Terrorism, the Border, and the Fourth Amendment

By Roberto Iraola[*/]

Abstract

Post September 11th public demand for heightened homeland security quickly and inevitably runs headfirst into the U.S. Constitution's Fourth Amendment protections against unreasonable search and seizure. According to author Roberto Iraola, that collision point is no where more evident than at our national borders. Fourth Amendment jurisprudence recognizes an exception to the warrant requirement for routine searches and seizures at the border. Mr. Iraola's timely article analyzes the rationale and case law surrounding this exception. The extensive collection of current media materials and case law provide an invaluable resource for any judge or fourth amendment scholar.

Table of Contents

I. INTRODUCTION

[I.1] Yearly, United States seaports receive 51,000 calls from 7,500 foreign-flag ships[1/] and approximately 6 million cargo containers.[2/] On land, 2.2 million rail cars and 11.2 million trucks enter the country annually, while more than 500 million persons (of which 330 million are non-citizens)

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[1/] White House Press Release, Securing America's Borders Fact Sheet: Border Security, Jan. 25, 2002.

[2/] See Jeanninne Aversa, *Customs Moving to Block Entry of Nuclear Weapons but Offers No Guarantees*, Associated Press, May 30, 2002.

are admitted into the United States.[3/] It is further estimated that the United States processes approximately $1.2 trillion worth of trade a year.[4/]

[I.2] While none of the nineteen hijackers involved in the planes used in connection with the September 11 attacks are believed to have entered the United States through Canada or Mexico,[5/] following these attacks, security along the nation's borders was substantially heightened for terrorists and weapons.[6/] Other countries have followed suit.[7/]

[I.3] In February 2002, administration officials announced the deployment of 1,600 National Guard troops to help inspect trucks and cars and perform other duties at some of the 156 ports of entry along the southwest and northern borders.[8/] In April 2002, the Pentagon announced the establishment of the Northern Command, responsible for defending U.S. airspace and coasts and

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[3/] See White House Press Release, Securing America's Borders Fact Sheet: Border Security, Jan. 25, 2002. It is estimated that 360,000 vehicles and 1.4 million persons cross U.S. borders every day. See Bill Miller, *1,600 Guard Troops to Aid Border Control Temporarily*, WASH. POST, Feb. 2, 2002, at A26.

[4/] See Robert C. Bonner, *The Customs Patrol*, WASH. POST, Feb. 16, 2002, at A25.

[5/] See Bill Miller, *Plugging a Very Porous Northern Border*, WASH. POST, Apr. 8, 2002, at A3; Elisabeth Bumiller, *White House Announces Security Pact With Mexico*, N.Y. TIMES, Mar. 22, 2002.

[6/] See Michael Janofsky, *Border Agents On Lookout For Terrorists Are Finding Drugs*, N.Y. TIMES, Mar. 6, 2002 (reporting that the "United States is on a heightened security alert for terrorists and weapons, and checkpoints have more personnel and equipment than ever."); Kevin Sullivan, *Tunnel Found Under Border With Mexico*, WASH. POST, Feb. 28, 2002 (reporting how "[s]ince the Sept. 11 terrorist attacks in New York and at the Pentagon, security has been substantially heightened at the border."). See also Charles Doyle, Terrorism: Section by Section Analysis of the USA Patriot Act, CRS Report for Congress (Dec. 10, 2001) at CRS-32 through CRS-39 (analyzing provisions affecting the Northern Border and immigration).

[7/] See *Singapore Tightens Border Security with Bomb Scanners,* Associated Press, Nov. 29, 2002 (reporting that "Singapore is installing two $2.5 million x-ray machines to screen cargo coming into the country for nuclear material that could be used by terrorists to make a bomb."). *Papal-Nuke Threat*, CANADIAN PRESS, May 3, 2002 (reporting that in Canada, "security checks on cargo containers have increased since Sept. 11.").

