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Intrusive Border Searches -- What Protection Remains for the International Traveler Entering the United States after United States v. Montoya de Hernandez and Its Progeny?

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I. INTRODUCTION

From the early 1960s to the mid-1980s, the United States Supreme Court did not step into the area of intrusive border searches, an area which includes strip, X-ray, and body cavity searches. Because of the Supreme Court's refusal to intervene and a lack of federal legislation directly addressing the area, the circuit courts of appeal were left to fashion their own standards and rules of conduct based upon the fourth

amendment.[1]

After some cases in the early 1960s that focused on the reasonableness of the circumstances surrounding the search, the Ninth Circuit Court of Appeals took the lead in establishing standards for the initiation of intrusive searches and in ruling upon what methods were or were not "reasonable" in the conduct of the search. A few other circuit courts, however, decided not to follow the Ninth Circuit's protectionist approach. Thus, by the time the Supreme Court granted certiorari in *United States v. Montoya de Hernandez*,[2] there was a need to resolve the conflicts between the circuits and to clarify guidelines for intrusive searches, both for the good of the customs agent who carries out the searches and the international traveler who is subjected to such searches.[3] The Court, however, failed to settle the conflicts between the circuit courts. In addition, although the Court left many important issues unresolved it did expand governmental power in the area of intrusive border searches. The cases following *Montoya de Hernandez* highlight the erosion of the Ninth Circuit's protectionist posture in the conduct of body searches and exemplify the confusion resulting from the Supreme Court's failure to establish clear guidelines concerning the initiation of the search.

This Note will examine the standards for initiation of strip, body cavity, and X-ray searches developed by the different circuits as well as the latitude allowed customs agents in carrying out such searches. It will also delve into the effect which *Montoya de Hernandez* and its progeny have had on this area of the law. Finally, this Note will propose possible solutions to the present confusion in the law.

II. LEGAL BACKGROUND

A. *Establishment of the Standards for Intrusive Searches*

1. Statutory Aid to Establishing a Standard

Courts dealing with intrusive border searches have regularly cited two federal statutes[4]: 19 U.S.C. §§ 482 and 1582. Section 482 addresses the

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1. The fourth amendment states:
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.

2. 473 U.S. 531 (1985).

3. *See* Note, *From Bags to Body Cavities: The Law of Border Search*, 74 COLUM. L. REV. 53 (1974) [hereinafter Note]. The author points out the need for clearly defined constitutional restraints upon customs agents in initiating and carrying out searches.

4. The area of border searches is exclusively a federal area of law. Such searches do

search of vessels entering United States territory and grants customs officials the authority to search any "vehicle, beast, or person" at the border. The Tariff Act of 1930, 19 U.S.C. § 1582, addresses the issue of intrusive border searches more closely than does section 482. Section 1582 provides:

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.[5]

By authorizing the hiring of female inspectors, section 1582 clearly contemplates strip searches and, arguably, even body cavity searches. In addition, it provides for detention and search at the border under certain circumstances. This provision, unfortunately, gives no guidance as to what level of suspicion is necessary for initiating such searches.

Despite the lack of statutory standards, numerous courts have relied upon these provisions to justify warrantless searches at the border. For example, in *United States v. Ramsey*[6] the Supreme Court ruled that the fourth amendment does not prohibit border searches. Such searches come within an exception to the amendment's requirement of probable cause and the requirement of a warrant issued pursuant to that probable cause. The Court thus emphasized that the border search exception was not based on exigency but rather upon a long-standing exception to the fourth amendment.[7]

Some courts have viewed section 1582 as granting the broadest possible authority to customs officers to conduct warrantless searches at the

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not depend upon probable cause and are not governed by any state laws. People v. Mitchell, 209 Cal. App. 2d 312, 26 Cal. Rptr. 89 (Cal. Dist. Ct. App. 1962), *cert. denied*, 374 U.S. 845 (1963).

5. 19 U.S.C. § 1582.

6. 431 U.S. 606 (1977).

7. 431 U.S. at 621-22. The first customs statute passed Congress on July 31, 1789, 1 Stat. 29, and the fourth amendment was not proposed until September 25, 1789, 1 Stat. 97. The Court held that the statute could not properly be interpreted as requiring probable cause and warrants for border searches. The Court cited *Boyd v. United States*:

> As this act [customs statute] was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable", and they are not embraced within the prohibition of the amendment.

116 U.S. 616, 623 (1886).

border.[8] The justification for the exception to the warrant and probable cause requirements is based on the fundamental national interest in protecting United States borders against illegal importations.[9] Thus, although the statutes do not aid in establishing a standard for the initiation of an intrusive search, courts have interpreted these provisions as exempting border searches from the probable cause and warrant requirements of the fourth amendment.

2. The Early Cases Focusing on "Reasonableness" Under All the Circumstances

Although the probable cause and warrant requirements generally are not applicable to the initiation of border searches, the fourth amendment's requirement that the search be "reasonable" is applicable.[10] The earliest reported cases challenging border searches focused on this "reasonableness" requirement and forced judges to make ad hoc adjudications based upon all the facts in the record. The United States Supreme Court laid the foundation for analyzing the reasonableness of government conduct in carrying out an intrusive search in *Rochin v. California*. In *Rochin*, three state officers, having "some information" that the petitioner was selling narcotics, barged into the petitioner's home and bedroom.[11] The officers, after seeing petitioner swallow some capsules, tried by force to remove the capsules from his mouth with their hands.[12] After the officers took petitioner to a hospital, doctors forced an emetic into petitioner's stomach, and he vomited two morphine capsules.[13] The Court held that this conduct "shocks the conscience"[14] and reversed the conviction based upon the fourteenth amendment's due process clause.

Courts subsequently applied the "shocks the conscience" standard in several border search cases because the methods used by the officers in *Rochin* were so similar to those often used by customs agents. In *Black-*

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8. Landau v. United States Attorney, 82 F.2d 285 (2d Cir.), *cert. denied*, 298 U.S. 665 (1936); United States v. Rodriguez, 195 F. Supp. 513 (S.D. Tex. 1960), *aff'd*, 292 F.2d 709 (5th Cir. 1961); United States v. Yee Ngee How, 105 F. Supp. 517 (N.D. Cal. 1952).

9. United States v. Bilir, 592 F.2d 735, 740 (4th Cir. 1979). The Supreme Court stated that broad powers are granted to the government "to prevent smuggling and to prevent prohibited articles from entry." United States v. 12 200-ft. Reels of Super 8mm Film, 413 U.S. 123, 125 (1973).

10. *See supra* note 1.

11. 342 U.S. 165, 166 (1952). This case is not based upon a border search.

12. *Id.*

13. *Id.*

14. *Id.* at 172. *See infra* note 20.

ford v. United States,[15] the first appellate case challenging a border search, customs officers conducted a strip search of the defendant[16] and noticed a greasy substance on his rectum.[17] During interrogation, appellant admitted to the officers that he was carrying narcotics.[18] After the appellant was taken to a hospital, physicians conducted a rectal search, notwithstanding appellant's resistance, and found heroin in his rectal cavity.[19] The Ninth Circuit Court of Appeals ruled that the fourth amendment not only protects against the actual invasion of privacy, that is, the search itself, but also may regulate the reasonableness of the manner in which the search is conducted.[20] The court indicated that this test of reasonableness under the fourth amendment is stricter than that applied under the fourteenth amendment in *Rochin*[21] and that each case must "turn on its own relevant facts and circumstances."[22] Applying the *Rochin* standard, the Ninth Circuit ruled that the facts in *Blackford* did not "shock the conscience" and thus the search was reasonable.[23] In *Blackford* a circuit court of appeals recognized for the first time that, under the fourth amendment, officials must not only have sufficient justification for the search of the person, but must also carry out the search in accordance with a standard of reasonableness stricter than the standard established under the fourteenth amendment in *Rochin*.[24]

The Fifth Circuit applied the *Blackford* reasonableness test in *Lane v. United States*.[25] There, officers asked the appellant to take an emetic

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15. 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958).

16. Upon entering the International Boundary Line at San Ysidro, the California port of entry, a customs officer stopped Blackford and took him into the customs building for a personal examination. *Id.* at 747. When he removed his coat, the officer noticed needle marks on Blackford's arms. *Id.* After Blackford admitted that he had been using some narcotics and that he was on parole from a California conviction for possession of marijuana, he was asked to disrobe. *Id.*

17. *Id.* Case law on border searches indicates that the use of a lubricant near a body cavity is considered an indication that one may be carrying contraband in that body cavity. United States v. Aman, 624 F.2d 911 (9th Cir. 1980).

18. 247 F.2d at 747.

19. *Id.*

20. *Id.* at 750. Formerly, the fourth amendment safeguarded the right to be free from an unwarranted initiation of a search or seizure, while the fifth or fourteenth amendment protected one from unfair or inhumane treatment in the conduct of the search. *Id.* at 748. *See also* Davis v. United States, 328 U.S. 582, 603-07 (1946) (Frankfurter, J., dissenting).

21. 247 F.2d at 750.

22. *Id.* at 751.

