</sup> Federal courts have interpreted this to mean that customs officials are empowered to search vehicles for both aliens and contraband.<sup>4</sup> A customs official need not have a warrant or probable cause in order to conduct a border search.<sup>5</sup> However, even though border searches do not have to comply with the Fourth Amendment warrant requirements, they still have to be “reasonable” in light of the circumstances.<sup>6</sup>

Furthermore, customs officials may also search “any trunk or envelope, wherever found,” in which an official has “reasonable cause” to suspect there is merchandise imported contrary to law.<sup>7</sup> The U.S. Supreme Court has interpreted “any trunk or envelope” to include all international mail entering the United States.<sup>8</sup> This means customs officials need not have probable cause, nor must they procure a warrant, to commence a search of a piece of international mail.<sup>9</sup> However, even though a customs official may conduct a border search of incoming international

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<sup>2</sup> Act of July 18, 1866, ch. 201, § 3, 14 Stat. 178 (codified at 19 U.S.C. § 482).

<sup>3</sup> 19 U.S.C. § 482.

<sup>4</sup> *United States v. Rivera*, 595 F.2d 1095 (5<sup>th</sup> Cir. 1979); *United States v. Bilir*, 592 F.2d 735 (4<sup>th</sup> Cir. 1979).

<sup>5</sup> *United States v. Glaziou*, 402 F.2d 8 (2<sup>d</sup> Cir. 1968); *United States v. Berard*, 281 F. Supp. 328 (D. Mass. 1968).

<sup>6</sup> *United States v. Montoya de Hernandez*, 473 U.S. 53, 539 (1985) (“Having presented herself at the border for admission, and having subjected herself to the criminal enforcement powers of the Federal Government, respondent was entitled to be free from unreasonable search and seizure.”). *See also* *United States v. Bilir*, 592 F.2d 735 (4<sup>th</sup> Cir. 1979); *United States v. Bowman*, 502 F.2d 1215 (1974).

<sup>7</sup> 19 U.S.C. § 482.

<sup>8</sup> *United States v. Ramsey*, 431 U.S. 606 (1977).

<sup>9</sup> *Id.* at 612-613.

mail, the search is still “subject to the substantive limitations imposed by the Constitution.”<sup>10</sup>

**Immigration Officers.** Section 287 of the Immigration and Nationality Act (INA) expressly confers upon immigration officers broad powers to question and detain individuals without warrant. Immigration officers may, without warrant, interrogate an alien about his right to be within the United States.<sup>11</sup> Furthermore, immigration officers may also arrest without warrant:

- any alien who, in the presence of the officer, is attempting to enter the United States in violation of the federal immigration laws;<sup>12</sup>
- any alien who the officer has a reason to believe is an alien currently within the United States in violation of the federal immigration laws;<sup>13</sup>
- any person for any felony regulating the admission or removal of aliens;<sup>14</sup>
- any person for any offense against the United States committed in the presence of the officer;<sup>15</sup> or
- any person for any felony if the officer has reasonable grounds to believe the person committed the felony, the arrest was made while the officer was performing duties relating to the enforcement of the federal immigration laws, there is a likelihood that the suspect would escape before a warrant can be obtained, and the officer is properly certified to make those types of arrests.<sup>16</sup>

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<sup>10</sup> *Id.* at 619.

<sup>11</sup> INA § 287(a)(1), 8 U.S.C. § 1357(a)(1) (authorizing any officer or employee “to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States” without obtaining a warrant).

<sup>12</sup> INA § 287(a)(2), 8 U.S.C. § 1357(a)(2) (authorizing any officer or employee “to arrest any alien who in [the officer’s] presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens,” or “arrest any alien in the United States, if [the officer] 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.”)

<sup>13</sup> *Id.*

<sup>14</sup> INA § 287(a)(4), 8 U.S.C. § 1357(a)(4) (authorizing any officer or employee “to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest.”)

<sup>15</sup> INA § 287(a)(5)(A), 8 U.S.C. § 1357(a)(5)(A).

<sup>16</sup> INA § 287(a)(5)(B), 8 U.S.C. § 1357(a)(5)(B). *See also* 8 C.F.R. § 287.5(c)(4).

Immigration officers may also conduct searches without warrant. The INA expressly authorizes immigration officers, within “a reasonable distance”<sup>17</sup> from the external boundary of the United States,<sup>18</sup> to search any land-based vehicle or conveyance, and any vessel within U.S. territorial waters.<sup>19</sup> Immigration officers may also without warrant have access to any private lands located within 25 miles of the U.S. border, but not dwellings, for the purpose of patrolling for aliens illegally entering the United States.<sup>20</sup> Moreover, immigration officers, authorized and designated under prescribed regulations, have the power to search, without warrant, a person and the personal effects in his possession, if the person seeks admission to the United States and the officer has reasonable cause to suspect that grounds exist for denial of admission that would be disclosed by a search.<sup>21</sup>

When Congress conferred the power to interrogate and detain aliens without warrant upon immigration officers, it did not add any additional statutory limitations to the power, thereby granting it to the fullest extent permissible under the Fourth Amendment.<sup>22</sup> However, an immigration officer’s powers to make arrests or conduct searches without warrant are still subject to constitutional constraints, and any exercise of the power must satisfy the Fourth Amendment requirement that all searches and seizures be reasonable.<sup>23</sup> As discussed below, the “reasonableness” of a search or arrest varies depending on the surrounding circumstances, which include the justifications for the search, the scope, place, and manner of the search, and whether an appropriate exception to the Fourth Amendment’s warrant requirement applies.

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<sup>17</sup> INA §287(a)(3), 8 U.S.C. § 1357(a)(3), authorizes searches without warrant “within a reasonable distance from any external boundary of the United States.” “Reasonable distance” is defined by 8 C.F.R. § 287.1(a)(2) to mean “within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the chief patrol agent of CBP, or the special agent in charge of ICE . . .”

<sup>18</sup> “External boundary” is defined by 8 C.F.R. § 287.1(a)(1) to mean “the land boundaries and the territorial sea of the United States extending 12 nautical miles from the baselines of the United States determined in accordance with international law.”

<sup>19</sup> INA § 287(a)(3), 8 U.S.C. § 1357(a)(3).

<sup>20</sup> *Id.*

<sup>21</sup> INA § 287(c), 8 U.S.C. § 1357(c).

<sup>22</sup> *Zepeda v. INS*, 753 F.2d. 719, 726 (9<sup>th</sup> Cir. 1983). *See also* *Babula v. INS*, 665 F.2d 293 (3<sup>d</sup> Cir. 1981).

<sup>23</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). *See also* *United States v. Rogers*, 436 F. Supp. 1 (E.D. Mich. 1976) (holding that the Fourth Amendment prohibits identification stops by roving patrols which are not based on articulable suspicion of illegal activity); *Illinois Migrant Council v. Pilliod*, 531 F. Supp. 1011 (N.D. Ill. 1982) (holding that the Fourth Amendment prohibits INS from conducting investigatory seizures based only on reasonable suspicion that a person seized is an alien).

