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Protecting Our Perimeter: "Border Searches" under the Fourth Amendment

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Protecting our Perimeter: "Border Searches" under the Fourth Amendment

Summary

Many border security initiatives were developed after the events of September 11, 2001. Because security initiatives often maintain 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 support any judicially granted warrant. An invalid "search" is an infringement of an expectation of privacy that society is prepared to consider reasonable. A "seizure" of a person occurs when a government official makes an individual reasonably believe that he or she is not at liberty to ignore the government's presence in view of all the circumstances surrounding the incident. The 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 Court, however, has also recognized situations that render the obtainment of 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 nonroutine. Generally, the distinction between "routine" and "nonroutine" turns on the level of intrusiveness. Routine border searches are usually very limited intrusions into a person's privacy and require no suspicion of illegal activity to be upheld by a court. Nonroutine border searches must generally be supported by "reasonable suspicion" and can include destructive searches of inanimate objects, prolonged detentions, strip searches, body cavity searches, and x-ray searches.

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, legislative actions taken in the 108th and 109th Congress, and features of the "Minuteman Project." 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. This report will be updated as warranted.

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Introduction

United States border policy has reflected a longstanding goal of balancing legitimate cross-border commerce and travel with the right of the sovereign to protect itself from terrorist activities, illegal immigrants, and contraband. After the events of September 11, 2001, border security received considerable attention from the White House and the Congress and many new security initiatives were developed. Indeed, many of the border security recommendations and observations made in the 9/11 Commission Report saw significant congressional action in the 108th Congress and dialogue has already continued in the 109th.

The judiciary has noted that the events of September 11 emphasized a heightened need for more thorough security and inspections at our borders.[1] Security initiatives, however, often contain a search and seizure component that implicate Fourth Amendment protections. The Fourth Amendment establishes that a search or seizure conducted by a governmental agent must be reasonable, and that probable cause support any judicially granted warrant. Although the Supreme Court has interpreted this language as imposing a presumptive warrant requirement on all searches and seizures conducted by governmental authority, the Court has recognized exceptions to the warrant and probable cause requirements of the Fourth Amendment. Few exceptions to the usual Fourth Amendment requirements are more firmly rooted in the history of the United States than the "border search" exception. Pursuant to the right of the sovereign 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. Border searches are another tool that government officials may use to combat terrorism.

Routine searches are usually very limited intrusions into a person's privacy, generally consist of a patdown, the emptying of pockets, or a vehicle inspection, and do not require suspicion of criminal activity to be conducted. Upon a "reasonable suspicion" of smuggling or other illegal activity, government officials may generally conduct a nonroutine border search. Nonroutine 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 nonroutine border searches, courts have interpreted

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[1] *United States v. Flores-Montano,* 124 S.Ct. 1582, 1583 (2004) ("The government's interest in preventing entry of unwanted persons and effects is at its zenith at the international border."); *United States v. Teng Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002); *Bradley v. United States*, 299 F.3d 197, 202 (3d Cir. 2002); *Chen Yun Gao v. Ashcroft*, 299 F.3d 266, 281 (2002) (Greenberg, J., dissenting).

Supreme Court precedent as warning against the development of multiple gradations of suspicion in the context of nonroutine border searches.

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. Initially, this report analyzes the historical development of the Fourth Amendment and its "border search" exception. It then describes the varying levels of suspicion generally associated with each type of search as interpreted by the courts. Finally, the report highlights some of the border security recommendations made by the 9/11 Commission, as well as, some of the recent border security measures taken by Congress. Also included, is a brief discussion on some of the legal issues posed by the newly formed "Minuteman Project." Although related, this report does not address the various types of interior searches and seizures performed by immigration personnel.

The Fourth Amendment

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[2] It establishes, in essence, that a search or seizure conducted by a government agent must be reasonable, and that probable cause must support any judicially granted warrant.[3] In general, the purpose of the Fourth Amendment is to protect the people of the United States against arbitrary action by their own government, not to restrain the actions of the federal government against aliens outside of United States territory.[4]

Initially, the Supreme Court interpreted the "reasonableness" standard of the Fourth Amendment as imposing a presumptive warrant requirement, stating that "searches 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."[5] The Court, however, has wavered from this approach, determining that "a warrant is not required to

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[2] U.S. Const., Amend. IV.

[3] 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).