[8/] See Miller *supra* note 3 (reporting that "[t]he Bush administration plan[ned] to deploy 1,600 National Guard troops . . . to help with security at the nation's borders.").

also for coordinating military relations with Mexico and Canada.[9/] Legislation also was passed in the Congress affecting border security issues[10/] and security accords reached with Canada and Mexico to improve security along the common borders.[11/] In September 2002, the Immigration and Naturalization Service initiated a new program requiring foreign visitors to be photographed and fingerprinted at the border.[12/]

[I.4] Homeland Security Director Tom Ridge has cautioned that the borders remain vulnerable to terrorists and that coordination must be improved among the various agencies responsible for guarding them – the Customs Service, the Coast Guard, the Immigration and Naturalization Service, and the Border Patrol.[13/] In a similar vein, Customs Service Commissioner Robert C. Bonner has

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[9/] See Thomas E. Ricks, *Northern Command to Defend the U.S.*, WASH. POST, Apr. 18, 2002.

[10/] See *Bush Signs Bill to Keep Terrorists Out of U.S.*, WASH. POST, May 15, 2002 (reporting signing of the Enhanced Border Security and Visa Entry Reform Act of 2002, legislation "meant to screen out terrorists by using high-tech passports and more border enforcers to check millions of people who enter the United States each year."). See also *Lawmakers Propose Tougher Security at U.S. Ports*, Associated Press, May, 18, 2002 (reporting on proposed legislation that "would require that all cargo containers received at or shipped from U.S. ports be sealed at the point of loading. It would also prohibit the loading of undocumented or improperly documented cargo.").

[11/] See Elisabeth Bumiller, *White House Announces Security Pact With Mexico*, N.Y. TIMES, Mar. 22, 2002 (reporting "new border security accord with Mexico . . . intended to weed out terrorists and smugglers but speed up legitimate goods and travelers."); News Release, Canada-United States Issue Statement of Common Security Priorities, Dec. 13, 2001, (reporting signing of "Joint Statement of Cooperation on Border Security and Regional Migration Issues that will directly support Prime Minister Chretien and President Bush's emerging public security and border strategy.").

[12/] See Susan Sachs, *Federal Government Ready to Fingerprint and Track Some Foreign Vistors*, N.Y. Times, Sept. 9, 2002 (reporting initiation of program and indicating government officials "would not disclose criteria agents will use in determining who will be required to submit to fingerprinting, as well as photographing, for fear of jeopardizing intelligence gathering.").

[13/] See Eric Pianin & Bill Miller, *U.S. Borders Remain Vulnerable Despite Measures, Ridge Says*, WASH. POST, Feb. 12, 2002. In June 2002, President Bush proposed the creation of a Department of Homeland Security which would assume oversight responsibility over the Customs Service, the Immigration and Naturalization Service, the Border Patrol, the Coast Guard, the Federal Emergency Management Agency, and other agencies. See Joseph Curl, *Bush Wants New Cabinet Post*, WASH. TIMES, Jun. 7, 2002; Thomas E. Ricks, *A Question of Implementation*, WASH. POST, Jun. 7, 2002, at A1. In November 2002, he signed a homeland security bill establishing the (continued...)

warned that effective border enforcement will require "a combination of good intelligence, advance arrival information, state-of-the-art inspection technology, strong industry-government partnerships, a well-trained workforce, and sophisticated systems to exchange and analyze mountains of data."[14/]

[I.5] Undoubtedly, the long-term campaign against terrorism will maintain a criminal law component,[15/] which will be part of a broader diplomatic, intelligence, economic and military effort.[16/] In the context of criminal law enforcement, the question arises -- to what extent does the detention and/or search of persons and goods attempting to enter the United States implicate the Fourth Amendment?

[I.6] This article generally explores the Fourth Amendment's exception for routine searches and seizures occurring at the border.[17/] It is divided into three parts. First, the article provides an

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[13/] (...continued)
Department of Homeland Security and nominated Director Ridge as its first secretary. John Mintz, *Homeland Agency Created: Bush Signs Bill to Combine Federal Security Functions,* WASH. POST, Nov. 26, 2002, at A1.