23. *Id.*

24. *Id.* at 749.

25. 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 381 U.S. 920 (1965).

to induce vomiting.[26] Unlike the situation in *Rochin*, the officers did not force the emetic upon the appellant. The court, stating that the lack of force is not controlling but is a factor indicative of reasonableness, considered all the circumstances of the case and found the search reasonable.[27] The Fifth Circuit appeared to follow the *Blackford* analysis as that analysis reflected two prongs of the fourth amendment—the sufficient justification prong and the reasonableness of the conduct prong.[28] However, a close reading of the case reveals that the court actually applied the totality of the circumstances test by analyzing all the facts to determine reasonableness rather than by looking individually and separately at the reasonableness of the initiation and conduct of the search.[29]

3. The Ninth Circuit Approach

In 1966 the Ninth Circuit Court of Appeals became the first circuit court to abandon the totality of the circumstances test in favor of a bifurcated approach which required a certain standard in order to initiate a search and prescribed separate guidelines for the manner of carrying out that search. The Ninth Circuit, as well as other circuits, however, has had considerable difficulty in establishing a standard for the initiation of intrusive border searches because the standard does not need to be as high as that for probable cause.[30] In *Rivas v. United States*[31] the Ninth Circuit, relying on the United States Supreme Court opinion in *Schmerber v. California*,[32] ruled that government authorities must have a "clear indication of the possession of narcotics before a search at a border may be made."[33] In *Schmerber*, a non-border search case in which a physician took a police-ordered blood sample from the defendant against the defendant's will, the trial court allowed the introduction of the results of the blood test into evidence at defendant's trial for driving while

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26. An informer, whom customs agents claimed was reliable, telephoned the customs office and told an agent that Lane had purchased heroin in Juarez, Mexico. Agents located Lane's car near the border in El Paso, Texas. After Lane went to a druggist, requested something to make him vomit, and purchased castor oil, the agents stopped him and led him to a customs house search room. After agents conducted a strip search which provided no contraband but did reveal needle marks on Lane's arms, they took him to a hospital where Lane ingested the emetic. 321 F.2d at 574-75.

27. *Id.* at 576.

28. *Id.*

29. *Id.*

30. *See supra* notes 4, 7 and accompanying text.

31. 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967).

32. 384 U.S. 757 (1966).

33. 368 F.2d at 710.

intoxicated.[34]

In upholding the reasonableness of the blood test, the Supreme Court stated:

> The interests in human dignity and privacy which the Fourth amendment protects forbid any such intrusions [beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a *clear indication* that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.[35]

The Court put strict limits on the holding in *Schmerber* by stating that its approval of minor intrusions into an individual's body did not permit more substantial intrusions under other conditions.[36] In attempting to avoid an expansion of its holding, the Supreme Court actually provided the basis for the Ninth Circuit's protective standard for international travelers subject to border searches.[37]

The *Rivas* court, adopting the "clear indication" language of *Schmerber*, defined "clear" as "free from doubt . . . free from limitation" or "plain"[38] and defined "indication" as "an indicating; suggestion."[39] Under this standard, there is no need to establish probable cause in order to justify the search.[40] The court, however, did not indicate specifically what kinds of searches required a clear indication for their initiation. Though undoubtedly referring to non-routine border searches, the court failed to identify which of such searches must meet this standard. In *Rivas*, customs agents conducted a rectal search of the defendant.[41] The

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34. 384 U.S. at 758-59.

35. *Id.* at 769-70 (emphasis added).

36. *Id.* at 772.

37. *See* Note, *supra* note 3, at 80-82. The author argues that the test adopted in *Rivas* from the *Schmerber* opinion does not provide adequate protection for individual rights in the border search context. First, the author points out that the search in *Schmerber* was after arrest, whereas, in most border search cases, the search occurs before an arrest. In *Rivas* the court failed to emphasize the fact that the defendant was not searched until after he resisted a rectal search and customs agents arrested him for impeding a federal officer. Second, in *Schmerber*, the evidence of blood-alcohol content was destructible, whereas, in border searches, evidence hidden within the body generally is not destructible. Thus, the author concludes that, if *Schmerber* required a clear indication standard independent of the probable cause standard for arrest, then the protection established in *Rivas* for border search cases is far less than the protection provided in *Schmerber*.

38. *Id.*

39. 368 F.2d at 710.

40. *Id. See supra* notes 4, 7 and accompanying text.

41. *Id.* at 705-06.

court noted:

> An honest "plain indication" that a search involving an intrusion beyond the body's surface is justified cannot rest on the mere chance that desired evidence may be obtained. Thus we need not hold the search of any body cavity is justified merely because it is a border search, and nothing more.[42]

Thus, one certain requirement was the establishment of a clear indication of smuggling in order to perform a rectal search. The court, in establishing the clear indication standard, conceded that drawing the line between "mere suspicion,"[43] "clear indication," and "probable cause" presented problems. Specifically, a great deal of uncertainty existed as to what factors would lead to a "clear indication" above and beyond a "mere suspicion" but short of "probable cause."[44] The Ninth Circuit characterized this as a difficult problem, but one not impossible to resolve.[45]

The Ninth Circuit's ruling in *Henderson v. United States*[46] provided the standard necessary to conduct a strip search. The court, prefacing its ruling by stating that there is no need for even "mere suspicion" for an agent to conduct a routine border search, stated, however, that a "real suspicion" directed specifically to one person was necessary to justify the strip search of an international traveler.[47] Although the *Henderson* court did not define "real suspicion," the Ninth Circuit in *United States v. Guadalupe-Garza*[48] did describe "real suspicion" as "subjective suspicion supported by objective, articulable facts"[49] that would reasonably

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42. *Id.* at 710.

43. Mere suspicion or unsupported suspicion alone is enough to justify a non-intrusive border search for purposes of customs law enforcement. Cervantes v. United States, 263 F.2d 800, 803 n.5 (9th Cir. 1959). *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925); Boyd v. United States, 116 U.S. at 623; King v. United States, 348 F.2d 814, 817 (9th Cir. 1965); Denton v. United States, 310 F.2d 129 (9th Cir. 1962); Mansfield v. United States, 308 F.2d 221 (5th Cir. 1962).

44. 368 F.2d at 710.

45. *Id.* For how the court addresses satisfaction of the *Rivas* standard, see *supra* text accompanying notes 38-42.

46. 390 F.2d 805 (9th Cir. 1967).

47. *Id.* at 808. Also, the court dealt with the question of when a strip search becomes a body cavity probe. The court in *Henderson* stated that a visual inspection of the vagina is a body cavity probe and, thus, such a search must meet the "clear indication" standard. *Id.* This problem of line-drawing was further addressed in Morales v. United States, 406 F.2d 1298 (9th Cir. 1969) and United States v. Holtz, 479 F.2d 89 (9th Cir. 1973). For a more thorough analysis of the distinction between strip and body cavity searches, see Note, *supra* note 3, at 77-80.

48. 421 F.2d 876 (9th Cir. 1970).

49. *Id.* at 879. The court justifies the "real suspicion" standard for strip searches by

lead a customs official to suspect that a particular international traveler crossing the United States border is concealing contraband on the person's body. The objective, articulable facts must point toward the suspicion that some contraband is concealed on the person's body or that the breadth of the search will not be related to the justification for the initiation of the search.[50]

By the beginning of the 1980s, the Ninth Circuit had established a "clear indication" standard for certain body cavity searches and a "real suspicion" standard for strip searches at the border, but the court had not decided what standard was necessary to initiate an X-ray search. In *United States v. Caldera*[51] the court suggested that a "clear indication" of body cavity smuggling may be required for an X-ray search but did not decide the question. Again, in *Aman* the court noted that it had not yet decided the standard applicable to X-ray searches but then stated that it need not determine which standard should apply because both the body cavity search and the strip search standards were met under the facts of the case.[52] Finally, in *United States v. Ek*, the Ninth Circuit held that the stricter "clear indication" standard must be applied in order to justify an X-ray search.[53] The majority concluded that "[a]n x-ray

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stating:

> [The international traveler] must anticipate that he will be detained temporarily at the border. He will be interrogated. His vehicle, if any, and his personal effects will be examined. . . . [S]uch routine inspections are not deemed unreasonable searches. . . . But nothing leads a person to anticipate that, on reaching our border, he will be singled out, removed to a private examination room, undressed, and subjected to a skin search. No one should be subjected to the indignity of such a search unless there are compelling reasons to do so.

421 F.2d at 878.

50. *Id.* In Terry v. Ohio, 392 U.S. 1, 29 (1967), the Supreme Court held that the scope of a search must be related to the justification for initiating it in order to meet the reasonableness requirement of the fourth amendment. The Court stated that "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *Id. See also* Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).

51. 421 F.2d 152 (9th Cir. 1970). Under the standards established in body cavity search cases, the court justified the X-ray search of the defendant.

52. 624 F.2d 911.