[4] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (Fourth Amendment not applicable to search in Mexico of Mexican citizen's home). Immigration laws have long made a distinction between those aliens who have come to our shores seeking admission and those who are within the U.S. after an entry, irrespective of its legality. In the latter instance, the Court has recognized additional rights and privileges not extended to those in the former category, who are merely "on the threshold of initial entry." *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (articulating the "entry fiction" doctrine).

[5] *Katz v. United Sates*, 389 U.S. 347, 357 (1967).

establish the reasonableness of all government searches; and when a warrant is not required . . . probable cause is not invariably required either."[6] Traditionally, the warrant requirement in the criminal setting has been viewed as a protective measure, placing the authority to issue a warrant with a "neutral and detached" judicial officer who can assess whether the police have probable cause to make an arrest, to conduct a search, or to seize materials.[7] In instances where the interests of the public outweigh those of private individuals, however, the Court has recognized "specifically established exceptions" to the warrant and probable cause requirements of the Fourth Amendment.[8]

At its broadest, a Fourth Amendment analysis is a two-stage inquiry. First, was the action of a government officer toward a person or thing sufficiently intrusive to constitute a "search" or "seizure?"[9] Second, if a "search" or "seizure" did occur, was the intrusion "reasonable" in light of the circumstances? The "reasonableness" of a particular government action is judged by balancing the governmental interest which allegedly justifies the official intrusion against a person's legitimate expectations of privacy. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. If a court determines that a government intrusion constitutes a "search" or "seizure" that was not reasonable in light of the relative weights of the government's interest and a person's constitutionally protected privacy interests, it will conclude that a Fourth Amendment violation has occurred. While a violation of the Fourth Amendment may, as a general rule, result in the suppression of any information derived therefrom in a judicial proceeding, such a rule does not apply to deportation proceedings.[10]

Seizure. In general, 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."[11] An individual is "seized" when a government official makes a person reasonably believe that he or she is not at liberty to ignore the government's presence and go about his business in view of all

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[6] *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Interpreted literally, the Fourth Amendment requires neither a warrant for each search or seizure, nor probable cause to support a search or seizure.

[7] *See Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971); *see also Warden v. Hayden*, 387 U.S. 294, 301-02 (1967).

[8] *Camara v. Municipal Court*, 387 U.S. 523, 539-540 (1967).

[9] *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. . . .).

[10] *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *see also Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (exclusionary rule in general).

[11] *Sodal v. Cook County*, 506 U.S. 56, 61 (1992) *quoting United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

the circumstances surrounding the incident.[12] Additionally, a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.[13] 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. The Supreme Court has identified a number of factors that might suggest that a seizure has occurred, including (1) the intimidating presence or movement of officers; (2) the display of weapons; (3) the application of physical force; and (4) the authoritative tone of voice used by officers.[14]

Search. Historically, a "search" entailed some type of government invasion into a "constitutionally protected area."[15] Early courts looked to the enumerated areas described in the Fourth Amendment to determine what was a "constitutionally protected area" (i.e., "persons, houses, papers, and effects").[16] These courts soon began to emphasize property principles in their Fourth Amendment analysis.[17] Not until the landmark decision of *Katz v. United States* in 1967 did the Supreme Court abandon its structural "property" approach for a fluid constitutional framework that was to "protect people, not places."[18]

Katz involved eavesdropping by means of an electronic surveillance device attached to the *exterior* of a public telephone booth — a location not within the enumerated constitutional protections (i.e., persons, houses, papers, and effects). The lower courts concluded that no search took place since the electronic surveillance device did not penetrate the wall of the telephone booth. The Supreme Court, however, stepped away from its historical property principles and proclaimed that the reach of the Fourth Amendment could not turn upon the presence or absence of a physical intrusion into a given enclosure. Although the majority in *Katz* demonstrated a new understanding of the term "search," it was Justice Harlan's concurring opinion that articulated the basic standard courts emphasize today.

According to Justice Harlan's concurrence, a "search" does not occur for purposes of the Fourth Amendment unless (1) the individual manifested a subjective

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[12] *Florida v. Bostick*, 501 U.S. 429, 437 (1991) *citing Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

[13] *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 216 (1984).

[14] *See United States v. Drayton*, 536 U.S. 194 (2002); *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

[15] *Silverman v. United States*, 365 U.S. 505 (1961); *Berger v. New York*, 388 U.S. 41 (1967).

[16] *See, e.g., Beck v. Ohio*, 379 U.S. 89 (1964) (person's clothing); *Clinton v. Virginia*, 377 U.S. 158 (1964) (apartment); *Preston v. United States*, 376 U.S. 364 (1964) (automobile interpreted as an effect).