## The Fourth Amendment

The Fourth Amendment mandates that a search or seizure conducted by a government agent must be reasonable, and that probable cause<sup>24</sup> must support any judicially granted warrant.<sup>25</sup> Although the Supreme Court has interpreted the “reasonableness” standard of the Fourth Amendment to impose a presumptive warrant requirement and individualized suspicion,<sup>26</sup> the Court has recognized “specifically established exceptions” to the warrant and probable cause requirements of the Fourth Amendment.<sup>27</sup>

At its broadest, a Fourth Amendment analysis is a two-stage inquiry: (1) whether the government action was sufficiently intrusive to constitute a “search” or “seizure” and (2) whether the intrusion was “reasonable” in light of the circumstances.<sup>28</sup> “Reasonableness” of a government action is judged by balancing the governmental interest justifying the intrusion against a person’s legitimate expectation of privacy. A Fourth Amendment violation occurs when the government intrusion constituting the “search” or “seizure” is not reasonable in light of these interests. While a violation of the Fourth Amendment may result in the suppression of any information derived therefrom in a judicial proceeding, such a rule does not apply to deportation proceedings.<sup>29</sup>

**Searches.** A “search” does not occur for purposes of the Fourth Amendment unless (1) the individual exhibits “an actual (subjective) expectation of privacy” in the searched object and (2) society is willing to recognize that expectation as reasonable.<sup>30</sup> Legitimate expectations of privacy must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.<sup>31</sup> For example, where the government uses a remote surveillance device that is not in general public use to explore physical activities within a home or other “constitutionally protected

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<sup>24</sup> The Supreme Court has interpreted probable cause to mean “a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). *See also* *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

<sup>25</sup> U.S. Const., Amend. IV.

<sup>26</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions.”).

<sup>27</sup> *Camara v. Municipal Court*, 387 U.S. 523, 539-540 (1967).

<sup>28</sup> *See* *Oliver v. United States*, 466 U.S. 170, 177-78 (1984). *See also* *Walter v. United States*, 447 U.S. 649, 656 (1980) (noting that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment).

<sup>29</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). *See also* *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (exclusionary rule in general).

<sup>30</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>31</sup> *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).



area” that would have been otherwise unknowable without physical intrusion, the surveillance is a “search” and is presumptively unreasonable without a warrant.<sup>32</sup>

**Seizures.** Seizures may be of individuals or property. The Supreme Court has described a seizure of property as “some meaningful interference with an individual’s possessory interests in that property.”<sup>33</sup> An individual is “seized” when a government official makes a person reasonably believe that he is not at liberty to ignore the government’s presence and go about his business in view of all the circumstances surrounding the incident.<sup>34</sup> Additionally, a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.<sup>35</sup> A seizure of a person, therefore, can include full arrests, investigatory detentions, checkpoint stops for citizenship inquiries, and detentions of a person against his will.

**Immigration Seizures.** A consensual encounter in which an immigration officer questions an alien about his identity is not necessarily a Fourth Amendment seizure even if the alien is unaware that he has a right not to answer.<sup>36</sup> Furthermore, “questioning about immigration status, in the absence of a seizure, does not require reasonable suspicion of alienage.”<sup>37</sup> However, there is a Fourth Amendment seizure if “the circumstances are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded.”<sup>38</sup> Generally, in order to detain, without warrant, a person for questioning, an immigration officer must have “a reasonable suspicion based on articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States.”<sup>39</sup>

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<sup>32</sup> *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

<sup>33</sup> *Sodal v. Cook County*, 506 U.S. 56, 61 (1992) *quoting* *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

<sup>34</sup> *Florida v. Bostick*, 501 U.S. 429, 437 (1991) citing *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). *See also* *United States v. Mendenhall*, 446 U.S. 544 (1980); *Brendlin v. California*, 127 S. Ct. 2400 (2007).

<sup>35</sup> *INS v. Delgado*, 466 U.S. 210, 216 (1984).

<sup>36</sup> *Delgado*, 466 U.S. at 216; *United States v. Rodriguez-Franco*, 749 F.2d 1555, 1560 (11<sup>th</sup> Cir. 1985). *See also* 8 C.F.R. § 287.8(b)(1) (“An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.”).

<sup>37</sup> *Zepeda*, 753 F.2d at 731. *See also* *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9<sup>th</sup> Cir. 1979); *Cordon de Ruano v. INS*, 588 F.2d 1274 (9<sup>th</sup> Cir. 1977).

<sup>38</sup> *Delgado*, 466 U.S. at 216. *See also* *Zepeda*, 753 F.2d at 730.

<sup>39</sup> 8 C.F.R. § 287.8(b)(2).

## Border Searches

Warrantless searches are *per se* unreasonable under the Fourth Amendment, unless a court determines that the search is subject to an established exception. The border search is a well-recognized and long established exception to the Fourth Amendment’s probable cause and warrant requirements. Authorized by the First Congress,<sup>40</sup> the border search exception has a history older than the Fourth Amendment and obtains its broad power from Congress’s authority to regulate commerce with foreign nations and to enforce immigration laws.<sup>41</sup> The Fourth Amendment does not require warrants or probable cause for routine stops and searches at the border because the power to control who or what comes within its borders is an inherent attribute of national sovereignty.<sup>42</sup>

Although the border search is an exception to the Fourth Amendment’s warrant and probable cause requirements, it is not exempt from the Fourth Amendment’s “reasonableness” standard because a “search” has still occurred (i.e., the government’s search is still subject to a balancing test).<sup>43</sup> Courts have determined that border searches usually fall into two categories — routine and non-routine — though the Supreme Court has arguably suggested that this bifurcation may no longer be appropriate for vehicular searches. Generally, the distinction between “routine” and “non-routine” turns on the level of intrusiveness. Routine border searches are reasonable simply by virtue of the fact that they occur at the border and consist of only a limited intrusion, while non-routine searches generally require reasonable suspicion and vary in technique and intrusiveness. Border searches may occur when entry is made by land from the neighboring countries of Mexico or Canada, at the place where a ship docks in the United States after having been to a foreign port, and at any airport in the country where international flights first land. In general, authorities at the border may search a person entering or leaving the country, an individual’s automobile, baggage, or goods, and inbound and outbound international materials.

### Functional Equivalent

The border search exception extends to those searches conducted at the “functional equivalent” of the border. The “functional equivalent” of a border is generally the first practical detention point after a border crossing or the final port of

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<sup>40</sup> Act of July 31, 1789, ch.5 §§23-24, 1 Stat. 29, 43 (current version at 19 U.S.C. §§482, 1582).

<sup>41</sup> *United States v. Ramsey*, 431 U.S. 606, 619 (1977) (citing U.S. Const., Art. I, §8, cl. 3).

<sup>42</sup> *See Ramsey*, 431 U.S. at 616. It should be noted that many of nation’s border security agencies or functions have been transferred to the newly created Department of Homeland Security. See P.L. 107-296. For purposes of consistency, this report refers to agency names as maintained in the case law.