53. 676 F.2d 379 (9th Cir. 1982). District Judge Schnacke, in a special concurrence, objected to the majority's application of the clear indication standard to X-ray searches. He called the majority's statement "dicta," stating that "[s]uch a holding is neither required by the opinion, nor supported by any evidence adduced in this case." *Id.* at 383. Judge Schnacke conceded that he had no factual basis for concluding that an X-ray search is less intrusive than a strip search but did state that the majority had no basis for concluding the opposite. *Id.* The majority rejected the concurring opinion's characteriza-

search, although perhaps not so humiliating as a strip search, nevertheless is more intrusive since the search is potentially harmful to the health of the suspect. It goes beyond the passive inspection of body surfaces."[54] The court further stated that it would utilize a sliding-scale approach to determine whether a certain intrusive search is justified. As a search becomes more intrusive, there must be a higher level of suspicion of criminal activity.[55] Of course, the degree of intrusiveness and the level of suspicion required for any particular search are subjective determinations to be made by the court.

4. Other Circuits' Approaches

Because the Ninth Circuit has decided the bulk of the border search cases,[56] the other circuits have lagged behind in their development of border search law. For example, the Ninth Circuit began to distinguish between the initiation of the search and the conduct of the search in 1966, while it was not until the mid-1970s that other circuits began to make this distinction.

In *United States v. Briones*[57] the Fifth Circuit recognized the Ninth Circuit's establishment of the clear indication standard for body cavity searches as articulated in *Henderson* but stopped short of either accepting or rejecting that standard by finding that the facts of the case satisfied both standards. For purposes of this case, the Fifth Circuit thus eliminated the need to adopt a standard for body cavity searches. In the 1973 case of *United States v. Forbicetta*[58] the Fifth Circuit avoided establishing a standard for strip searches as well and instead decided the case upon the reasonableness standard based on all the facts.

In a pair of 1977 cases, however, the Fifth Circuit both articulated a standard for strip searches and body cavity searches and criticized the Ninth Circuit's approach. Thus, even though in *Perel v. Vanderford*[59] the court adopted the Ninth Ciruit's "real" or "reasonable" suspicion standard for strip searches, the court in *United States v. Himmelwright*[60]

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tion of its holding as dicta, noting that a definite standard to measure customs officer's actions was necessary for X-ray searches. *Id.* at 382.

54. *Id.*

55. *Id.*

56. The Ninth Circuit includes the states of California and Arizona, two states which handle a great number of border crossings from Mexico. In addition, the Los Angeles International Airport deals with hundreds of international travelers daily.

57. 423 F.2d 742 (5th Cir.), *cert. denied*, 399 U.S. 933 (1970).

58. 484 F.2d 645 (5th Cir. 1973).

59. 547 F.2d 278 (5th Cir. 1977).

60. 551 F.2d 991 (5th Cir. 1977).

refused to adopt the Ninth Circuit standard for body cavity searches. Aside from the indefiniteness of the terms "real suspicion" and "clear indication,"[61] the court found it very difficult to draw the line between strip and body cavity searches.[62] The Fifth Circuit, therefore, held the "reasonable suspicion" standard "flexible enough to afford the full measure of protection which the fourth amendment commands."[63] The court stated that the "reasonable suspicion" standard required that customs officials suspect that contraband exist in the particular place where the officials search.[64] In *United States v. Afanador*[65] the Fifth Circuit more fully explained the "reasonable suspicion" standard in recognizing that the standard was a sliding-scale of reasonableness. Under this sliding-scale approach what is reasonable to justify one particular search may not justify another more intrusive search; thus, each case must turn on its own facts.[66]

Other circuits followed the Fifth Circuit approach to intrusive border searches. The First Circuit, admitting its hesitancy to accept a hard and fast standard because of its indefiniteness and the need to develop the standard on a case-by-case basis, adopted the sliding-scale "reasonable suspicion" standard.[67] The Eleventh Circuit followed the Fifth Circuit in 1984 by adopting the "reasonable suspicion" standard for all intrusive searches and specifically rejecting the Ninth Circuit's adoption of the "clear indication" standard for X-ray searches.[68] The Eleventh Circuit also provided a way to measure the intrusiveness of the search—by focusing generally on the indignity of the search and, specifically, on three factors: (1) physical contact between the person searching and the person being searched, (2) the exposure of intimate parts, and (3) the use of force.[69]

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61. *See supra* notes 44-45 and accompanying text.

62. 551 F.2d at 995; *see supra* note 47.

63. 551 F.2d at 995.

64. *Id.* The court referred to Chimel v. California, 395 U.S. 752 (1969), in which the Supreme Court held that law officers must have only probable cause to search within a specified area.

65. 567 F.2d 1325 (5th Cir. 1978).

66. *Id.* at 1328. This explanation of the "reasonable suspicion" standard is similar to the Ninth Circuit's explanation of the "real suspicion" and "clear indication" dichotomy in *Ek*, 676 F.2d 379.

67. United States v. Wardlaw, 576 F.2d 932 (1st Cir. 1978).

68. United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir. 1984).

69. *Id.* at 1346.

B. *Satisfaction of the Various Standards for Intrusive Searches*

In order to understand the level of protection provided by the "clear indication" and "real" or "reasonable suspicion" standards and the practical differences between those standards, one must analyze what fact patterns have and have not satisfied the particular standards. In *Rivas*, the first Ninth Circuit decision dealing with the intrusive search standards, the court ruled that nervousness of the traveler, a registration certificate indicating he was a previously convicted and registered user of narcotics, and needle marks coupled with a doctor's observation that he was under the influence of narcotics amounted to a clear indication of drug smuggling, thus justifying a rectal search.[70] In contrast, the Ninth Circuit held in *Henderson* that the recollection, later found erroneous, of one customs agent that the traveler searched was the same person on whom he had found contraband three or four weeks earlier did not amount to a clear indication of smuggling, but amounted only to a "mere suspicion."[71] Thus, the initiation of a vaginal search of the defendant was not justified. Again, in *Guadalupe-Garza*, the same court held that the fact that defendant "tilted his head to one side and shied away"[72] when approaching the customs officer and appeared nervous when answering routine questions did not warrant real suspicion necessary to conduct a strip search. The court added that the good faith of an official could not turn "mere suspicion" into "real suspicion" so as to satisfy the standard.[73]

Rivas, Henderson, and *Guadalupe-Garza* did not appear to present difficult fact situations for the court's resolution. Likewise, the Ninth Circuit in *Aman* upheld the legality of a strip search and an X-ray search based on numerous factors: the disoriented appearance of the de-

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70. 368 F.2d at 705.

71. 390 F.2d at 809.

72. 421 F.2d at 877. After agents conducted a strip search that further revealed needle marks and asked questions that elicited evasive answers from the defendant, a doctor conducted a rectal search and injected an emetic which caused defendant to regurgitate a small amount of heroin. The court held that the contraband acquired through these further body cavity searches was inadmissible evidence because it was fruit of the earlier unlawful strip search. Therefore, the court decided it need not pass on the legality of the body cavity search itself. *Id.* at 880. The court cited United States v. Di Re, 332 U.S. 581, 595 (1948), in which the Supreme Court stated that "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

73. 421 F.2d at 879. The court cited *Beck v. Ohio*, where the Supreme Court declared that "[i]f subjective good faith alone were the test, the protections of the Fourth amendment would evaporate." 379 U.S. 89, 97 (1964).

fendant, the restriction of body movements, a computer indication that defendant had previously smuggled narcotics, luggage containing two types of lubricants and six prophylactics, and inconsistent and contradictory answers to questions.[74]

The Ninth Circuit, however, had a more difficult time deciding two 1983 cases. In *United States v. Quintero-Castro*[75] the government claimed that several factors justified a warrant for an X-ray search: (1) nervousness, (2) conflicting stories from defendant and a travelling companion about their occupations, (3) defendant's statement that he was on a brief pleasure trip and his family was at home, (4) defendant's plan to stay at a hotel although he had relatives in the area, and (5) defendant's possession of a large amount of cash. The court, ruling that the clear indication standard was not satisfied, stated that "[t]hese are suspicious circumstances and indicate some wrongdoing, but the issue here is whether these circumstances adequately focused suspicion on body cavity smuggling."[76] Contrasting these facts to the overwhelming degree of suspicion surrounding the *Aman* facts, the court ruled that these facts simply did not give "a strong indication of body cavity smuggling."[77] In *United States v. Mendez-Jimenez*[78] the Ninth Circuit was again presented with the issue of the legality of an X-ray search. In this case, however, the court upheld the legality of the search because: (1) the defendant possessed an anti-diarrhea pill; (2) he had not consumed food or beverages since leaving Colombia; (3) the source of his flight—Colombia—was a known source country for drugs; (4) he had neither relatives nor friends in the United States, nor could he speak English; and (5) he carried an altered passport.[79] The court recognized that the facts in this case were similar to those in *Quintero-Castro* but distinguished the earlier decision as having fewer factors to support a clear indication finding and placed particular reliance on certain factors

74. 624 F.2d at 912.

75. 705 F.2d 1099, 1100 (9th Cir. 1983).

76. *Id.* at 1100-01.