[17] *See Goldman v. United States*, 316 U.S. 129, 134-135 (1942) (applying a trespass equals search analysis); *Olmstead v. United States*, 277 U.S. 438 (1928) (same).

[18] 389 U.S. 347, 351 (1967). *See also Warden v. Hayden*, 387 U.S. 294, 304 (1967) ("We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly disregarded fictional and procedural barriers rested on property concepts.").

expectation of privacy in the searched object and (2) society is willing to recognize that expectation as reasonable or legitimate.[19] In essence, an impermissible "search" occurs when there is an infringement of an expectation of privacy that society is prepared to consider reasonable. 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.[20] Among the factors to be considered in determining whether a defendant had a legitimate expectation of privacy in addition to the proprietary or possessory interest in the place to be searched, are (1) whether the defendant has the right to exclude others from the place in question; (2) whether he has exhibited a subjective expectation that the area would remain free from governmental intrusion; and (3) whether he was legitimately on the premises.[21]

In an effort to detect and search increasingly sophisticated smugglers, officials today have begun to rely more heavily on advanced technologies that seemingly intrude into our daily lives, often without our knowledge. The use of such devices may blur the line between expectations of privacy that are legitimate and those that are not. The Supreme Court addressed this issue in *Kyllo v. United States* when it considered the constitutional limits upon the government's use of sensory-enhancing technology.[22] The *Kyllo* Court determined that the use of a thermal-imaging device to detect heat waves emitted from a home was a "search" partly because all details in the home are intimate (i.e., a person has a subjective and reasonable expectation of privacy in the interior of his home).[23] As a result, the Court held that where the government uses a device that is not in general public use, to explore details of the home or a "constitutionally protected area" that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.[24] The Court felt that the Fourth Amendment was to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted,[25] but nonetheless, opined that it would "be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."[26]

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[19] *Katz,* 389 U.S. at 357 (Harlan, J., concurring).

[20] *Minnesota v. Carter,* 525 U.S. 83, 88 (1998).

[21] *United States v. Elmore,* 304 F.3d 557, 562 (6th Cir. 2002).

[22] 533 U.S. 27, 34 (2001).

[23] *Id.* at 37.

[24] *Id.* at 40.

[25] *Id. citing Carroll v. United States*, 267 U.S. 132, 149 (1925). Accordingly, the Fourth Amendment draws a firm line at the entrance of the home against unreasonable searches and requires clear specification of those methods of surveillance that require a warrant.

[26] *Kyllo*, 533 U.S. at 33-34.

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, although a warrantless search in general, is among the more well-recognized and long established exceptions to the Fourth Amendment's probable cause and warrant requirements. Authorized by the First Congress,[27] the border search exception has a history as old as the Fourth Amendment and obtains its broad power from Congress's authority to regulate commerce with foreign nations and to enforce immigration laws.[28] The Fourth Amendment does not require warrants or probable cause for routine stops and searches at the border because it is within the power of the federal government to protect itself by inspecting persons and property entering and leaving the country.[29]

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 the balancing scale).[30] Courts have determined that border searches usually fall into two categories — routine and nonroutine. Generally, the distinction between "routine" and "nonroutine" 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 nonroutine searches generally require reasonable suspicion and vary in technique and intrusiveness.[31] 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 U.S. 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.[32]

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[27] Act of July 31, 1789, ch.5 §§23-24, 1 Stat. 29, 43 (current version at 19 U.S.C. §§482, 1582).

[28] *United States v. Ramsey*, 431 U.S. 606, 619 (1977) (citing U.S. Const., Art. I, §8, cl. 3).

[29] *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.

[30] *Marsh v. United States*, 344 F.2d 317, 324 (5th Cir. 1965).

[31] For a more thorough explanation on the distinctions between routine and nonroutine searches see page 9, Types of Searches and Seizures at the Border.

[32] *See Ramsey*, 431 U.S. 606 (inbound international mail); *United States v. Ezeiruaku*, 936 F.2d 136 (3d. Cir. 1991) (routine searches of outbound materials). The 5th Circuit has found the search of outbound materials permissible when: (1) the outbound search is at the border or its functional equivalent; (2) Customs agents have reasonable suspicion that a particular traveler will imminently engage in the felonious transportation of specific contraband in foreign commerce; and (3) the search is relatively unintrusive and only of the area where the contraband is allegedly secreted. *United States v. Roberts*, 274 F.3d 1007, 1014 (5th Cir.