<sup>43</sup> *Marsh v. United States*, 344 F.2d 317, 324 (5<sup>th</sup> Cir. 1965).

entry.<sup>44</sup> It is justified because in essence, it is no different than a search conducted at the border and occurs only because of the impossibility of requiring the subject searched to stop at the physical border. A search occurs at the border's functional equivalent when: (1) a reasonable certainty exists that the person or thing crossed the border; (2) a reasonable certainty exists that there was no change in the object of the search since it crossed the border; and (3) the search was conducted as soon as practicable after the border crossing.<sup>45</sup> Places such as international airports within the country and ports within the country's territorial waters or stations at the intersection of two or more roads extending from the border exemplify such functional equivalents.<sup>46</sup> In general, courts have given the "border" a geographically flexible reading because of the significant difficulties in detecting the increasingly mobile smuggler.

## Extended Border Search

The border search exception may be extended to allow warrantless searches beyond the border or its functional equivalent. Under the "extended border search" doctrine, government officials may conduct a warrantless search beyond the border or its functional equivalent if (1) the government officials have reasonable certainty or a "high degree of probability" that a border was crossed; (2) they also have reasonable certainty that no change in the object of the search has occurred between the time of the border crossing and the search; and (3) they have "reasonable suspicion" that criminal activity was occurring.<sup>47</sup> This three-part test ensures that a suspect still has a significant nexus with a border crossing so that border officials can reasonably base their search on statutory and constitutional authority and to ensure that the search is reasonable.<sup>48</sup>

Although a search at the border's functional equivalent and an extended border search require similar elements, the extended border search entails a greater intrusion on a legitimate expectation of privacy, and thus, requires a showing of "reasonable suspicion" of criminal activity. Another difference between the functional equivalent of a border search and an extended border search is that the latter takes place after the first point in time when the entity might have been stopped within the country.<sup>49</sup> For example, in *United States v. Teng Yang*, the Seventh Circuit upheld an extended

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<sup>44</sup> Thirty-First Annual Review of Criminal Procedure; Border Searches, 90 Geo. L.J. 1087, 1190 (2002) (9th Cir. 1973).

<sup>45</sup> See *United States v. Hill*, 939 F.2d 934, 936 (11<sup>th</sup> Cir. 1991).

<sup>46</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973).

<sup>47</sup> "Reasonable certainty" in this context has been defined as a standard which requires more than probable cause, but less than proof beyond a reasonable doubt. *United States v. Cardenas*, 9 F.3d 1139, 1148 (5<sup>th</sup> Cir. 1993); see, e.g., *Delgado*, 810 F.2d at 482. In *Delgado*, smugglers used a foot-bridge to transfer narcotics to delivery trucks on a farm near El Paso, Texas. The court upheld an extended border search conducted on a farm road near and leading from the border but otherwise away from the official border checkpoint.

<sup>48</sup> *United States v. Teng Yang*, 286 F.3d. 940, 946 (7<sup>th</sup> Cir. 2002).

<sup>49</sup> *United States v. Niver*, 689 F.2d 520, 526 (5<sup>th</sup> Cir. 1982).

border search that occurred at an international airport but at a time after the Defendant's initial inspection process and at a location away from the designated U.S. border inspection sites.<sup>50</sup> The court determined that “[i]t is the enforcement of the customs laws combined with the mandate of protecting the border of the United States that permits the extension of the search rights of border authorities to allow non-routine searches in areas near our nation’s borders.”<sup>51</sup> Because of the dynamics of cross-border travel, the extended border search doctrine has gained wide acceptance among the courts because it strikes a sensible balance between the legitimate privacy interests of the individual and societal interests in the enforcement of border security laws.<sup>52</sup>

## Types of Searches and Seizures at the Border

As mentioned above, courts have generally analyzed all the various types of border searches under a routine/non-routine scheme. Recent courts, however, have interpreted a Supreme Court ruling to suggest that this type of division may no longer be appropriate for vehicular searches. The following paragraphs examine the typical routine/non-routine analysis for persons and their belongings and then discuss border searches for vehicles.

### Searches and Seizures of People and their Belongings

**Routine Searches.** In order to regulate the collection of duties and to prevent the introduction of illegal aliens and contraband into this country, Congress has granted the Executive plenary power to conduct routine searches of persons and their personal belongings without reasonable suspicion, probable cause, or a warrant.<sup>53</sup> In fact, routine searches made at the border require no suspicion and are “reasonable” simply by the fact that they occur at the border.<sup>54</sup> A routine border search is a search

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<sup>50</sup> 286 F.3d. 940 (7<sup>th</sup> Cir. 2002).

<sup>51</sup> *Id.* at 947.

<sup>52</sup> *See, e.g., Teng Yang*, 286 F.3d. 940; *United States v. Sahanaja*, 430 F.3d 1049 (9<sup>th</sup> Cir. 2005); *United States v. Espinoza-Seanez*, 862 F.2d 526 (5<sup>th</sup> Cir. 1989); *United States v. Caicedo-Guarnizo*, 723 F.2d 1420 (9<sup>th</sup> Cir. 1984); *United States v. Garcia*, 672 F.2d 1349 (11<sup>th</sup> Cir. 1982); *United States v. Bilir*, 592 F.2d 735 (4<sup>th</sup> Cir. 1979).

<sup>53</sup> *See, e.g.*, 8 U.S.C. §1357(c) (authorizing immigration officials to search without a warrant persons entering the country for evidence which may lead to the individual’s exclusion); 19 U.S.C. §1496 (authorizing customs officials to search the baggage of person entering the country); 19 U.S.C. §1582 (authorizing customs officials to detain and search all persons coming into the United States from foreign countries). *See also* *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

<sup>54</sup> *United States v. Odland*, 502 F.2d 148 (7<sup>th</sup> Cir. 1974) citing *Carroll v. United States*, 267 U.S. 132, 153 (1925). Some courts have indicated a need for “mere suspicion” to conduct a routine border search, which usually requires at least some knowledge identifying an individual as a suspect. *See, e.g., Rodriguez-Gonzalez v. United States*, 378 F.2d 256 (9<sup>th</sup> Cir. 1967) (also using the term “unsupported suspicion”). This standard, however, is an

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that does not pose a serious invasion of privacy or offend the average traveler.<sup>55</sup> For example, a routine border search may consist of limited searches for contraband or weapons through a pat-down,<sup>56</sup> the removal of outer garments such as jackets, hats, or shoes, the emptying of pockets, wallets, or purses,<sup>57</sup> the use of a drug-sniffing dog,<sup>58</sup> the examination of outbound materials,<sup>59</sup> and the inspection of luggage.<sup>60</sup> Similar to routine searches, border searches of vehicles generally do not require any articulable level of suspicion unless the agency action is especially destructive or intrusive (see later discussion).<sup>61</sup> The consistent approval of routine border searches by courts reflects a longstanding concern for the protection of the integrity of the border.