77. *Id.* at 1101. The court contrasted the facts of the present case to United States v. Shreve, 697 F.2d 873 (9th Cir. 1983), in which the court upheld the legality of an X-ray search. In that case, many suspicious factors were present: (1) the defendant's eyes were dilated and his speech slurred; (2) he walked in an unnaturally stiff and erect manner; (3) he came from Peru, a known source of narcotics; (4) although he was unemployed, he paid cash for his ticket; (5) he had consumed only beverages for three days before coming into the United States; and (6) his luggage contained a bottle of oil which could be used as a lubricant to insert contraband into his rectal cavity. *Id.* at 874.

78. 709 F.2d 1300 (9th Cir. 1983).

79. *Id.* at 1304.

not present in *Quintero-Castro*,[80] i.e., the possession of the anti-diarrhea pill, the non-consumption of food or beverages, and the alteration of the passport.

Other circuits have been much more reluctant to exclude evidence seized in a border search. The Third Circuit, which has little experience in the area of intrusive border searches, ruled in *United States v. Diaz*[81] that ample factors existed to find a real suspicion, and, thus, justify a strip search. The court relied upon several factors including: the circuitous route of travel for the purpose of visiting friends, the large amount of cash defendants were carrying, the defendant's attempt to conceal her upper chest from view, the bulky appearance of her upper chest in comparison to her size, and the fact that the two defendants fit the known modus operandi of a man and woman smuggling team.[82] Also, the First Circuit found that customs agents had "reasonable suspicion" that a woman was carrying contraband in *United States v. Wardlaw*[83] based primarily on only three factors: the male defendant, Randell, was wearing a raincoat though it was dry outside; the female defendant, Wardlaw, seemed to have a bulge in her waist; and she refused to lift her skirt when asked and requested a lawyer. The court noted that her refusal to lift her skirt and her request for an attorney gave the agent more cause to press the search.[84] The court, however, justified the search of Wardlaw's travelling companion, Randell, on different grounds. Again, the court pointed to the wearing of a raincoat and the fact that the two had conferred with each other before Wardlaw went through inspection and further stated:

> As the officials had reasonable grounds to believe Randell was associated with Wardlaw, the suspicious appearance and behavior of the latter culminating in her refusal to lift her skirt at [the agent's] request and her demand for a lawyer, constituted objective, articulable facts that justified the search of her similarly attired travelling companion.[85]

Unlike the other circuit courts of appeal dealing with intrusive border searches, the Fifth and Second Circuits have attempted to establish express guidelines to determine whether the circumstances satisfy the "rea-

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80. *Id.*
81. 503 F.2d 1025 (3d Cir. 1974).
82. *Id.* at 1026.
83. 576 F.2d 932, 934-35 (1st Cir. 1978).
84. *Id.* at 935.
85. *Id.* at 935. Although not addressed by the court, it appears that the court transferred reasonable suspicion from one defendant to the other on the sole basis that they were traveling together. *See infra* text accompanying note 97.

sonable suspicion" standard. In *United States v. Forbicetta*[86] the Fifth Circuit established a "smuggling profile" that included numerous customary signs of narcotics smuggling. Although in *Himmelwright*[87] the court partly relied on this profile, the court prescribed limits on how much reliance to place on the smuggling profile in order to satisfy the "reasonable suspicion" standard. The court noted that "[a] generalized suspicion of criminal activity such as that which is fostered, for example, when one closely resembles a 'smuggling profile' will not normally in itself permit a reasonable conclusion that a strip search should occur."[88] In *Himmelwright* the fact that the woman was travelling alone from Colombia, a known drug source, was wearing platform shoes,[89] appeared unusually calm, and changed her story to agents about her occupation amounted to a reasonable suspicion that she was carrying contraband.[90] The court here required only one fact beyond the smuggling profile—contradictory answers about her occupation—to justify a strip search. Although the *Himmelwright* opinion stressed the fact that the defendant was unusually calm throughout the strip search procedure, the nervousness of the defendant has been used in an overwhelming number of cases as one factor satisfying either the "clear indication" or "reasonable suspicion" standard.[91]

Despite the limiting language of *Himmelwright*, the court stated in *United States v. Mejia*[92] that the presence of a combination of appropriate elements of the smuggling profile and incriminating information obtained from a "closer examination" of the traveler may be enough to

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86. 484 F.2d at 646. The court stated:

> [W]omen discovered carrying cocaine on their persons usually wore loose-fitting dresses to conceal the bulkiness of the packages hidden beneath their clothing; usually when an official could not see the contours of a feminine figure under loose-fitting dresses, even when the subject was in a bending position, the wearer generally had something strapped to her waist; individuals attempting to smuggle cocaine usually carried only one suitcase and no items to declare so as to clear customs quickly; it had been observed that it was very unusual for young people to go on vacations to Colombia if they had no relatives there; and the usual airline female traveler ordinarily wore tight-fitting clothes.

Id.

87. 551 F.2d at 991.

88. *Id.* at 995.

89. Customs officers knew from experience that platform shoes were often used to carry contraband. *Id.* at 992.

90. *Id.* at 995-96.

91. The number of cases using the defendant's nervousness as a factor to be considered is so high that a list of citations would be inappropriate. *See* 551 F.2d at 992 n.1.

92. 720 F.2d 1378, 1382 (5th Cir. 1983).

raise reasonable suspicion although the meaning of the words "closer examination" is unclear.[93] In *Afanador* the Fifth Circuit, in refusing to admit contraband into evidence, ruled that reasonable suspicion as to drug smuggling by one stewardess does not, standing alone, justify strip searching a fellow stewardess on the same flight without an independent reasonable suspicion as to her activity.[94] *Afanador* is the only Fifth Circuit case to exclude contraband in the intrusive border search context.[95]

Following the Fifth Circuit approach of establishing guidelines for the satisfaction of the search standards, the Second Circuit in *United States v. Asbury*[96] adopted a smuggling profile consisting of twelve factors to which the court might refer in finding the reasonableness of a search: (1) excessive nervousness, (2) unusual conduct, (3) an informant's tip, (4) computerized information showing pertinent criminal propensities, (5) loose-fitting or bulky clothing, (6) an itinerary suggestive of wrongdoing, (7) the discovery of incriminating matter during routine searches, (8) the lack of employment or a claim of self-employment, (9) needle marks or other indications of drug addiction, (10) information arousing suspicion derived from the search or conduct of a traveling companion, (11) an inadequate amount of luggage, and (12) evasive or contradictory answers. The court noted that a combination of these factors is necessary to justify an intrusive search and that in each case reasonableness depends upon balancing the warranted suspicion of the border official against the offensiveness of the search.[97]

The Eleventh Circuit followed the Fifth Circuit in establishing its

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93. If the court meant by this statement that it planned to procure information from the search to justify the search itself, the action would run afoul of the fourth amendment. *Di Re*, 332 U.S. 581. *See supra* note 72.

94. 567 F.2d at 1330. Customs officials obtained a tip from a reliable informant that one stewardess, Blanca Nuba Vidal-Garcia, would be carrying narcotics into Miami International Airport. Although the tip did not involve any other members of the crew, officials strip searched all six members of the crew. The defendant Afanador, in addition to Vidal-Garcia, was carrying cocaine on her body surface, but the other four crew members were innocent. The court rejected the government's arguments that Afanador fit the "smuggling profile" described in *Forbicetta*, 484 F.2d 645, and that reasonable suspicion may be transferred from one traveler to another traveling companion. The court ruled, "Lest there be any doubt, we state here that 'reasonable suspicion' must be specifically directed to the person to be searched." 567 F.2d at 1331.

95. The Eleventh Circuit has no new cases excluding contraband.

96. 586 F.2d 973 (2d Cir. 1978).

97. *Id.* at 976-77. In this case, the court ruled that the strip searches of the defendants were justified because the court found several of the enumerated factors to be reasonableness guidelines.

border search law. In *Vega-Barvo*[98] the court found "reasonable suspicion" based on four factors: the defendant was traveling alone from a drug-source country; she was extremely nervous; she gave contradictory answers; and she had only one piece of luggage, which was filled mainly with rags.

Thus, a look at the factual settings of the intrusive search cases shows that the Ninth Circuit required more factors to justify an intrusive search. In the area of strip searches where all circuits employ the same standard, it is difficult to determine whether the Ninth Circuit was really more stringent as to what factors would satisfy "real" suspicion. Yet given the Ninth Circuit's decision in *Guadalupe-Garza*, it seems likely that the Ninth Circuit would have decided cases such as *Wardlaw*, *Vega-Barvo*, and *Himmelwright* differently. A comparison of other circuits' cases on body cavity and X-ray searches to those of the Ninth Circuit becomes more difficult because the Ninth Circuit established a higher standard to satisfy. An indisputable fact, however, is that the Ninth Circuit was much more protective of the international traveler than were the other circuits.