[14/] Robert C. Bonner, *The Customs Patrol*, WASH. POST, Feb. 16, 2002, at A25. See also Bill Miller, *Firms and U.S. in Border Bargain*, WASH. POST, Apr. 16, 2002 (reporting how automakers and fifty "leading corporations have agreed to tighten security controls on goods and equipment coming into the United States in return for further processing through border checkpoints, striking a deal that Customs Service officials say will help thwart and speed the flow of commerce.").

[15/] See David Johnston & Benjamin Weiser, *Ashcroft Is Centralizing Control Over the Prosecution and Prevention of Terrorism*, N.Y. TIMES, Oct. 10, 2001 (reporting the establishment of "9/11 Task Force" within the Department of Justice "to operate as the agency's central command structure for prosecuting terror cases and helping to prevent further acts of violence against the United States.").

[16/] See Bob Woodward, *50 Countries Detain 360 Suspects at CIA's Behest; Roundup Reflects Aggressive Efforts of an Intelligence Coalition Viewed as Key to War on Terrorism*, WASH. POST, Nov. 22, 2001, at A1 (reporting that a "senior White House official said . . . the intelligence coalition is as important as the military and diplomatic coalitions involved in the war on terrorism.").

[17/] This article does not address the application of the Fourth Amendment's exception for routine searches and seizures occurring at the border to incoming international mail, see Andrew H. Meyer, Note, *Customs Inspectors and International Mail: To Open or Not to Open?*, 21 VAND. J. TRANSNAT'L L. 773 (1988); Michael A. DiSabatino, Annotation, Customs Inspection By Opening International Letter Mail As Within Border Search Exception To Fourth Amendment Requirement For Search Warrant, 36 A.L.R. Fed. 864 (1978), searches at sea, see Note, *High on the Seas: Drug Smuggling, The Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725 (continued...)

overview of the requirements of the Fourth Amendment. A discussion of the difference between routine and non-routine searches and seizures at the border, and the Fourth Amendment standards governing each, follows. Lastly, the article addresses searches and seizures which occur at the functional equivalent of the border.

II. GOVERNING LEGAL PRINCIPLES

[II.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.[18/]

The first clause of the Fourth Amendment proscribes unreasonable searches and seizures;[19/] the second clause addresses the requirements necessary to obtain a warrant.[20/]

[17/] (...continued)
(1980), or extended border searches. See Ralph V. Seep, Annotation, Validity of Warrantless Search Under Extended Border Doctrine, 102 A.L.R. Fed. 269, 277-78 (1991).

[18/] U.S. CONST. amend. IV. See Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1974) ("It is only 'searches' and 'seizures' that the Fourth Amendment requires to be reasonable; police activities of any other sort may be as unreasonable as the police please to make them.").

[19/] See Horton v. California, 496 U.S. 128, 133 (1990) ("A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property.").

[20/] See Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 487-532 (1995); Akil Reed Amar, *Fourth Amendment Principles*, 107 HARV. L. REV. 757, 762 (1994).

[II.2] Generally, a search requires a warrant based on probable cause,[21/] a level of individualized suspicion,[22/] or an exception to the warrant requirement.[23/] One of the exceptions to the warrant requirement is that found for routine searches and seizures which take place at the international border,[24/] or its functional equivalent.[25/]

[21/] See Terry v. Ohio, 392 U.S. 1, 20 (1968) ("Police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."). A warrant must describe with particularity the object or person to be seized, see Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325 (1979), and the place to be searched. Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971). In Steagald v. United States, 451 U.S. 204 (1981), the Supreme Court explained the different interests protected by an arrest warrant and a search warrant as follows:

> An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure. A search warrant, in contrast, is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place , and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police.

Id. at 213.

[22/] See United States v. Sokolov, 490 U.S. 1, 7 (1989) (Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "'may be afoot.'") (quoting Terry, 392 U.S. at 30).