It has long been established that an individual's reasonable expectation of privacy is lower at the border than in the interior of the country. Because a person crossing the border is on notice that a search may be likely, his privacy is "less invaded by those searches."<sup>62</sup> Routine border searches are also arguably less intrusive because they are administered to a class of people (international travelers) rather than

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<sup>54</sup> (...continued)

inaccurate articulation of the general rule that no suspicion is required. *See Odland*, 502 F.2d at 151 ("Any person or thing coming into the United States is subject to search by that fact alone, whether or not there be any suspicion of illegality directed to the particular person or thing to be searched."); *Bradley v. United States*, 299 F.3d 197, n.7 (3d Cir. 2002) (stating "mere suspicion" standard effectively overruled by *Montoya de Hernandez*).

<sup>55</sup> *United States v. Johnson*, 991 F.2d 1287, 1291 (7<sup>th</sup> Cir. 1993).

<sup>56</sup> *See, e.g., United States v. Beras*, 183 F.3d 22, 24 (1<sup>st</sup> Cir. 1999) (holding that a patdown of an international traveler's legs was not intrusive enough to qualify as non-routine).

<sup>57</sup> *United States v. Sandler*, 644 F.2d 1163, 1169 (5<sup>th</sup> Cir. 1981).

<sup>58</sup> *United States v. Kelly*, 302 F.3d 291, 294-95 (5<sup>th</sup> Cir. 2002) (sniff by a dog of a person at the border upheld as a routine border search); *cf. United States v. Garcia-Garcia*, 319 F.3d 726, 730 (5<sup>th</sup> Cir. 2003) (dog sniff of a person on a bus at an immigration checkpoint upheld and seen as analogous to a pat down).

<sup>59</sup> *United States v. Kolawole Odutayo*, 406 F.3d 386, 392 (5<sup>th</sup> Cir. 2005) (joining sister circuits in holding that the border search exception applies for all outgoing searches at the border).

<sup>60</sup> *United States v. Okafor*, 285 F.3d 842 (9<sup>th</sup> Cir. 2002) (finding an X-ray examination and subsequent probe of luggage a routine search because it requires no force, poses no risk to the bag's owner or to the public, causes no psychological fear, and does not harm the baggage); *United States v. Lawson*, 461 F.3d 697, 701 (6<sup>th</sup> Cir. 2006) (accepting the "commonsense conclusion that customs officers may x-ray an airline passenger's luggage at the border without reasonable suspicion").

<sup>61</sup> *United States v. Flores-Montano*, 541 U.S. 149 (2004) (no suspicion required for the disassembly, removal, and reassembly of a vehicle's fuel tank).

<sup>62</sup> Gary N. Jacobs, Note, *Border Searches and the Fourth Amendment*, 77 Yale L.J. 1007, 1012 (1968). It should also be noted that the "reasonable person" test presupposes an innocent person. *Bostick*, 501 U.S. at 437.

to individuals.<sup>63</sup> The degree of intrusiveness or invasiveness associated with the particular technique is particularly indicative of whether a search is routine. The First Circuit, for example, compiled a nonexhaustive list of six factors to be considered: (1) whether the search required the suspect to disrobe or expose any intimate body parts; (2) whether physical contact was made with the suspect during the search; (3) whether force was used; (4) whether the type of search exposed the suspect to pain or danger; (5) the overall manner in which the search was conducted; and (6) whether the suspect's reasonable expectations of privacy, if any, were abrogated by the search.<sup>64</sup>

**Non-Routine Searches.** Once a personal search by a government official goes beyond a limited intrusion, a court may determine that a non-routine search has occurred. Non-routine border searches may include destructive searches of inanimate objects, prolonged detentions, strip searches, body cavity searches, and some X-ray examinations.<sup>65</sup> At the very least, it appears courts require a government official have a "reasonable suspicion" of illegal activity to conduct a non-routine border search on an individual entering the country.<sup>66</sup> The reasonable suspicion standard generally requires an officer at the border to have "a particularized and objective basis for suspecting the particular person" of wrongdoing.<sup>67</sup> For example, in *United States v. Forbicetta*, the court found reasonable suspicion to exist where Customs officials acted on the following objective facts: the suspect (1) arrived from Bogota, Colombia, (2) was traveling alone, (3) had only one suitcase and no items requiring Customs inspection, (4) was young, clean-looking, and attractive, and (5) was wearing a loose-fitting dress.<sup>68</sup> Some courts, however, have required a higher degree of suspicion to justify the more intrusive of the procedures.<sup>69</sup>

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<sup>63</sup> 77 Yale L.J. 1007, 1012 (1968).

<sup>64</sup> *United States v. Braks*, 842 F.2d 509, 511-12 (1<sup>st</sup> Cir. 1988). The *Braks* court concluded that only strip searches and body cavity searches are consistently non-routine.

<sup>65</sup> See, e.g., *United States v. Reyes*, 821 F.2d 168, 170-71 (2d Cir. 1987) (strip search); *United States v. Oyekan*, 786 F.2d 832, 837 (8<sup>th</sup> Cir. 1986) (strip search); *United States v. Adekunle*, 2 F.3d 559, 562 (5<sup>th</sup> Cir. 1993) (continued detention and X-ray examination of alimentary canal); *United States v. Rivas*, 157 F.3d 364, 367 (5<sup>th</sup> Cir. 1998) (drilling of hole into body of automobile).

<sup>66</sup> *Montoya de Hernandez*, 473 U.S. at 541; *United States v. Garcia-Garcia*, 319 F.3d 726, 730 (5<sup>th</sup> Cir. 2003) (an alert by a drug sniffing dog provided reasonable suspicion to detain a bus long enough to investigate the reason for the dog's response).

<sup>67</sup> See *Montoya de Hernandez*, 473 U.S. at 541 citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

<sup>68</sup> 484 F.2d 645 (5<sup>th</sup> Cir. 1973). These factors taken together matched the "smuggling profile" for narcotic carriers in that area, and thus, the court concluded there was a sufficient basis to conduct the search. *But see Reid v. Georgia*, 448 U.S. 438, 441 (1980) (rejecting the argument that arrival from a source location could, by itself, provide reasonable suspicion).

<sup>69</sup> See, e.g., *United States v. Ramos-Saenz*, 36 F.3d 59, 61 (9<sup>th</sup> Cir. 1994) (requiring the higher "clear indication" standard for a body cavity search); *United States v. Ek*, 676 F.2d (continued...)