(continued...)

Functional Equivalent. Border searches may also be conducted within the interior of the United States. 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 entry.[33] 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.[34] 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.[35] 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.[36] 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.[37]

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

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[32] (...continued)
2001).

[33] Thirty-First Annual Review of Criminal Procedure; Border Searches, 90 Geo. L.J. 1087, 1190 (2002).

[34] *See United States v. Hill*, 939 F.2d 934, 936 (11th Cir. 1991).

[35] *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973).

[36] "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 (5th Cir. 1993); *see, e.g.,United States v. Delgado*, 810 F.2d 480, 482 (5th Cir. 1987). 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.

[37] *United States v. Teng Yang*, 286 F.3d. 940, 946 (7th Cir. 2002).

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.[38] For example, in *United States v. Teng Yang*, the 7th Circuit upheld an extended 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.[39] 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 nations's borders."[40] Due to 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 society's vital interest in the enforcement of U.S. laws.[41]

At Sea. Searches of persons and conveyances crossing our international borders are reasonable simply because of the fact that they occur at the border. Similar to land-based situations, the border search exception to the Fourth Amendment's probable cause and warrant requirements also applies to vessels entering the territorial seas of the United States. Government officials may board any vessel in U.S. territorial waters or the high seas without a warrant or reasonable suspicion of criminal activity to conduct routine document and safety inspections if the vessel is subject to the jurisdiction or the operation of any U.S. law.[42] The United States has plenary power over its territorial seas, which generally extend three miles from the coast,[43] but may also enforce its laws up to twelve miles from the coast.[44] Thus, a ship that docks at a port within the United States' territorial waters (i.e., the functional equivalent of the border) after arriving from a foreign country or a ship that crosses our nation's coastal boundaries may be subjected to a routine suspicionless and warrantless search.

Courts have limited such warrantless and suspicionless searches to examining the ship's documents, visiting the ship's public areas, and entering a ship's storage

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[38] *United States v. Niver*, 689 F.2d 520, 526 (5th Cir. 1982).

[39] 286 F.3d. 940 (7th Cir. 2002).

[40] *Id.* at 947.

[41] *See, e.g., Teng Yang*, 286 F.3d. 940; *United States v. Espinoza-Seanez*, 862 F.2d 526 (5th Cir. 1989); *United States v. Caicedo-Guarnizo*, 723 F.2d 1420 (9th Cir. 1984); *United States v. Garcia*, 672 F.2d 1349 (11th Cir. 1982); *United States v. Bilir*, 592 F.2d 735 (4th Cir. 1979).

[42] *See United States v. Villamonte-Marquez*, 462 U.S. 579, 592-593 (1983) (reasonable under Fourth Amendment for Customs, acting pursuant to statutory authority, to board vessel in domestic waters and inspect documents); *see also United States v. Cilley*, 785 F.2d 651, 654 (9th Cir. 1985) (reasonable under Fourth Amendment for Coast Guard to stop and board U.S. vessel to conduct safety inspection pursuant to safety inspection laws).

[43] *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978).

[44] *United States v. Williams*, 617 F.2d 1063, 1073 (5th Cir. 1980); 19 U.S.C. §1401.

compartments.[45] Because there is a reasonable expectation of privacy in the nonpublic areas of a ship, reasonable suspicion is required to conduct a limited search that extends beyond document and safety inspections. Moreover, probable cause or consent is required for full stem-to-stern searches or seizures.[46] For example, in *United States v. Cardona-Sandoval*, the court concluded that the captain and crew of a small pleasure boat had a reasonable expectation of privacy in all areas of the vessel, much like a host and overnight guests in a small apartment.[47] The *Cardona-Sandoval* court nevertheless validated a limited search of the vessel pursuant to the government's reasonable suspicion of criminal activity but invalidated a subsequent seizure and destructive search due to the lack of probable cause.[48] In general, routine inspections of vessels entering into the U.S. may be conducted without a warrant, probable cause, or reasonable suspicion of illegal activity, because a sovereign has the right to protect its borders.