[23/] See Katz v. United States, 389 U.S. 347, 357 (1967) ("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.") (footnotes omitted). See generally Michael Mello, *Friendly Fire: Privacy vs. Security After September 11*, 38 Crim. L. Bull. 367, 376 (2002)("if a search occurs pursuant to probable cause and a warrant (or if the facts come within an exception to either or both of these requirements) then that search will be deemed 'reasonable' and therefore constitutional.").

[24/] See United States v. Ramsey, 431 U.S. 606, 616 (1977) ("That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."). See generally, Allan W. Fung, Comment, *Reasonable Suspicion of a Violation Unnecessary for Routine Secondary Vehicle Inspection at Permanent Border Checkpoint, United States v. Soyland, 3 F.3d 1312 (9th Cir. 1993)*, 18 SUFFOLK TRANSNAT'L L. REV. 751, 754-55 (1995) (noting that "[s]ince 1886, the United States Supreme Court has continually recognized the existence of the border search exception to the Fourth

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[II.3] It is well-established that a traveler crossing an international boundary reasonably may be required "to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."[26/] Consequently, "[a]t the border one's expectation of privacy is less than in the interior and the Fourth Amendment balance between the government's interests and the traveler's privacy rights is 'struck much more favorably to the Government.'"[27/] As a result, routine searches at the border "are not subject to any requirement of reasonable suspicion, probable cause, or warrant[.]"[28/] Under the Fourth Amendment, border searches are deemed reasonable because of "the single fact that the person or item in question had entered into our country from outside."[29/]

[24/] (...continued)
Amendment.") (footnote omitted).

[25/] See Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) (noting that a routine border search "may in certain circumstances take place not only at the border itself, but at its functional equivalents as well.").

[26/] Carroll v. United States, 267 U.S. 132, 154 (1925).

[27/] United States v. Gonzalez-Rincon, 36 F.3d 859, 864 (9th Cir. 1994), cert. denied, 514 U.S. 1008 (1995) (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 539-40 (1985)).

[28/] Montoya de Hernandez, 473 U.S. at 538 (footnote omitted). See 2 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure, § 3.9(f), at 272 (1999) ("routine searches of persons and things may be made upon entry into the country without first obtaining a search warrant and without establishing probable cause or any suspicion at all in the individual case.") (footnotes omitted).

[29/] Ramsey, 431 U.S. at 619. In California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974), the Supreme Court noted in dicta that "those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment[.]" Id. at 63. Relying in part on this dicta, the circuit courts that have confronted the issue of whether the border exception applies to outgoing, as well as incoming travelers and goods, uniformly have ruled that it does. See United States v. Beras, 183 F.3d 22, 26 (1st Cir. 1999) (traveler); United States v. Oriakhi, 57 F.3d 1290, 1296 (4th Cir. 1995) (traveler and cargo); United States v. Ezeiruaku, 936 F.2d 136, 143 (3d Cir. 1991) (luggage); United States v. Berisha, 925 F.2d 791, 795 (5th Cir. 1991) (travelers for currency); United States v. Udofot, 711 F.2d 831, 839-40 (8th Cir.) cert. denied, 464 U.S. 896 (1983) (luggage); United States v. Ajlouny, 629 F.2d 830, 833-35 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981) (cargo). See also United States v. Garcia, 905 F.2d 557, 559 (1st Cir.), cert. denied, 498 U.S. 896 (1990) ("[T]he United States Customs Service has the authority to routinely search, without a warrant or suspicion, baggage or persons in transit from one foreign country to another. It is also authorized to decline to immunize international travelers who pass through this country however briefly."). See generally Susan L. Wallace, Comment *Constitutional Law - Border Searches*
(continued...)