The Supreme Court has not articulated the level of suspicion required for the various non-routine border searches or the factors that render a border search routine or non-routine;<sup>70</sup> however, in *United States v. Montoya de Hernandez* the Supreme Court concluded that a third suspicion standard (i.e., clear indication) in addition to “reasonable suspicion” and “probable cause” was not consistent with the Fourth Amendment’s emphasis upon reasonableness in the prolonged detention setting.<sup>71</sup> The Court determined that the “clear indication” standard (a suggestion that is free from doubt) was to be used to indicate the necessity for particularized suspicion, “rather than as enunciating a third Fourth Amendment threshold between ‘reasonable suspicion’ and ‘probable cause.’”<sup>72</sup> Although the Court has not articulated a level of suspicion for all non-routine searches, courts have viewed the *Montoya de Hernandez* reasoning as a warning against the development of multiple gradations of suspicion for non-routine border searches in general.<sup>73</sup>

***Prolonged Detentions.*** Prolonged detentions are seizures conducted in order to either verify or dispel an agent’s suspicion that a traveler will introduce a harmful agent into the country through alimentary canal smuggling. In *United States v. Montoya de Hernandez*, the Supreme Court was confronted with a passenger on a flight from Bogota, Columbia, suspected of alimentary canal smuggling who refused to consent to an X-ray examination. In an attempt to verify or dispel their suspicions, Customs detained Ms. Montoya de Hernandez for over 16 hours and told her she could not leave until she had excreted into a wastebasket.<sup>74</sup>

The Court determined “that the detention of a traveler at the border, beyond the scope of a routine Customs search and inspection, is justified at its inception if Customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary

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<sup>69</sup> (...continued)

379, 382 (9<sup>th</sup> Cir. 1982) (requiring a “clear indication” for X-ray search).

<sup>70</sup> See *Montoya de Hernandez*, 473 U.S. at 541 n.4.

<sup>71</sup> *Id.* at 541.

<sup>72</sup> *Id.* at 540.

<sup>73</sup> *United States v. Charleus*, 871 F.2d 265, 268 n.2 (2d Cir. 1989); *United States v. Oyekan*, 786 F.2d 832, 837-39 (8<sup>th</sup> Cir. 1986); *Bradley v. United States*, 299 F.3d 197, 202-04 (3d Cir. 2002). *United States v. Aguebor*, 1999 U.S. App. Lexis 25, at \*9 (4<sup>th</sup> Cir. January 4, 1999) (this unpublished opinion is cited merely as an example and is not intended to have precedential value). According to Professor LaFave, however, extending *Montoya de Hernandez* to other non-routine searches would require a broad reading of the case, which does not consider the fact that body cavity searches are more intrusive. See 4 Wayne R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* §10.5(e), 556 (3d ed. 1996 & Supp. 2003).

<sup>74</sup> According to Professor LaFave, *Montoya de Hernandez* does not stand for a “detention until defecation” proposition. The court narrowly decided that the particular detention “was not unreasonably long” under “these circumstances.” In fact, the agents expected Ms. de Hernandez to produce a bowel movement without extended delay because she had just disembarked from a 10-hour flight. 4 Wayne R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* §10.5(b), 546 (3d ed. 1996 & Supp. 2003).

canal.”<sup>75</sup> The Court concluded that it was reasonable to detain Ms. Montoya de Hernandez for the period of time necessary to either verify or dispel the suspicion of the agents in these circumstances. Courts have reasoned that “an otherwise permissible border detention does not run afoul of the Fourth Amendment simply because a detainee’s intestinal fortitude leads to an unexpectedly long period of detention.”<sup>76</sup> Notably however, the Fifth Circuit in *United States v. Adekunle* concluded that the government must, within a reasonable time (generally within 48 hours), seek a judicial determination that reasonable suspicion exists to detain a suspect for an extended period of time.<sup>77</sup>

In general, it seems that most prolonged detentions are classified as routine searches. There appear to be no “hard-and-fast time limits” that would automatically make a routine search rise to the level of a non-routine search,<sup>78</sup> nor render a non-routine search conducted under the reasonable suspicion standard unconstitutional.<sup>79</sup> Rather, courts must consider “whether the detention of [the traveler] was reasonably related in scope to the circumstances which justified it initially.”<sup>80</sup> In order to provide perspective, the 16 hour detention in *Montoya de Hernandez* was considered a non-routine search (justifiable by reasonable suspicions),<sup>81</sup> while the one hour vehicular search in *Flores-Montano* was considered routine.<sup>82</sup> The Second Circuit characterized four- to six-hour-long detentions of individuals, suspected of terrorist ties because of their association with an Islamic Conference that took place in Canada, as routine.<sup>83</sup>

**Strip Searches.** A strip search consists of removing one’s clothing either all or in part to a state which would be offensive to the average person. Accordingly, reviewing courts generally require the presence of reasonable suspicion that a person is concealing something illegal on the place to be searched in order for such a search

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<sup>75</sup> *Montoya de Hernandez*, 473 U.S. at 541. See also *United States v. Esieke*, 940 F.2d 29 (2d Cir. 1991) (court upheld a detention of one and half days before first bowel movement and another two and half days until all balloons were expelled); *United States v. Yakubu*, 936 F.2d 936 (7<sup>th</sup> Cir. 1991) (16-hour detention upheld after refusal to be X-rayed).

<sup>76</sup> *Esieke*, 940 F.2d at 35.

<sup>77</sup> 2 F.3d 559, 562 (5<sup>th</sup> Cir. 1993). The court opined that a formal determination is not necessary; rather, an informal presentation of the evidence supporting the government’s suspicion before a neutral and detached judicial officer satisfies this requirement. Furthermore, the court concluded that the failure to obtain such a judicial determination within 48 hours shifts the burden to the government to demonstrate a *bona fide* emergency justifying the extended detainment.

<sup>78</sup> See *Tabbaa v. Chertoff*, 2007 U.S. App. LEXIS 27258, 28-29 (2007) (quoting *Montoya de Hernandez*, 473 U.S. at 543).

<sup>79</sup> See *Montoya de Hernandez*, 473 U.S. at 543 (quoting *United States v. Sharpe*, 470 U.S. 675, 685 (1985)).

<sup>80</sup> *Tabbaa*, 2007 U.S. App. LEXIS 27258 at 28.

<sup>81</sup> *Montoya de Hernandez*, 473 U.S. at 535.

<sup>82</sup> *Flores-Montano*, 541 U.S. at 151.

<sup>83</sup> *Tabbaa*, 2007 U.S. App. LEXIS 27258 at 29.



to be justified. Because strip searches generally involve an embarrassing imposition upon a traveler, it appears to be unreasonable to conduct such searches without reasonable suspicion.<sup>84</sup> Often, routine searches give rise to the reasonable suspicion required to conduct strip searches. For instance, in *United States v. Flores*, upon discovering 600 small undeclared emerald stones in the defendant's pockets during a routine search, Customs agents conducted a strip search and discovered an envelope of narcotics.<sup>85</sup> The court held that the prior discovery of the undeclared emeralds was clearly sufficient to heighten suspicion to the level necessary to conduct the strip search.<sup>86</sup>

**Body Cavity Searches.** Government officials are well aware that narcotic smuggling often has been concealed in the body cavities of travelers, and searches into such cavities have become more commonplace. Body cavity searches may include inspections of the vagina, rectum, or the use of emetics.<sup>87</sup> Because of the extreme medical risks involved in internal drug smuggling, courts have determined that body cavity searches do not require the advance procurement of a search warrant from a magistrate.<sup>88</sup> Nevertheless, a border official must “reasonably suspect” that an individual is attempting to smuggle contraband inside his body for a court subsequently to uphold a body cavity search.<sup>89</sup> Some courts historically required a “clear indication” (a suggestion that is free from doubt) of alimentary canal smuggling due to the significant intrusion beyond the body's surface.<sup>90</sup> However, ever since the Supreme Court articulated a more general, but firm rejection of the “subtle verbal gradations” being developed by courts of appeals to enunciate the Fourth Amendment standard of reasonableness, courts have apparently been unwilling to adopt the “clear indication” standard in the context of body cavity searches.<sup>91</sup> Additionally, the manner in which the body cavity search is conducted

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<sup>84</sup> *United States v. Chase*, 503 F.2d 571 (9<sup>th</sup> Cir. 1974).