Types of Searches and Seizures at the Border

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, luggage, personal belongings, and vehicles without reasonable suspicion, probable cause, or a warrant.[49] In fact, routine searches made at the border require no suspicion and are "reasonable" simply by the fact that they occur at the border.[50] A routine border

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[45] *See Villamonte-Marquez*, 462 U.S. at 592 (intrusion limited to document inspection and public areas); *United States v. Merritt*, 736 F.2d 223, 230 (5th Cir. 1984) (Customs may check main beam number in hold of vessel). Public areas of the vessel include the engine room, ice holds, and cargo holds. *See, e.g., United States v. Pinto-Mejia*, 720 F.2d 248, 255 (2d Cir 1983) (cargo holds); *United States v. Arra*, 630 F.2d 836, 842 (1st Cir. 1980) (engine room); *United States v. De Weese*, 632 F.2d 1267, 1271 (5th Cir. 1980) (ice holds).

[46] *See, e.g., United States v. Roy*, 869 F.2d 1427, 1430-33 (11th Cir. 1989) (limited search of vessel based on reasonable suspicion valid, but stem-to-stern search required probable cause).

[47] 6 F.3d 15, 22 (1st Cir. 1993). The court also concluded that the recent construction, unusual thickness of the walls, and general unkempt state of the vessel created a reasonable suspicion of criminal activity.

[48] *Id.*

[49] *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 Untied States from foreign countries); *see also United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

[50] *United States v. Odland*, 502 F.2d 148 (7th 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 (9th Cir. 1967) (also using the term "unsupported suspicion"). This standard, however, is an inaccurate articulation of the general rule that no suspicion is required. *See Odland*, 502

(continued...)

search is a search that does not pose a serious invasion of privacy or offend the average traveler.[51] For example, a routine border search may consist of limited searches for contraband or weapons through a pat-down,[52] the removal of outer garments such as jackets, hats, or shoes, the emptying of pockets, wallets, or purses,[53] the use of a drug-sniffing dog,[54] some inspection of cars,[55] the cutting of a spare tire,[56] and some x-ray searches of inanimate objects.[57] 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. In essence, because a person crossing the border is on notice that a search may be likely, his privacy is "less invaded by those searches."[58] A person crossing the border apparently has an opportunity to decrease the amount of intrusion by limiting the nature and character of the items which he brings with him.[59] Routine border searches are also arguably less intrusive because they are administered to a class of people (international travelers) rather than to individuals.[60] The degree of intrusiveness or invasiveness associated with the particular technique is particularly helpful in determining whether a search is routine. The First Circuit, for example, compiled a nonexhaustive list of

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[50] (...continued)
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*).

[51] *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993).

[52] *See, e.g., United States v. Beras*, 183 F.3d 22, 24 (1st Cir. 1999) (holding that a patdown of an international traveler's legs was not intrusive enough to qualify as nonroutine).

[53] *United States v. Sandler*, 644 F.2d 1163, 1169 (5th Cir. 1981).

[54] *United States v. Kelly*, 302 F.3d 291, 294-95 (5th 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 (5th Cir. 2003) (dog sniff of a person on a bus at an immigration checkpoint upheld and seen as analogous to a pat down).

[55] *United States v. Flores-Montano*, 124 S. Ct. 1582 (2004) (disassembly, removal, and reassembly of a vehicle's fuel tank); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Uribe-Galindo*, 990 F.2d 522, 525-526 (10th Cir. 1993); *United States v. Mendoza-Gonzalez*, 318 F.3d 663, 666 (5th Cir. 2003).

[56] United States v. Julio Cortez-Rocha, 383 F.3d 1093 (9th Cir. 2004).

[57] *United States v. Okafor*, 285 F.3d 842 (9th 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).

[58] Gary N. Jacobs, Note, *Border Searches and the Fourth Amendment*, 77 Yale L.J. 1007, 1012 (1968).

[59] It should be noted that the "reasonable person" test presupposes an innocent person. *Florida v. Bostick*, 501 U.S. 429, 437 (1991).

[60] 77 Yale L.J. 1007, 1012 (1968).

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 suspects's reasonable expectations of privacy, if any, were abrogated by the search.[61]

Nonroutine Searches. Once a personal search by a government official goes beyond a limited intrusion, a court may determine that a nonroutine search has occurred. In general, nonroutine border searches are conducted in order to detect and search individuals who have resorted to alimentary canal smuggling. Nonroutine border searches may include destructive searches of inanimate objects, prolonged detentions, strip searches, body cavity searches, and some x-ray examinations.[62] At the very least, it appears courts require a government official have a "reasonable suspicion" of illegal activity to conduct a nonroutine border search on an individual entering the country.[63] 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.[64] For example, in *United States v. Forbicetta*, the court found reasonable suspicion to exist where Customs officials acted on the following objective facts: (1) the suspect 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.[65] Some courts, however, have required a higher degree of suspicion to justify the more intrusive of the procedures.[66]

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[61] *United States v. Braks*, 842 F.2d 509, 511-12 (1st Cir. 1988). The *Braks* court concluded that only strip searches and body cavity searches are consistently nonroutine.