[II.4] The rationale for the border exception rests on the notion that, as a sovereign state, the United States "has the right to control what persons or property crosses its international borders."[30/] It has been noted that "[t]he federal government's power over immigration and foreign commerce is immense, and the nation's border is the primary locus at which that power must be exercised."[31/] Two important governmental interests are advanced by routine searches and seizures at the border. First, "the sovereign's interest in excluding undesirable outside influences, such as entrants with communicable diseases, narcotics, or explosives[.]"[32/] Secondly, and "[a]s important is the

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[29/] (...continued)
- *Applying Fourth Amendment Border Search Exception to Outgoing Searches, United States v. Ezeiruaku, 936 F.2d 136 (3d Cir. 1991)*, 16 SUFFOLK TRANSNAT'L L. J. 228, 234 (1992) (noting that "clear trend among the circuits is to exempt outgoing searches from the requirements of a warrant, probable cause, and reasonable suspicion."). It has been noted, however, that in several of these cases, the courts "emphasized the narrowness of their holdings" and that "[n]o case has explicitly held that the border search exception applies identically to searches of persons or property entering and exiting the country, and without regard to the purpose of the search." United States v. Roberts, 86 F. Supp. 2d 678, 685 (S.D. Tex. 2000).

[30/] United States v. Cardenas, 9 F.3d 1139, 1147 (5th Cir. 1993). See Montoya De Hernandez, 473 U.S. at 537-38 (executive branch has "plenary authority" to engage in routine warrantless border searches and seizures "in order to regulate the collection of duties and to prevent the introduction of contraband into this country"); Torres v. Puerto Rico, 442 U.S. 465, 472-73 (1979) (recognizing government's "inherent sovereign authority to protect its territorial integrity."); Ramsey, 431 U.S. at 616 (government may search mail entering the United States based on its "longstanding right . . . to protect itself by stopping and examining persons and property crossing into this country."). See generally, Fung, *supra* note 24, at 756 ("[C]ourts have premised the government's broad power to conduct searches and seizures at international borders on the sovereign's legitimate interest in protecting its borders.").

[31/] Paul S. Rosenzweig, Comment, *Functional Equivalents of the Border, Sovereignty, and the Fourth Amendment*, 52 U. CHI. L. REV. 1119, 1131 (1985).

[32/] Oriakhi, 57 F.3d at 1297 (citing Montoya de Hernandez, 473 U.S. at 544). One commentator has noted:

> The government has a fundamental interest in enforcing its immigration laws through border-zone searches. Immigration laws are uniquely important because a state is defined by its members and their agreement to form it. Membership in a specific community or state is the 'central concept of politics'; the identity of the members of a community is critical to the political embodiment of that community.

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sovereign's interest in regulating foreign commerce and, in particular, in regulating and controlling its currency."[33/]

[II.5] But what precisely are "routine" border stops and searches?[34/] What happens when more than a routine border stop and search is involved? And what are the factors to consider when determining whether a search or seizure takes place at the functional equivalent of the border? It is to a discussion of those questions that we now turn.

[32/] (...continued)
Rosenzweig, *supra* note 31, at 1137 (footnotes omitted).

[33/] Oriakhi, 57 F.3d at 1297; Ezeiruaku, 936 F.2d at 143 ("National interests in the flow of currency justify the diminished recognition of privacy inherent in crossing into and out of the borders of the United States."); Berisha, 925 F.2d at 791 (recognizing "the substantial national interest in regulating the exportation of domestic currency at the border.").

Additionally, 31 U.S.C. § 5317(b) (2000) authorizes warrantless border searches for purposes of enforcing the currency reporting requirements found in section 5316. In particular, section 5317(b) states that "a customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States." In 1986, Congress removed the "reasonable cause" requirement from this provision, see Ezeiruaku, 936 F.2d at 139, thereby authorizing border searches to the full extent permitted by the Constitution. See United States v. Benevento, 836 F.2d 60, 68-69 n.1 (2d Cir. 1987), cert. denied, 486 U.S. 1043 (1988).

[34/] Border officials are given the authority to perform searches at the border by statutes and regulations. See, e.g., 19 U.S.C. § 482 (2000)(customs official may search persons or vehicle if reasonable cause to suspect contraband); 19 U.S.C. § 1582 (2000) ("The Secretary of Treasury may prescribe regulations for the search of persons and baggage . . . 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."); 19 C.F.R. § 162.6 (2002)("[a]ll persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a Customs officer.") .