C. *The Manner of Conducting the Intrusive Searches*

The Ninth Circuit historically has allowed much less latitude to customs officials in the manner of carrying out intrusive searches than have the other circuits. The Ninth Circuit ruled in *Guadalupe-Garza* that not only must the court consider the justification for initiating the search but also must consider the scope of the particular intrusion and the manner in which the search is conducted.[99] In *Guadalupe-Garza* the court did not reach the reasonableness of a rectal search and administration of two separate emetics to induce vomiting because the initiation of the search was held not justified; thus, all evidence seized was inadmissible as fruit of an unlawful search.[100]

In *United States v. Cameron*[101] the Ninth Circuit promulgated guide-

98. 729 F.2d at 1350. In addition to *Vega-Barvo*, the Eleventh Circuit ruled on several border search cases in 1984, all involving the swallowing of contraband in order to avoid detection. United States v. Saldarriaga-Marin, 734 F.2d 1425 (11th Cir. 1984); United States v. De Montoya, 729 F.2d 1369 (11th Cir. 1984); United States v. Padilla, 729 F.2d 1367 (11th Cir. 1984); United States v. Castaneda-Castaneda, 729 F.2d 1360 (11th Cir. 1984); United States v. Pino, 729 F.2d 1357 (11th Cir. 1984); United States v. Mosquera-Ramirez, 729 F.2d 1352 (11th Cir. 1984).

99. 421 F.2d at 878.

100. *Id.* at 880.

101. 538 F.2d 254 (9th Cir. 1976).

lines for the conduct of intrusive border searches, thus extending a sphere of protection around the international traveler. In *Cameron*, customs officials conducted a warrantless search of defendant's rectal cavity and subjected him to two forced digital probes. Because the defendant resisted a rectal search, he had to be restrained during the search while a physician administered two warm-water enemas in an attempt to obtain the suspected contraband.[102] Finally, customs officials, without the assistance of a doctor, forced the traveler's mouth open and poured a liquid laxative down the defendant's throat. The court, holding that sufficient justification existed for initiating the search, stated that such justification will not end the court's inquiry because a clear indication of contraband smuggling does not authorize border officials to resort to any means they deem fit in order to retrieve the suspected contraband.[103] The court ruled that customs officials must conduct every body search with due regard for the suspect's privacy and must design the search to minimize the emotional and physical trauma associated with such a search.[104] Thus, when less intrusive means are available, customs officials should use these means to conduct the search.[105] Here, the court held that detaining the traveler until natural bodily processes expelled the contraband would have been much less intrusive; thus, authorities "did not take reasonable steps to allay the anxieties and concerns of the suspect."[106] A final rationale for the court's ruling in *Cameron* was that, although a warrant is not constitutionally required for border searches,[107] the failure to obtain

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102. *Id.* at 256.

103. *Id.* at 258.

104. *Id.*

105. *Id.*

106. *Id.* The court explained its reasons for providing the suspect so much protection:

> In addition to the fears and anxieties harbored by most suspects, the person accused of concealing contraband within his body is faced with the real prospect that the most intimate portions of his anatomy will be invaded and that he will suffer resulting pain or even physical harm. As in the case before us, the suspect usually faces this ordeal without assistance, surrounded by persons who administer the procedure on behalf of the government and thus appear to him to have as their overriding motive the obtaining of evidence to convict, and not his personal well being. In a situation thus laden with the potential for fear and anxiety, a reasonable search will include, beyond the usual procedural requirements, reasonable steps to mitigate the anxiety, discomfort, and humiliation that the suspect may suffer.

Id.

107. United States v. Mason, 480 F.2d 563, 564 (9th Cir.), *cert. denied*, 414 U.S. 941 (1973); *Rivas*, 368 F.2d at 710.

a warrant is a factor in determining the reasonableness of a search. The purpose of a warrant, by limiting what search procedures officials may use,[108] is legally to justify the search and to assure that the conduct of the search is reasonable.

The Ninth Circuit has also dealt with the issue of a suspect's right to an attorney's presence at an intrusive search. In *United States v. Erwin*[109] the court held that, although officials denied the defendant's request that his attorney be present during strip, body cavity, and X-ray searches, the agents took steps to minimize the intrusivenss of the search. For example, the agents allowed only a licensed physician and female officials to be present during the searches; they secured a court order for the searches; and they allowed the defendant to remove a packet of heroin from her vagina rather than having an agent or the doctor remove the contraband. The court considered these aspects of the conduct of the search reasonable in light of *Cameron's* mandate to minimize the emotional and physical trauma of the search.[110] In *United States v. Couch*,[111] however, the court warned that, given certain circumstances, the failure to permit a telephone call and denial of an accused's right to consult with retained counsel could render the conduct of the search unreasonable. Nonetheless, counsel could have done little to prevent the agents' discovery of incriminating evidence in this case.[112]

The *Erwin* court also considered what constitutes a reasonable length of detention for purposes of an intrusive border search. The issue in *Erwin* was whether detaining the defendant for seven hours before making the arrest exceeded what was reasonable to conduct a legal border search.[113] The court ruled that, given the strong preference for search warrants in body cavity searches as expressed in *Cameron*, it would be anomalous for the court to hold that, in trying to obtain such a warrant, the agents detained a suspect for an excessively long period.[114] In fact, the court in *Cameron* approved a detention where the agents were pro-

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108. 528 F.2d at 258. *See infra* note 114 and accompanying text.

109. 625 F.2d 838, 840-41 (9th Cir. 1980).

110. *Id.* at 841.

111. 688 F.2d 599 (9th Cir.), *cert. denied*, 459 U.S. 857 (1982). Couch was not formally charged or indicted at the time his requests for counsel were denied; thus, there was no violation of his sixth amendment right to counsel. Brewer v. Williams, 430 U.S. 387, 398 (1977). However, Couch was in the custody of government officials, and he was interrogated by the officials. Thus, Couch had a right to fifth amendment protection against self-incrimination. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

112. 688 F.2d at 604.

113. 625 F.2d at 841. *See supra* note 49.

114. 625 F.2d at 841.

curing a search warrant during the detention period.[115] The *Ek* dicta provided an interesting twist to the detention issue. The court ruled that a ten to twelve hour detention at the border while officials sought an order to conduct a series of intrusive searches at the border was reasonable. However, the court stated further that had the authorities detained Ek while gathering evidence sufficient to support the search order, the detention might be unreasonable.[116] Thus, the court blended the standards for initiation of the search and the manner of conducting the search while hinting that the requisite suspicion must exist before officials may detain a suspect.[117]

Other circuit courts of appeal have very little case law addressing the reasonableness of the conduct of the intrusive search. In circuits other than the Ninth, the courts have decided almost all intrusive border search cases solely on the issue of whether the search was justified at its initiation. The courts' opinions thus have stopped short of examining the methods agents have used in carrying out those searches.[118] However, there are a handful of cases dealing with the reasonableness of the conduct of the search. In *United States v. Mosquera-Ramirez*[119] the Eleventh Circuit held that a twelve-hour detention of the defendant until he excreted was reasonable when the defendant refused to submit to an X-ray search which the agents constitutionally could have performed.[120] The court ruled that detaining a person at the border long enough to reveal by natural processes what an X-ray search would have disclosed is not an unreasonable seizure under the fourth amendment.[121]

Only one Fifth Circuit case addresses the reasonableness of the conduct of the search. In *Mejia*[122] the court appeared to reject the protec-

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115. 538 F.2d at 258 n.7.

116. *See* 676 F.2d at 383 n.5. The customs officials noted that the defendant refused food and drink, facts obtained during the detention itself, in their affidavit to the magistrate requesting the search order. *Id.*

117. *See id.* at 383. The court here found that while the officials presented the facts of refusing food and drink in the affidavit, *see supra* note 116, the officials had a "clear indication" of defendant's smuggling prior to detention. *Id.*

118. The related topic of voluntary consent to these searches is not covered in this analysis. For a discussion of this topic, see *supra* text accompanying notes 25-27. *See also* Spano v. New York, 360 U.S. 315 (1959), and Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

The topic of *Miranda* rights also is not included in this analysis. For a discussion of this topic, see *Mejia*, 720 F.2d 1378.

119. 729 F.2d 1352 (11th Cir. 1984).

120. *Id.*

121. *Id.* at 1356.

122. 720 F.2d at 1381.

tionist posture assumed by the Ninth Circuit in *Cameron*.[123] The court stated that customs officials are "under no affirmative obligation to put the person seeking entry at ease."[124] This, of course, is in contrast to the *Cameron* mandate to minimize the emotional and physical trauma of the searches.[125]

Judicial silence in other circuit courts of appeal concerning the conduct of the intrusive search may, in itself, be a telling commentary on the latitude those courts will allow agents in this area. In this context, judicial silence may arguably be construed as a judicial carte blanche to customs officials to handle the searches in almost any manner they choose.

III. Recent Development

A. *Supreme Court Intervention*

The Supreme Court of the United States granted certiorari in *Montoya de Hernandez* at a time when a unified approach was needed toward intrusive border search law. In *Montoya de Hernandez* the defendant arrived at Los Angeles International Airport on a flight from Bogota, Colombia.[126] A customs agent directed the defendant to a secondary search area because he suspected her of being a "balloon swallower."[127] The facts upon which the agent relied to show that the defendant fit the drug courier profile were: (1) she paid cash for her airplane ticket; (2) she came from a drug source country; (3) she carried $5,000 in United States currency; (4) she had made many trips of short duration to the United States and had no family or friends in the country; (5) she had only one small piece of luggage; (6) she had no confirmed hotel reservations; and (7) she did not speak English.[128]

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123. 538 F.2d at 254.