[62] *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 (8th Cir. 1986) (strip search); *United States v. Adekunle*, 2 F.3d 559, 562 (5th Cir. 1993) (continued detention and x-ray examination of alimentary canal); *United States v. Rivas*, 157 F.3d 364, 367 (5th Cir. 1998) (drilling of hole into body of automobile).

[63] *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985); *United States v. Garcia-Garcia*, 319 F.3d 726, 730 (5th 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).

[64] *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.").

[65] 484 F.2d 645 (5th 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).

[66] *See, e.g., United States v. Ramos-Saenz*, 36 F.3d 59, 61 (9th Cir. 1994) (requiring the higher "clear indication" standard for a body cavity search); *United States v. Ek*, 676 F.2d 379, 382 (9th Cir. 1982) (requiring a "clear indication" for x-ray search).

The Supreme Court has not articulated the level of suspicion required for the various nonroutine border searches or the factors that render a border search routine or nonroutine;[67] 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.[68] 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.'"[69] Although the Court has not articulated a level of suspicion for all nonroutine searches, courts have viewed the *Montoya de Hernandez* reasoning as a warning against the development of multiple gradations of suspicion for nonroutine border searches in general.[70]

Searches of Inanimate Objects. A suspicionless physical or x-ray search at the border of an inanimate object such as a person's luggage or vehicle is generally viewed as reasonable because it does not pose the same degree of intrusiveness as searches of the human body.[71] Furthermore, more intrusive or destructive border searches of such inanimate objects also may not require "reasonable suspicion." In *United States v. Flores-Montano*, the Supreme Court 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.[72] The Court found that the dignity and privacy interests that require reasonable suspicion for highly intrusive searches of the person did not apply to vehicles being examined at the border.[73] The Supreme Court further articulated that the "[c]omplex balancing tests to determine what is a 'routine' search of a

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[67] *See Montoya de Hernandez*, 473 U.S. at 541 n.4.

[68] *Id.* at 541.

[69] *Id.* at 540.

[70] *United States v. Charleus*, 871 F.2d 265, 268 n.2 (2d Cir. 1989); *United States v. Oyekan*, 786 F.2d 832, 837-39 (8th 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 (4th Cir. Jan. 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 nonroutine searches would require a broad reading of the case, which doesn't 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).

[71] *United States v. Okafor*, 285 F.3d 842 (9th Cir. 2002) (finding an x-ray examination and subsequent probe of luggage a routine search).

[72] 124 S. Ct. 1582 (2004).

[73] *Flores-Montano*, 124 S.Ct. at 1585; *see also* United States v. Cortez-Rocha, 2004 U.S. App. LEXIS 19583 (9th Cir. Sept. 21, 2004) (no reasonable suspicion required when border officials cut open a *spare* tire because the action did not affect the vehicles safety or operation).

vehicle, as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles."[74]

The Court, however, again left open the question of whether certain types of inanimate object searches could be so offensive or intrusive as to require "reasonable suspicion."[75] In upholding the suspicionless search of the gas tank, the Court noted the factual difference between a search that ultimately *reassembles* what is examined and those that use a potentially *destructive* drilling practice.[76] Accordingly, while it seems that a border search of an inanimate object does not invade a person's privacy interests *per se* or require an articulable level of suspicion, especially destructive searches of property may require reasonable suspicion.[77]

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. de Hernandez for over 16 hours and told her she could not leave until she had excreted into a wastebasket.[78]

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 canal."[79] The Court concluded that it was reasonable to detain Ms. de Hernandez for

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[74] *Flores-Montano*, 124 S.Ct. at 1585.

[75] Id. at 1587, n.2.

[76] *Id.* at 1587 (citing *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998) (drilling into body of trailer required reasonable suspicion); *United States v. Robles*, 45 F.3d 1 (1st Cir. 1995) (drilling into machine part required reasonable suspicion); *United States v. Carreon*, 872 F.2d 1436 (10th Cir. 1989) (drilling into camper required reasonable suspicion)).

[77] *Flores-Montano*, 124 S.Ct. at 1587. *See also United States v. Bennett*, 363 F.3d 947, 951 (9th Cir. 2004) (dictum); *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.").

[78] 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).