<sup>85</sup> 477 F.2d 608 (1<sup>st</sup> Cir. 1973).

<sup>86</sup> *Id.*

<sup>87</sup> *See, e.g.*, *United States v. Ogberaha*, 771 F.2d 655, 657 (2d Cir. 1985) (vagina); *United States v. Pino*, 729 F.2d 1357, 1358 (11<sup>th</sup> Cir. 1984) (rectum); *United States v. Briones*, 423 F.2d 742, 743 (5<sup>th</sup> Cir. 1970) (emetics).

<sup>88</sup> *See, e.g.*, *United States v. Sosa*, 469 F.2d 271 (9<sup>th</sup> Cir. 1972) (no warrant for rectal probe); *United States v. Mason*, 480 F.2d 563 (9<sup>th</sup> Cir. 1973) (no warrant for vaginal probe); *United States v. Briones*, 423 F.2d 742 (5<sup>th</sup> Cir. 1970) (no warrant for administration of an emetic). *But see* *United States v. Holtz*, 479 F.2d 89 (9<sup>th</sup> Cir. 1973) (Ely, J., dissenting); *Blefare v. United States*, 362 F.2d 870 (9<sup>th</sup> Cir. 1966) (Ely, J., dissenting).

<sup>89</sup> *See, e.g.*, *United States v. Ogberaha*, 771 F.2d 658 (2d Cir. 1985); *Swain v. Spinney*, 117 F.3d 1, 7 (1<sup>st</sup> Cir. 1997) (only required reasonable suspicion for visual body cavity search); *United States v. Gonzalez-Ricon*, 36 F.3d 859, 864 (9<sup>th</sup> Cir. 1984) (noting in dictum that a body cavity search must be supported by reasonable suspicion).

<sup>90</sup> *See, e.g.*, *United States v. Ramos-Saenz*, 36 F.3d 59, 61 (9<sup>th</sup> Cir. 1994) (affirming clear indication standard).

<sup>91</sup> *See, e.g.*, *United States v. Ogberaha*, 771 F.2d 658 (2d Cir. 1985); *Swain v. Spinney*, 117 F.3d 1, 7 (1<sup>st</sup> Cir. 1997) (only required reasonable suspicion for visual body cavity search);  
(continued...)

must also be reasonable in light of the circumstances. Generally, conduct that “shocks the conscience” is inherently unreasonable.<sup>92</sup> Such conduct has included use of a stomach pump<sup>93</sup> and could potentially include medical procedures performed by nonmedical personnel.<sup>94</sup>

**X-Ray Searches.** X-ray searches have also been used at the border, instead of, or in conjunction with, body cavity searches. X-ray searches raise Fourth Amendment concerns because they locate items where there is normally an expectation of privacy. Their level of intrusion has been questioned by courts because they do not constitute an actual physical invasion but can pose harmful medical effects.<sup>95</sup> A question arises as to whether an involuntary X-ray search is more akin to a strip search, and thus only requires a “reasonable suspicion,” for its application, or whether the intrusion is so great that it could potentially require a greater level of suspicion.

In examining this issue, the Eleventh Circuit in *United States v. Vega-Barvo* determined that an X-ray search is no more intrusive than a strip search.<sup>96</sup> The *Vega-Barvo* court examined (1) the physical contact between the searcher and the person searched; (2) the exposure of intimate body parts; and (3) the use of force.<sup>97</sup> These factors helped the court examine the level of intrusiveness endured by the defendant and to ultimately conclude that the government agents, acting under a reasonable suspicion of illegal activity, properly detained and X-rayed the smuggler. The court reasoned that X-rays do not require physical contact or usually expose intimate body parts. The court also determined that “an x-ray is one of the more dignified ways of searching the intestinal cavity.”<sup>98</sup> In general, courts have likened X-ray searches to strip searches, and thus, “reasonable suspicion” is the level of suspicion necessary to conduct an X-ray examination of a suspected alimentary canal smuggler.<sup>99</sup>

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<sup>91</sup> (...continued)

United States v. Bravo, 295 F.3d 1002, (9<sup>th</sup> Cir. 2002) (noting in dictum that a body cavity search must be supported by reasonable suspicion).

<sup>92</sup> Rochin v. California, 342 U.S. 165 (1952).

<sup>93</sup> *Id.*

<sup>94</sup> Rectal searches have been upheld when conducted by medical personnel using accepted and customary medical techniques in medical surroundings. See, e.g., *Rivas v. United States*, 368 F.2d 703 (9<sup>th</sup> Cir. 1966) (upholding rectal search by a doctor at doctor’s office). There is little case law on vaginal searches, however rectal search cases are arguably analogous.

<sup>95</sup> *United States v. Vega-Barvo*, 729 F.2d 1341, 1345 (11<sup>th</sup> Cir. 1984) (asking whether an X-ray is more intrusive than a cavity search because it will reveal more than the cavity search, or less intrusive because it does not infringe upon human dignity to the same extent as a search of private parts).

<sup>96</sup> *Id.* at 1341.

<sup>97</sup> *Vega-Barvo*, 729 F.2d at 1346.

<sup>98</sup> *Id.* at 1348.

<sup>99</sup> Although some courts required a “clear indication” for X-ray searches, courts now (continued...)

**Cumulative Effect of Multiple Routine Searches.** Some have argued that subjecting an individual at the border to multiple routine searches during a period of detention can rise to the level of a non-routine search. The argument was raised in *Tabbaa v. Chertoff*, where the plaintiffs alleged that they were subjected to intrusive questioning, pat-down searches, the forcible spreading of their feet, and being fingerprinted and photographed, all in the course of a four- to six-hour period of detention at the border.<sup>100</sup> The Second Circuit first noted that, based on prior case law, “each of the individual elements of the searches was routine.”<sup>101</sup> However, even though the court did “leave open the possibility that in some circumstances the cumulative effect of several routine search methods could render an overall search non-routine,” the court did not find this particular sequence of search methods to be non-routine.<sup>102</sup> This was because the decisive factor in determining whether a search is non-routine is in evaluating “the invasiveness of privacy” the search caused to the traveler, rather than the level of inconvenience, and in this particular case, even taken collectively, the searches “were routine in the border context, albeit near the outer limits of what is permissible absent reasonable suspicion.”<sup>103</sup> Thus, although most cases of multiple routine searches will not rise to the level of non-routine, the Second Circuit does leave open the possibility that a particularly long sequence of routine searches can rise to the level of a non-routine search.