124. 720 F.2d at 1381.

125. 538 F.2d at 258.

126. 473 U.S. 531. The fact scenario presented is a combination of facts set forth in the Supreme Court majority opinion of Justice Rehnquist, the dissenting opinions of Justices Brennan and Marshall, and the Ninth Circuit Court of Appeals opinion found at 731 F.2d 1369 (9th Cir. 1984). The various opinions present some conflicts in the fact scenario. Disputed facts are noted.

127. 473 U.S. at 534. A "balloon swallower" is one who attempts to smuggle narcotics into the country by concealing swallowed amounts of contraband in his or her alimentary canal. Generally, one either will swallow the drugs in a tiny balloon or in a condom. The risk involved in such smuggling is very high; if the balloon or condom should break while inside the smuggler's body, rapid death may occur depending on the amount of narcotics contained in the burst container. In one instance, a smuggler swallowed one hundred thirty-five condoms full of narcotics. *Vega-Barvo*, 729 F.2d 1341.

128. 473 U.S. at 533-34.

Agents subsequently led the suspect to a private room where agents patted her down and conducted a strip search; neither search, however, revealed any contraband. Agents then attempted to obtain consent for an X-ray search, which the defendant refused, although it is unclear whether she refused to submit to the X-ray procedure itself or refused the use of handcuffs on her.[129] One agent then contacted a special agent to obtain a court order for a rectal and an X-ray search. The special agent decided that the facts would not support a court-ordered X-ray examination,[130] and therefore he directed the agent to give Montoya de Hernandez the choice between consenting to an X-ray search, being held in custody until her bowels moved, or leaving the United States on the next plane to Colombia. Montoya de Hernandez chose to leave, but the Mexican Airline making the flight refused to take her because she did not have a Mexican visa. Therefore, agents held her under supervision for sixteen hours. Several hours into the detention, it is fairly clear that agents conducted another strip search, which was also unsuccessful.[131]

During her detention, officials monitored her at all times and told her that, if she had to use the toilet, she would have to use the wastebasket in the room as a toilet while agents observed. Montoya de Hernandez asked several times if she could call someone, and such requests were denied. She also asked that an attorney be contacted, a request which was also denied. Sixteen hours into the detention, agents sought a court order for an X-ray and body cavity search, based on the affidavit containing information gleaned during the detention and observation of the suspect. Specifically, the affidavit cited that the defendant refused food and water and that she seemed in discomfort from resisting nature's call. Thus, nearly twenty-four hours after her plane landed, a court issued an order authorizing the body-cavity and X-ray searches. Agents arrested Montoya de Hernandez after a rectal examination revealed a balloon

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129. *Id.* at 535. The Supreme Court dissenters and the Ninth Circuit stated that she did not refuse consent to the X-ray search, but refused to be led away in handcuffs. *Id.* at 546.

130. Because the agents were under the jurisdiction of the Ninth Circuit Court of Appeals, the standard for X-ray and body cavity searches is "clear indication." *See Rivas*, 368 F.2d 703.

131. The opinions, when combined, seem to indicate two strip searches. The Ninth Circuit stated in its opinion that she was strip-searched some time well into the lengthy detention, *see* 731 F.2d 1369, 1370-71 (9th Cir. 1984), while the Supreme Court majority indicated she was strip-searched immediately after coming through the customs stop in the airport. *See* 473 U.S. at 535. The dissenters of the Supreme Court expressly stated that two strip searches took place. *Id.* at 546-48.

filled with cocaine.[132] Within the next four days, she passed eighty-eight balloons.

The Ninth Circuit Court of Appeals reversed the decision of the United States District Court for the Central District of California convicting Montoya de Hernandez.[133] The court analyzed the standards for intrusive searches and stated that a "clear indication" or a "real suspicion" of smuggling (depending on the kind of search to be conducted) based on facts known before the search is made must exist for such search to be lawful.[134] The Ninth Circuit did not reach the question of whether the strip search, X-ray search, or body cavity search was justified. The majority did find, however, that in detaining the defendant in order to produce sufficient evidence to support a court order, the officials chose a course of action which "impacted both the comfort and the dignity of a human being."[135]

The court next addressed the requisite level of suspicion necessary to detain an international traveler for the purpose of having that person produce a bowel movement. The court noted that some cases have approved this type of detention when the initial evidence establishing a drug courier profile is strong and that evidence has been enhanced by an informant's tip.[136] The court then stated that where customs officials are more in doubt about the smuggling they should seek judicial assistance in their determination.[137] The court ruled that this was the situation in the case before it and stated that although the defendant raised skepticism, many unusual people cross the border daily who are innocent of any wrongdoing.[138] The court found that the officers forced Montoya de Hernandez into a long, humiliating, and unjustified discomfort. In addition, since the facts necessary to obtain a court order did not exist before the detention, the detention that produced additional evidence for the court order was unlawful.[139] In making these determinations the court partially relied on the agents' failure to satisfy the standard for initiating

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132. The defendant was arrested for possession of cocaine with intent to distribute under 21 U.S.C. § 841(a)(1) (1982), and with importation of cocaine under 21 U.S.C. §§ 952(a), 960(a)(1) (1982).

133. 731 F.2d at 1373.

134. *Id.* at 1370.

135. *Id.* at 1371. The Ninth Circuit ruled in *Cameron* that a search warrant or lack of one is a factor to be considered in determining the reasonableness of the conduct of an intrusive search. 538 F.2d at 254.

136. *See Couch*, 688 F.2d 599; *Ek*, 676 F.2d 379; and *Erwin*, 625 F.2d 838.

137. 731 F.2d at 1372.

138. *Id.*

139. *Id.* at 1373.

the detention and partially relied on the improper conduct of the agents during the detention. Thus, in the opinion of the Ninth Circuit, when there are not enough facts to support a court order for a particular search, customs officials cannot legally detain a traveler until nature takes its course.

The Supreme Court reversed the Ninth Circuit and affirmed the defendant's conviction in a 7-2 decision.[140] In making this decision, the Court ruled that a reasonable suspicion was enough to detain a traveler for drug smuggling.[141] Justice Rehnquist, writing for the majority, emphasized that the increase in drug traffic into the United States and a corresponding increase in the difficulty in detecting smuggling meant that the government must have broad power to detain and search suspected narcotics smugglers. Justice Rehnquist also relied on 19 U.S.C. § 1582 (authorizing the Secretary of Treasury to prescribe regulations for customs searches) to justify the detention of travelers at the United States border.[142] The majority pointed out that, although the defendant was entitled to be free from an unreasonable search or seizure, an individual's expectation of privacy is less, and the government's power to search and seize is greater, at the border.[143]

Although he noted that other circuits have adopted a more lenient standard for some searches, Justice Rehnquist concentrated his analysis on the "clear indication" standard for X-ray and body-cavity searches established by the Ninth Circuit. Applying this test to the facts of the case, the Court ruled that the detention of a traveler is justified at its inception, if the customs agent, considering all the facts, reasonably suspects that the traveler is smuggling contraband in her alimentary canal.[144] However, after criticizing the Ninth Circuit's "clear indication" standard[145] and approving the "reasonable suspicion" standard as one

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140. 473 U.S. at 544.

141. *Id.* at 536-37. For a list of cases involving "balloon swallowing," see *supra* note 98.

142. For the full statute, see *supra* text accompanying note 5.

143. 19 U.S.C. § 482 (1982); Carroll v. United States, 267 U.S. 132 (1925); Florida v. Royer, 460 U.S. 491 (1983).

144. 473 U.S. at 540. The Court found that the Ninth Circuit misconstrued the Supreme Court's meaning in *Schmerber*, 384 U.S. 757. The Court intended "clear indication" language to indicate the necessity for particularized suspicion that evidence sought might be found in the body of the individual, rather than declaring a third fourth amendment standard. 473 U.S. at 540. Furthermore, the Court commented that the difference between "reasonable suspicion" and "clear indication" is merely one of semantics. *Id.*

145. 473 U.S. at 541.

which affects a needed balance between governmental and individual interests, the majority opinion stated in a footnote: "[B]ecause the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary X-ray searches."[146] Thus, the Court approved only the initiation of the detention under the reasonable suspicion standard and defined reasonable suspicion as a particularized and objective basis for suspecting smuggling. The majority, however, failed to mention the fact that the customs officials detained the defendant because they believed that they lacked sufficient evidence immediately after the defendant came through the inspection at the airport in order to seek a court order for an X-ray or rectal search.