[79] *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*,

(continued...)

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."[80] 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.[81]

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 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.[82] 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.[83] The court held that the prior discovery of the emeralds contrary to law was clearly sufficient to meet the higher level of suspicion necessary to conduct the strip search.[84]

Body Cavity Searches. Because government officials are well aware of narcotic smuggling that is concealed in the body cavities of travelers, searches into such cavities have become more common place. Body cavity searches may include inspections of the vagina, rectum, or the use of emetics.[85] 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

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[79] (...continued)
936 F.2d 936 (7th Cir. 1991) (16 hour detention upheld after refusal to be x-rayed).

[80] *Esieke*, 940 F.2d at 35.

[81] 2 F.3d 559, 562 (5th 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.

[82] *United States v. Chase*, 503 F.2d 571 (9th Cir. 1974).

[83] 477 F.2d 608 (1st Cir. 1973).

[84] *Id.*

[85] E.g., United States v. Ogberaha, 771 F.2d 655, 657 (2d Cir. 1985) (vagina); *United States v. Pino*, 729 F.2d 1357, 1358 (11th Cir. 1984) (rectum); *Untied States v. Briones*, 423 F.2d 742, 743 (5th Cir. 1970) (emetics).

magistrate.[86] In general, a border official must "reasonably suspect" that an individual is attempting to smuggle contraband inside his body for a court to justify a body cavity search.[87] 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.[88] 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.[89] Additionally, the manner in which the body cavity search is conducted must also be reasonable in light of the circumstances. Generally, conduct that "shocks the conscience" is inherently unreasonable.[90] Such conduct has included that use of a stomach pump[91] and could potentially include medical procedures performed by nonmedical personnel.[92]

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.[93] 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

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

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

[88] *See, e.g., United States v. Ramos-Saenz*, 36 F.3d 59, 61 (9th Cir. 1994) (affirming clear indication standard).

[89] *See, e.g.,United Stats v. Ogberaha*, 771 F.2d 658 (2d Cir. 1985); *Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997) (only required reasonable suspicion for visual body cavity search); *United States v. Bravo*, 295 F.3d 1002, (9th Cir. 2002) (noting in dictum that a body cavity search must be supported by reasonable suspicion).

[90] *Rochin v. California*, 342 U.S. 165 (1952).

[91] *Id.*

[92] 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 (9th 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.

[93] *United States v. Vega-Barvo*, 729 F.2d 1341, 1345 (11th 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).

application, or whether the intrusion is so great that it could potentially require a greater level of suspicion.

In examining this issue, the 11th Circuit in *United States v. Vega-Barvo* determined that an x-ray search is no more intrusive than a strip search.[94] 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.[95] 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. Further, the court noted that hospitals generally will not perform an x-ray without a person's consent. The court also determined that "an x-ray is one of the more dignified ways of searching the intestinal cavity."[96] 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.[97]

The 9/11 Commission Recommendations and Legislative Action

The 9/11 Commission made several recommendations and observations in its Report for changes to our border security operations. Most of these proposed changes involve enhancing the detection of travelers that would pose us harm and promoting cooperation between our 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.[98] 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.[99] The 108th Congress implemented some of these recommendations, as well as other

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[94] *Id.* at 1341.

[95] *Vega-Barvo*, 729 F.2d at 1346.

[96] *Id.* at 1348.

[97] Although some courts required a "clear indication" for x-ray searches, courts now generally analogize x-rays with strip searches, and thus, only require reasonable suspicion. Compare *United States v. Ek*, 676 F.2d 379, 382 (9th 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 (8th Cir. 1986) (requiring reasonable suspicion for x-ray search); *United States v. Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984) (x-ray search equal to strip search).

[98] 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).

[99] *Id.* at 385-390.

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 109th Congress is likely to revisit many of the issues addressed by the 9/11 Commission. The 109th Congress may focus on Commission recommendations and observations seemingly absent from the recently passed law. For example, it appears that the 9/11 Intelligence Reform and Terrorism Prevention Act of 2004 does not include specific language calling on the Secretary of DHS to integrate the U.S. border security system into a larger network of screening points. The 109th Congress is also likely to be very involved in oversight issues, since it should be receiving a number of reports and plans from various Departments on matters such as the implementation of new border surveillance technologies, the biometric entry and exit data system, and the enhanced training of border officials.