## Searches and Seizures of Vehicles

Although early courts generally analyzed vehicular border searches within the context of the routine/non-routine dichotomy, a 2004 decision by the Supreme Court appears to have placed this bifurcation into question. In *United States v. Flores-Montano* — a border search case that upheld the dismantling, removal, and reassembly of a vehicle’s fuel tank — the Supreme Court found that the dignity and privacy interests that require reasonable suspicion for highly intrusive searches of the person do not apply to vehicles being examined at the border.<sup>104</sup> The Supreme Court stated that the “complex balancing tests to determine what is a ‘routine’ search of a vehicle, as opposed to a more ‘intrusive’ search of a person, have no place in border searches of vehicles.”<sup>105</sup>

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<sup>99</sup> (...continued)

generally analogize X-rays with strip searches, and thus, only require reasonable suspicion. Compare *United States v. Ek*, 676 F.2d 379, 382 (9<sup>th</sup> Cir. 1982) (determining that while an X-ray search may not be as humiliating as a strip search, “it is more intrusive since the search is potentially harmful to the health of the suspect”) with *United States v. Oyekan*, 786 F.2d 832, 837 (8<sup>th</sup> Cir. 1986) (requiring reasonable suspicion for X-ray search); *United States v. Pino*, 729 F.2d 1357, 1359 (11<sup>th</sup> Cir. 1984) (X-ray search equal to strip search).

<sup>100</sup> 2007 U.S. App. LEXIS 27258 at 24-25.

<sup>101</sup> *Id.* at 25.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 26.

<sup>104</sup> *Flores-Montano*, 541 U.S. at 152.

<sup>105</sup> *Id.*

The Supreme Court in *Flores-Montano* held that the dismantling, removal, and reassembly of a vehicle's fuel tank at the border was justified by the United States' paramount interest in protecting itself and that it did not require reasonable suspicion.<sup>106</sup> In upholding the suspicionless search, the Court noted the factual difference between a search that ultimately *reassembles* what is examined and those that use a potentially *destructive* drilling practice.<sup>107</sup> It then determined that "while it may be true that some searches of property are so destructive as to require a different result, this was not one of them."<sup>108</sup> The Court, however, left open the question of "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner [in which] it is carried out."<sup>109</sup> Thus, while a suspicionless border search of a vehicle seems to be viewed as reasonable because it does not pose the same degree of intrusiveness as searches of the human body, especially destructive vehicular searches may require reasonable suspicion.<sup>110</sup>

Subsequent Ninth Circuit decisions have determined that the routine/non-routine bifurcation in the vehicular inspection context has been "severely undermined if not completely overruled," by *Flores-Montano*, and have relied on the Supreme Court case to allow other suspicionless search techniques on vehicles.<sup>111</sup> In *United States v. Cortez-Rocha*, for example, the court upheld the suspicionless slashing of a vehicle's spare tire.<sup>112</sup> In so holding, the court examined (1) the degree of damage to the vehicle and (2) any potential effect on the safety or security of the vehicle or its passengers. It then concluded that the "disabling of a spare tire does not undermine the immediate safety of the vehicle or threaten the security of the vehicle's driver or passengers."<sup>113</sup> Other Ninth Circuit border search cases have upheld the suspicionless drilling of a single 5/16-inch hole in the bed of a pickup truck,<sup>114</sup> the use of a radioactive density meter called a "Buster" to search the inside of a spare

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 155, n. 2 (citing *United States v. Rivas*, 157 F.3d 364 (5<sup>th</sup> Cir. 1998) (drilling into body of trailer required reasonable suspicion); *United States v. Robles*, 45 F.3d 1 (1<sup>st</sup> Cir. 1995) (drilling into machine part required reasonable suspicion); *United States v. Carreon*, 872 F.2d 1436 (10<sup>th</sup> Cir. 1989) (drilling into camper required reasonable suspicion).

<sup>108</sup> *Flores-Montano*, 541 U.S. at 155-156.

<sup>109</sup> *Id.* at 155, n. 2.

<sup>110</sup> *Flores-Montano*, 541 U.S. at 155-156; *United States v. Bennett*, 363 F.3d 947, 951 (9<sup>th</sup> Cir. 2004). *Cf. Okafor*, 285 F.3d at 846 (qualifying its holding by stating that a suspicionless X-ray search of luggage may be done at the border "[s]o long as the means of examination are not personally intrusive, do not significantly harm the objects scrutinized, and do not unduly delay transit").

<sup>111</sup> *Flores-Montano*, 424 F.3d at 1049, n.6 (This case dealt with the same defendant as the Supreme Court case but posed a different legal question.). *See also* *United States v. Cortez-Rocha*, 394 F.3d 1115, 1119 (9<sup>th</sup> Cir. 2005); *United States v. Chaudhry*, 424 F.3d 1051, 1054 (9<sup>th</sup> Cir. 2005).

<sup>112</sup> *United States v. Cortez-Rocha*, 394 F.3d 1115 (9<sup>th</sup> Cir. 2005).

<sup>113</sup> *Id.* at 1119-1120.

<sup>114</sup> *United States v. Chaudhry*, 424 F.3d 1051, 1053 (9<sup>th</sup> Cir. 2005).

tire,<sup>115</sup> and the removal of an interior door panel.<sup>116</sup> In all of these cases, the court found determinative the limited amount of damage to the vehicles and the fact that safety was not compromised. Concurring opinions, however, questioned whether the government needed a broad “suspicionless” search argument to prevail when the results in these cases could have been sustained on narrower grounds (i.e., the existence of reasonable suspicion).<sup>117</sup>

## Searches of Electronic Storage Devices

A recently developing issue is whether, at the border, the Fourth Amendment permits warrantless searches of the contents of laptop computers and other electronic storage devices, and if it does, whether these searches are routine or non-routine. The U.S. Supreme Court has yet to address this matter. Some lower federal courts, however, have held that searches of laptops and other forms of electronic storage devices fall under the border search exception as to warrants.<sup>118</sup> Yet these courts have also been far more reticent in determining whether these types of searches are either routine or non-routine, instead finding that the searches were supported by reasonable suspicions.<sup>119</sup> Even when a court has held that searches of electronic storage devices were routine, there is usually an accompanying finding of reasonable suspicion to support the searches.<sup>120</sup> The one exception is the Ninth Circuit, which has expressly

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<sup>115</sup> *United States v. Camacho*, 368 F.3d 1182 (9<sup>th</sup> Cir. 2004). The Ninth Circuit in this case distinguished prior precedent (*Ek*, 676 F.2d 379) requiring a heightened level of suspicion for X-ray searches of persons because such searches were potentially harmful to the health of the suspect and the “Buster” search was not harmful to motorists.

<sup>116</sup> *United States v. Hernandez*, 424 F.3d 1056 (9<sup>th</sup> Cir. 2005).

<sup>117</sup> *Chaudhry*, 424 F.3d at 1054-1055 (Fletcher, J., concurring) (“In each case, the government chose to create a dispute where none existed, rather than to prove up its officers’ valid suspicions.”); (Fisher, J. concurring) (“I am troubled by the government’s evident decision in this and other cases to eschew reliance on dog alerts or other evidence supporting reasonable suspicion.”) *Id.* at 1055.