The seven justice majority also approved of the manner in which customs officials carried out the detention. In determining whether the length of the detention was unreasonable, the Court declared that the fact that the customs officials' protection of the public's interest might have been accomplished in a less intrusive manner did not render the conduct of the officials unreasonable.[147] Thus, the Court approved the twenty-seven hour detention in this case[148] even though that length of time "undoubtedly exceeds"[149] any other period of detention which the Court has approved under the reasonable suspicion standard. The Court distinguished this case from the average detention cases on the ground that officials cannot detect alimentary canal smuggling in the shorter time in which they can investigate other illegal activity.[150] In a final note, Justice Rehnquist declared that, though the detention was lengthy and humiliating, the defendant was to blame for her own humiliation.[151]

In a concurring opinion, Justice Stevens disagreed with Justice Rehnquist's final statement. He warned that if reasonable suspicion alone may suffice as a basis for searching an international traveler, then many

146. *Id.* at 541 n.4.

147. *Id.* at 542, *citing* Cady v. Dombrowski, 413 U.S. 433, 447 (1983).

148. There was a twenty-seven hour span of time between her arrival at the airport and her arrest. 473 U.S. 531. After sixteen hours officials sought the court order, and after nearly twenty-four hours the order was issued. *Id.*

149. *Id.* at 543.

150. The Court relied on Terry v. Ohio, 392 U.S. 1 (1968), as authority for allowing this detention. 473 U.S. at 542. *Terry* gave government officials the authority to detain an individual briefly for investigation and questioning, but the detentions allowed under the *Terry* standard are generally quite brief, and this standard had not yet been applied to alimentary canal smuggling. *Id.* at 543.

151. *Id.* at 543.

innocent persons will likely be subject to this embarrassing treatment.[152] Thus, Justice Stevens concluded that the fact that the defendant smuggled drugs in this manner did not support the notion that it was the defendant alone who caused the humiliation and discomfort. Justice Stevens also stated, however, that the lengthy detention was justified because the defendant withdrew her consent to an X-ray search[153] which could have affirmed or dispelled the suspicion of alimentary canal smuggling.[154] This led Justice Stevens to suggest that officials conduct an X-ray search of all suspicious travelers, except for pregnant women.[155]

In a strong dissenting opinion, Justices Brennan and Marshall protested the humiliation which the defendant was forced to undergo. Specifically, these justices took issue with the fact that officials forced Montoya de Hernandez to use a wastebasket as a toilet in their presence.[156] They insisted that the proper issue in the case was whether the fourth amendment permits officials to subject an international traveler, alien or citizen, to this treatment based upon a "reasonable suspicion" without the sanction of a judicial officer.[157] Justice Brennan declared that "[i]ndefinite involuntary incommunicado detentions for investigation are the hallmark of a police state, not a free society."[158] The dissenting justices, therefore, would require probable cause and a warrant for officials to detain and search a traveler under these circumstances.[159] The dissent justified the need for a warrant in part upon the reasonable expectations of the international traveler. As Justice Brennan stated:

> I do not imagine that decent and law-abiding international travelers have yet reached the point where they "expect" to be thrown into locked rooms and ordered to excrete into wastebaskets. . . . In fact, many people from around the world travel to our borders precisely to escape such unchecked

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152. *Id.* at 545.

153. *See supra* note 129 and accompanying text.

154. 473 U.S. at 545.

155. *Id.*

156. *Id.*

157. *Id.* at 549. The dissenters lashed out at Justice Rehnquist's opinion, claiming it justified the treatment of the defendant by declaring a national crisis in law enforcement caused by the smuggling of narcotics. *Id.*

158. *Id.* at 550.

159. *Id.* The dissent cited three articles supporting its position on this issue. *See* Note, *supra* note 3 (advocating the use of a warrant based upon less than probable cause); Note, *Border Searches and the Fourth Amendment*, 77 YALE L. J. 1007 (1968) (promoting the use of both the probable cause standard and warrant); Note, *Intrusive Border Searches—Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276 (1966) (advocating the use of a warrant based upon probable cause "whenever practical").

executive investigatory discretion.[160]

The dissenters also relied on the fact that a significant number of innocent people have been and will be subjected to these intrusive searches. The justices cited cases in which, at one border site, only fifteen to twenty percent of the persons subjected to searches were found to be carrying contraband.[161] The dissenters cited statistics revealing that, out of a sample group of women subjected to intrusive searches, only sixteen percent were carrying contraband.[162] The dissenters also objected to the majority's statement that the defendant was to blame for the humiliation she suffered and stated that post hoc rationalizations have no place under the fourth amendment because a bedrock principle of that amendment is that the analysis must examine facts existing before the search.[163] Justices Brennan and Marshall ultimately based their disagreement with the majority on the nature and length of the detention: "[T]he nature and duration of the detention here may well have been tolerable for spoiled meat or diseased animals, but not for human beings held on simple suspicion of criminal activity."[164]

B. *Circuit Courts' Responses to* Montoya de Hernandez

The Eighth Circuit followed *Montoya de Hernandez* in *United States v. Oyekan*.[165] In *Oyekan* the court approved a four hour detention involving strip and body cavity searches of two women travelers whose answers to questions and whose appearances and belongings led customs officials to believe they fit the drug courier profile.[166] The court approved

160. 473 U.S. at 560.

161. Morales v. United States, 406 F.2d 1298, 1300 n.2 (9th Cir. 1969).

162. United States v. Holtz, 479 F.2d 89, 94 (9th Cir. 1973). *See* Metropolitan News, June 28, 1972, at 1, col. 3.

163. 473 U.S. at 559, *citing* United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

164. 473 U.S. at 550.

165. 786 F.2d 832 (8th Cir. 1986).

166. *Id.* at 834. The defendants, Toyin Oyekan and Eniten Keleni, claimed that they did not know each other, yet both women's customs declaration cards indicated they would be staying at the "Ramadan" Hotel. *Id.* Furthermore, both women were carrying a great deal of cash, had little luggage, indicated short stays in the United States, and were from a source country of drugs, Nigeria. *Id.*

The women were first strip-searched, but nothing was found. *Id.* The women's luggage was examined next, and officials discovered that Keleni had six $100 bills with consecutive serial numbers and that Oyekan had four $100 bills with consecutive serial numbers within ten numbers of Keleni's bills. *Id.*

The agents then informed the two women that they suspected them of drug smuggling and asked them to submit to X-ray, rectal, and pelvic examinations, to which the women

the initial detention finding these facts sufficient to raise a reasonable suspicion. Therefore, the court held the officials were justified in holding the women for strip searches and, when the strip searches proved unsuccessful, for X-ray, rectal and pelvic examinations.[167] The court noted that the length of the four hour detention was reasonable in light of the Supreme Court's approval of the detention of a traveler until natural processes affirm or dispel customs officials' suspicions.[168] In *Oyekan* the Eighth Circuit further examined the standard necessary to initiate intrusive searches and chose to adopt the "reasonable suspicion" standard for strip, X-ray, and body cavity searches.[169] After determining that the customs officials had satisfied the reasonable suspicion standard for the battery of searches in this case, the court examined the manner in which the officials carried out the searches. Since there was no touching or prodding of the defendants and no use of physical force, the court concluded that the conduct of the officials was reasonable and far less intrusive than the means employed in *Montoya de Hernandez.*[170]

In contrast to the Eighth Circuit's clear pronouncement of its view of intrusive border search law, the Ninth Circuit's decision in *United States v. Handy*[171] indicated that that circuit was confused as to the applicable law. This confusion is best illustrated by the following statement: "Comparing the facts here with those in [other] body cavity cases, we are persuaded that the government met not only the 'reasonable suspicion' test, but also the higher 'clear indication' test at issue in those cases."[172] In *Handy* the Ninth Circuit, which previously had applied the "clear indication" test for body cavity searches without hesitation, did not state which of the two standards was applicable to the body cavity search before it.[173] Although the Supreme Court's decision in *Montoya de Hernandez* clearly was the source of this confusion, the Ninth Circuit did not even cite the Supreme Court case in its opinion.

The most recent decision on intrusive border search law is *United*

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consented. *Id.* After X-rays revealed abnormal objects in the women's abdomen, they were arrested. *Id.*

167. *Id.* at 836-37. *See supra* note 166.

168. *Id.* at 837.

169. *Id.* The court adopted the Eleventh Circuit's approach toward X-ray searches in *Vega-Barvo*, 729 F.2d 1341, rejecting the Ninth Circuit's approach in *Quintero-Castro*, 705 F.2d 1099.

170. 786 F.2d at 838.

171. 788 F.2d 1419 (9th Cir. 1986).

172. *Id.* at 1421.

173. See *Briones*, 423 F.2d 742 and *Forbicetta*, 484 F.2d 645, where the Fifth Circuit twice avoided establishing intrusive border search standards.