The 109th Congress may also seek to enhance those recommendations passed into law or address, what some would claim, are deficiencies in the 9/11 Intelligence Reform law. For example, provisions to complete a 14-mile border security fence along the international boundary near San Diego, California, did not come to fruition during consideration of the 9/11 Intelligence Reform law; however, the 109th Congress successfully passed language to complete the fence in the FY2005 Emergency Supplemental Appropriation Act for Defense, the Global War on Terror, and Tsunami Relief (P.L. 109-13).[100] Other provisions in P.L. 109-13 call on DHS to study the technology, equipment, and personnel needed to address security vulnerabilities near our 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. Border security and the work of the 9/11 Commission will undoubtedly continue to be of interest to the 109th Congress.

The Minuteman Project

During April 2005, men and women from across the country gathered near the border in Arizona to take part in a "citizens neighborhood watch" program called the "Minuteman Project." The volunteers are supposed to set up observation posts and report the movement illegal aliens to the U.S. Border Patrol. According to the Project's website, the volunteers are directed "not to engage in argumentative or hostile confrontation with any illegal alien."[101] The volunteers, according to the website, are there to "assist" law enforcement in the conduct of their jobs, not to take the law into their own hands. Leaders of the Minuteman Project have stated that they

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[100] Border fence provisions were originally included in the REAL ID Act of 2005 (H.R. 418). The REAL ID Act passed the House on March 12, 2005, but was also included as part of the FY2005 emergency supplemental appropriation act (H.R. 1268). For more information on the Border Fence, see CRS Report RS22026, *Border Security: Fences Along the U.S. International Border*, by Blas Nuñez-Neto and Stephen R. Viña.

[101] *See* The Minuteman Project, Frequently Asked Questions, *available* at [http://www.minutemanproject.com/FAQ.html].

plan to continue the project until Congress commits to funding the "deployment of the National Guard or military along the border" and to expand the Project to Texas, New Mexico, California, Idaho, and Michigan.[102]

The Minuteman Project could raise a number of legal issues due to its law enforcement nature. For instance, issues of liability and authority might arise should a volunteer harm another person or conduct an unlawful activity. The volunteers of the Minuteman Project would unlikely be subject to the requirements and prohibitions of the Fourth Amendment because they are not government actors. However, it could be feasible to argue, depending on the circumstance, that a volunteer might become a *de facto* government agent. For example, should the Border Patrol start directing and controlling the volunteers in their operations, it might be argued that the Minuteman Project volunteers are acting as "agents" or "instruments" of the Border Patrol, subject to similar constitutional restraints.[103] These arguments notwithstanding, the volunteers are apparently acting as private citizens, and are therefore subject to the laws of the state where they are operating. Accordingly, at least for this initial phase, the volunteers had to follow Arizona state law for such things as, carrying a firearm, defending themselves, making citizen arrests (though they were not supposed to under the program), and using deadly force.[104] As the Minuteman Project expands to other states, compliance with similar laws in each state will be necessary.

Conclusion

Courts have consistently recognized the longstanding right of the United States to protect itself by inspecting persons and property entering the country. As an exception to the Fourth Amendment's probable cause and warrant requirements, the routine border search will continue to play a significant role in border management. The new terrorist threats of the 21st century, however, may necessitate the acquisition and use of advanced detection devices or procedures. Implementation of these and other border security measures might raise Fourth Amendment concerns, forcing courts to reconsider the parameters of the border search exception — this time, however, within the context of the "age of terrorism."[105]

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[102] Ignacio Ibarra and Mary Vandeveire, *"Minuteman" Expands Watch*, Arizona Daily Star, *available* at [http://deseretnews.com/dn/view/0,1249,600127623,00.html].

[103] *See, e.g.*, United Stats v. Malbrough, 922 F.2d 458 (8th Cir. 1990). In determining whether a private citizen is an agent of the government, two critical factors are whether the government knew of and acquiesced in the intrusive conduct, and whether the party performing the questionable conduct performed the activity at the request of the government and whether the government offered a reward. *Id*. at 462. *Cf* Proffitt v. Ridgway, 279 F.3d 503 (7th Cir. 2002) (discussing ways a private citizen can be held liable under 42 U.S.C. §1983 for acting under color of state law).

[104] *See* ARIZ. REV. STAT. ANN §13-3112 (permit to carry concealed weapon); §13-404 (justification; self-defense); §13-3884 (arrest by private person); §13-410 (justification; use of deadly force).

[105] The 9/11 Commission Report: Final Report on the National Commission on Terrorist Attacks Upon the United States, §12.4 at p. 383 (Official Gov't Ed. 2004).