<sup>118</sup> *See e.g.* *United States v. Ickes*, 393 F.3d 501, 505 (4<sup>th</sup> Cir. 2005); *United States v. Romm*, 455 F.3d 990, 997 (9<sup>th</sup> Cir. 2006); *United States v. Irving*, 452 F.3d 110, 123 (2<sup>d</sup> Cir. 2006) (“An airport is considered the functional equivalent of a border and thus a search there may fit within the border search exception”); *United States v. Furukawa*, No. 06-145, slip op. (D. Minn., November 16, 2006), 2006 U.S. Dist. LEXIS 83767; *United States v. Hampe*, No. 07-3-B-W, slip op. (D. Me., April 18, 2007), 2007 U.S. Dist. LEXIS 29218.

<sup>119</sup> *See e.g. Irving*, 452 F.3d at 124 (“Because these searches were supported by reasonable suspicion, we need not determine whether they were routine or non-routine.”); *Furukawa*, *supra* (“[T]he court need not determine whether a border search of a laptop is “routine” for purposes of the Fourth Amendment because, regardless, the magistrate judge correctly found the customs official had a reasonable suspicion in this case.”).

<sup>120</sup> *Ickes*, 393 F.3d at 507 (noting that the computer search did not begin until the custom agents found marijuana paraphernalia and child pornography which raised a reasonable suspicion); *Hampe*, *supra* (holding that even though the laptop search did not implicate any of the serious concerns that would characterize a search as non-routine, that the peculiar facts of the case gave rise to reasonable suspicions).

held that reasonable suspicion is not required to support a border search of a laptop.<sup>121</sup>

As a side note, even though these cases usually arise in child pornography prosecutions, there are national security implications involved as well. One of the justifications given for not requiring probable cause to conduct a laptop search is that to do so would enable terrorists to smuggle potentially incriminating information on electronic media without fear of it being searched.<sup>122</sup> Another potential issue that might arise is the possibility that the search power can be abused if an officer does not need to provide an articulable reason for his search.

## **The 9/11 Commission Recommendations and Legislative Action on Border Security**

The 9/11 Commission made several recommendations and observations in its Report for changes to U.S. border security operations. Most of these proposed changes involve enhancing the detection of travelers who would pose the United States harm and promoting cooperation between U.S. federal agencies and with foreign governments. The 9/11 Report emphasizes the importance of constraining and intercepting terrorist travel by using better technology and training to detect falsified documents.<sup>123</sup> To accomplish this end, the Commission recommends: (1) creating a strategy to combine terrorist intelligence, operations and law enforcement; (2) integrating the U.S. border security system into a larger network of screening points; (3) implementing a biometric entry-exit screening system; and (4) enhancing international cooperation, particularly with Canada and Mexico, to raise global border security standards.<sup>124</sup> The 108<sup>th</sup> Congress implemented some of these recommendations, as well as other Commission recommendations and observations, in the 9/11 Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) — a compromise piece of legislation drawn from H.R. 10, the 9/11 Recommendations Implementation Act and S. 2845, the National Intelligence Reform Act of 2004 during conference.

The 109<sup>th</sup> Congress continued to address issues covered by the 9/11 Commission and in the 9/11 Intelligence Reform law. The 109<sup>th</sup> Congress passed the FY2005 Emergency Supplemental Appropriation Act for Defense, the Global War on Terror, and Tsunami Relief (P.L. 109-13), which calls on DHS to study the technology, equipment, and personnel needed to address security vulnerabilities near the U.S. borders and to develop a pilot program to utilize or increase the use of ground surveillance technologies (e.g., video cameras, sensor technology, motion detectors) on both the northern and southern borders. The 109<sup>th</sup> Congress also passed the

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<sup>121</sup> *United States v. Arnold*, No. 06-50581, slip. op. 4173 (9th Cir. April 21, 2008). It is also interesting to note that the case's analysis also disregarded the routine/non-routine distinction used in most other border search analyses.

<sup>122</sup> *Ickes*, 393 F.3d at 506.

<sup>123</sup> The 9/11 Commission Report: Final Report on the National Commission on Terrorist Attacks Upon the United States, p. 385 (Official Gov't Ed. 2004).

<sup>124</sup> *Id.* at 385-390.

Secure Fence Act of 2006 (P.L. 109-367), which requires the Secretary of DHS to take all actions the Secretary determines necessary to achieve and maintain operational control over the entire international land and maritime borders of the United States. The Secretary is to use systematic surveillance and physical infrastructure enhancements, including fencing, to achieve control of the border.

The 110<sup>th</sup> Congress passed the Implementing Recommendations of the 9/11 Commission Act of 2007.<sup>125</sup> Within this act, Congress addresses a number of issues related to border security. The law attempts to modernize and strengthen the visa waiver program in INA § 217 by enhancing program security requirements through an electronic travel authorization system to collect biographical information about passengers, and extending visa-free travel privileges to nationals of countries that are cooperating with the United States in its anti-terrorism campaign. The law also authorizes: (1) a Terrorist Travel Program to monitor terrorists and prevent their entry into the United States; (2) the creation of a “model” port-of-entry program to help provide a more efficient and welcoming international arrival process at ports-of-entry; and (3) a pilot program to develop, with states, a machine-readable and tamper-proof driver’s license that can be used for admission into the United States from either the Canadian or Mexican border.

Pending bills in the 110<sup>th</sup> Congress seek “operational control” of the borders, which is defined as “the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.”<sup>126</sup> Most of the proposals also seek to increase border security through a variety of means, such as an increase in Border Patrol agents, the construction of fencing, the use of unmanned aerial vehicles, and the deployment of cameras, radar, and other forms of surveillance equipment.<sup>127</sup> There are also bills authorizing the Secretary of Homeland Security to require that aliens entering or leaving the United States provide biometric data and other information related to their immigration status.<sup>128</sup> One bill seeks to establish procedures that would limit the use of solitary confinement, shackling, and strip searches in detention facilities to those situations where the use of such techniques is necessitated by security interests.<sup>129</sup> Congress did not act on any of these proposed bills during the first session of the 110<sup>th</sup> Congress.

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<sup>125</sup> Implementing Recommendations of 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266.

<sup>126</sup> *See* Immigration Enforcement and Border Security Act of 2007, S. 1984 § 101 (2007); Secure Borders FIRST Act of 2007, H.R. 2954 § 101 (2007); America’s Border Security Act of 2007, H.R. 3469 (2007). *See also* Secure Fence Act of 2006, P.L. 109-367, 120 Stat. 2638.

<sup>127</sup> *See* Immigration Enforcement and Border Security Act of 2007, S. 1984 (2007); America’s Border Security Act of 2007, H.R. 3469 (2007).

<sup>128</sup> Unaccompanied Alien Child Protection Act of 2007, S. 1639, § 111 (2007); Immigration Enforcement and Border Security Act of 2007, S. 1984, § 123 (2007).

<sup>129</sup> Unaccompanied Alien Child Protection Act of 2007, S. 1639, § 146 (2007).