States v. Oshinuga, a federal district court decision.[174] In that case, the District Court for the Northern District of Illinois approved an eighteen hour detention and X-ray, vaginal, and rectal searches of a Nigerian citizen. After customs agents conducted a strip search and after some further questioning, the agents initiated steps to obtain a warrant for X-ray and body cavity searches two and one-half hours after the defendant arrived at the airport.[175] The warrant could not be issued, however, until the following morning. Thus, the agents detained the defendant nearly eighteen hours before they took any steps toward searching her.[176] The court found this detention reasonable because customs officials were forced either to detain her until doctors could affirm or dispel the officials' suspicions or allow her to go into the country.[177] The court found the fact that the officials knew that an X-ray could not be taken until the following day was irrelevant in determining the reasonableness of the length of the detention.[178] Also, relying on *Montoya de Hernandez*, the court ruled that the failure to allow the defendant a telephone call was certainly not enough to render the nature of the detention unreasonable.[179]

IV. ANALYSIS

When the Supreme Court granted certiorari in *Montoya de Hernandez* the Court needed to clarify which of the standards were appropriate for initiation of the three types of intrusive border searches and to establish some guidelines as to the reasonableness of customs agent conduct in carrying out these searches. Not surprisingly, the Supreme Court reversed the Ninth Circuit's decision in *Montoya de Hernandez* and affirmed the respondent's conviction.[180] In doing so, the Court eviscerated the protection afforded the international traveler entering the United

174. 647 F. Supp. 105 (N.D. Ill. 1986).

175. *Id.* at 106. The defendant's flight arrived at 2:30 p.m. on August 28, 1986. *Id.* The agents initiated steps to get a warrant at 5:00 p.m., but it was not until 9:20 a.m. on August 29 that the warrant was secured. *Id.* She admitted having something inside her body, but the X-ray procedure and rectal search did not take place until 6:45 p.m., twenty-six hours after arrival at the airport, due to defendant's refusal to consent to the searches. *Id.*

176. *Id.*

177. *Id.* at 109.

178. *Id.*

179. *See id.* The majority in *Montoya de Hernandez* gave this factor no consideration in determining the reasonableness of the detention.

180. *See 9th Circuit is '0 for 22' in High Court Reviews*, L.A. Times, June 25, 1984, part 1, at 1, col. 3.

States by the Ninth Circuit's stance on intrusive border searches and established a standard toward border searches much like that embodied in Fifth Circuit law.[181] This standard allowed customs officials much greater latitude in the search process.

Before *Montoya de Hernandez*, both the Ninth Circuit and the other circuits examined each particular search conducted by an official and approved or disapproved of that search based on whether or not the requisite standard for initiating such a search was met. In *Montoya de Hernandez*, however, the Supreme Court looked at the initial detention of the traveler, as opposed to the particular search involved to determine whether the detention itself was justified by "reasonable suspicion." The Court did not inquire further as to whether the subsequent strip and various body cavity searches were justified. Thus, all subsequent searches were justified by the initial finding of "reasonable suspicion" before the detention began. However, one does not know whether reasonable suspicion is indeed the proper standard after the Court's decision, because the Court failed to decide specifically what level of suspicion was necessary to justify the strip, X-ray, and body cavity searches, even though all three were conducted. If, in fact, the Court has established no standard as to the level of suspicion necessary to conduct intrusive searches, then the Court has approved the indefinite detention of international travelers and any searches of those travelers that customs officials deem appropriate.

If customs officials may detain a traveler until natural bodily processes affirm or dispel their suspicions, the length of such detentions alone may be repressive. In *Montoya de Hernandez* the Court overlooked several key factors when it held a twenty-four hour detention to be reasonable and stated that the defendant was to blame for her humiliation. First, the Court, by making post hoc rationalizations for the detention, violated a well-grounded principle of the fourth amendment that states that a court must examine all of the facts before the search, or in this case, the detention, in order to determine its legality.[182] Second, even the innocent international traveler may be likely to resist nature's calling and thus prolong the detention period if he or she is forced to use a wastebasket as a toilet in full view of customs officials. Furthermore, the Court did not examine the manner in which officials conducted the search despite the unpleasant conditions under which customs agents placed the defendant. Combining this omission with the Court's failure to examine the legality of the individual intrusive searches, the Supreme Court has apparently

181. *See Afanador*, 567 F.2d 1325; *supra* notes 86-95 and accompanying text.
182. *See* Byars v. United States, 273 U.S. 28, 32 (1927).

given the green light to customs officials to seize contraband at the border by any means at their disposal.

Despite the implications of the Supreme Court's opinion, the Eighth Circuit decision in *Oyekan*[183] provides some limited hope for persons interested in greater constitutional protection for the international traveler. Although the court employed the permissive "reasonable suspicion" standard, it went on to examine each search and scrutinize the manner in which the customs agents conducted the searches. However, this decision, standing alone, can do little to fill the gaps left by, or change the philosophical basis of the Supreme Court's decision in *Montoya de Hernandez.*

After the Supreme Court's opinion in *Montoya de Hernandez* and the three succeeding opinions of *Oyekan*, *Handy*, and *Oshinuga*, several problems still remain in the area of intrusive border search law. The primary problem is the Supreme Court's failure to establish the standard or standards necessary to conduct the various types of searches. One can intimate that the Court prefers the reasonable suspicion standard for all searches, but that intimation may not be accurate. The Court may prefer some standard even less strenuous than the reasonable suspicion standard since it applied no standard at all to determine the reasonableness of the searches in *Montoya de Hernandez.* By not establishing a standard, the Court left open that question for the circuit courts. The Ninth Circuit in *Handy* obviously was unsure of which standard to apply. Thus, the "clear indication" test could reappear in Ninth Circuit law, even though the Supreme Court believes that standard to be incongruous with the fourth amendment. However, given the strong implication of the Supreme Court decision, this result is not likely.

Thus, "reasonable suspicion" has emerged as the standard by which courts must judge all intrusive searches. In accepting the "reasonable suspicion" standard, the Fifth Circuit has stated that this standard effects a needed balance between the governmental interest in halting the flow of illegal narcotics into the United States and the individual interest in preventing humiliating searches and seizures.[184] A careful examination of the standard, however, reveals that it is disturbingly easy to satisfy. All that a customs officer need show is that the traveler exhibited two or three characteristics of the "smuggling profile,"[185] and almost any search is justified. Justice Stevens pointed out in his concurring opinion in *Montoya de Hernandez* that the characteristics of the "smuggling

183. 786 F.2d at 832.
184. *Himmelwright*, 551 F.2d at 994-95.
185. *See supra* note 96 and accompanying text.

profile" are characteristics which a significant number of innocent persons are certain to exhibit.[186] In fact, the statistics from the cases cited by the dissenters, in addition to statistics presented by the Ninth Circuit in *Guadalupe-Garza*, prove that scores of innocent travelers are subjected to the degradation of these intrusive searches.[187]

The Supreme Court criticized the "clear indication" and "reasonable suspicion" dichotomy created by the Ninth Circuit because the Court viewed the difference between these standards as nothing more than a "subtle verbal gradation."[188] Admittedly, it is difficult to draw a line between those standards. Yet, with the warrant and probable cause requirements removed from these searches, the "reasonable suspicion" standard is hardly a sufficient check on customs officials. While "probable cause" is clearly too high a standard to require border officials to satisfy considering the difficulty in detecting alimentary canal smuggling, "reasonable suspicion" provides the innocent traveler precious little protection. Thus, although there must be a balance between the governmental interests and the individual interests in these procedures, at present the balance is tipped too far in favor of the government. The interest in preventing narcotics from entering our country is one of great magnitude involving the health and safety of millions of our citizens, but this interest should not justify lengthy and humiliating detentions of international travelers entering the United States. The integrity of the fourth amendment is at stake. As Justice Jackson stated in *Brinegar v. United States*: "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."[189]

Thus, courts need to apply a standard for initiating intrusive searches that requires officials to show some objective facts outside of smuggling profile characteristics before conducting such searches. Furthermore, courts must require customs officials to do everything within their power to minimize the length of the detentions at the border. Finally, courts should examine with great scrutiny the manner in which detentions, searches, and seizures are carried out. The Ninth Circuit's standard for the conduct of the search established in *Cameron* provides sufficient protection for the traveler because the standard requires customs officials to use the least intrusive means available and to minimize the traveler's

186. 473 U.S. at 545.

187. 421 F.2d 876. Out of 331 strip and body cavity searches at one border site, only 96 led to contraband. *Id.* at 879 n.2. The Customs Office was unable to produce current statistics on the successfulness of intrusive border searches.

188. 473 U.S. at 541.

189. 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

emotional and physical trauma.[190] In contrast, the Supreme Court's "real suspicion" standard is nothing short of legalized abuse.

V. CONCLUSION

The area of intrusive border search law has presented great difficulty to American courts. Courts must weigh the interest of the government in preventing illegal narcotics from entering the nation against the constitutional right of the individual to be free from unreasonable searches and seizures. Each interest taken alone is indeed a weighty one. The Ninth Circuit found an equilibrium by providing sufficient protection to the individual while granting border officials sufficient latitude to seize contraband. The Fifth Circuit and other circuits erred on the side of supporting governmental authority, giving international travelers inadequate fourth amendment protection. The Supreme Court intervened and erred much further on the side of the government. Now, the Supreme Court should reexamine the issue and set the scale back to the balance struck by the Ninth Circuit before the Supreme Court destroyed that balance in *Montoya de Hernandez.*

Steve Anderson

190. 539 F.2d 244. *See supra* notes 101-106 and accompanying text.