III. BORDER SEARCHES AND SEIZURES

[III.1] In general, routine and nonroutine searches are distinguished by the degree and nature of the intrusiveness involved.[35/] In the case of seizures, the test centers on the length of the detention.[36/] Each of these types of searches and seizures are discussed below.

A. ROUTINE AND NON-ROUTINE SEARCHES INVOLVING PERSONS AND OBJECTS

[III.A.1] Routine searches of persons entering the country generally have been found when such persons have been requested to remove their shoes,[37/] roll up their sleeves,[38/] lift up their skirts,[39/]

[35/] See, e.g., United States v. Ramos-Saenz, 36 F.3d 59, 61 (9th Cir. 1994) ("the degree of intrusiveness is a critical factor in distinguishing between routine and nonroutine searches"); United States v. Cardenas, 9 F.3d 1139, 1148 n.3 (5th Cir. 1993) ("courts have generally classified routine searches as those which do not seriously invade a traveler's privacy."); United States v. Vega-Barvo, 729 F.2d 1341, 1345 (11th Cir.), cert. denied, 469 U.S. 1088 (1984) (noting that level of intrusiveness of a search must take into account the amount of extensiveness, as well as indignity). See also David L. Roland, Note, *Twenty-Seven Hour Detention At Border Without Warrant Or Probable Cause Held Reasonable Under Fourth Amendment*, 17 ST. MARY'S L. J. 1085, 1092 (1986) (noting "[c]ourts have determined . . . that as the level of intrusiveness of the search rises, the justification for the search must be supported by a correspondingly higher level of suspicion.") (footnote omitted); David J. Woll, Comment, *Fear of Flying: The Second Circuit Evaluates Body Cavity Searches at the Border*, 52 BROOK. L. REV. 743, 745 (1986) (noting that when "a border search becomes more intrusive than a routine inspection, such searches must be justified by more than a mere border crossing in order to be deemed reasonable.") (footnotes omitted).

[36/] See generally 4 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment, § 10.5(b), at 537 (3d ed. 1996) (discussing how extended detentions without searches have "become more common as smugglers have increasingly taken to bringing in contraband concealed in their alimentary canals.").

[37/] See, e.g., Ramos-Saenz, 36 F.3d at 61; United States v. Grotke, 702 F.2d 49, 52 (2d Cir. 1983); United States v. Nieves, 609 F.2d 642, 646 (2d Cir. 1979), cert. denied, 444 U.S. 1035 (1980); United States v. Fitzgibbon, 576 F.2d 279, 284 (10th Cir.), cert. denied, 439 U.S. 910 (1978); United States v. Chase, 503 F.2d 571, 574 (9th Cir. 1974), cert. denied, 420 U.S. 948 (1975).

[38/] See, e.g., United States v. Murphree, 497 F.2d 395, 396 (9th Cir. 1974).

[39/] See, e.g., United States v. Braks, 842 F.2d 509, 512-13 (1st Cir. 1988).

remove their coat,[40/] or submit to a patdown.[41/] Some courts, however, have ruled that a degree of suspicion is necessary when a person is asked to lift her skirt[42/] or to submit to a patdown.[43/]

[III.A.2] Strip searches, body cavity searches, and involuntary x-ray searches, are all examples of non-routine border searches of persons.[44/] Courts have held that the amount of suspicion needed to justify a strip search is real [45/] or reasonable suspicion.[46/] Similarly, body cavity[47/] and x-ray

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[40/] See, e.g., Shorter v. United States, 469 F.2d 61, 63 (9th Cir. 1972); Murray v. United States, 403 F.2d 694, 697 (9th Cir. 1969).

[41/] See, e.g., United States v. Ramos, 645 F.2d 318, 322 (5th Cir. 1981) ("non-offensive pat-down or frisk made at the border is justified by a traveler's request to cross our national border."). See also Beras, 183 F.3d at 26 (pat down of outgoing traveler conducted pursuant to routine border search such that neither probable cause nor reasonable suspicion was required).

[42/] See United States v. Palmer, 575 F.2d 721, 723 (9th Cir. 1978) (describing test as "if suspicion is founded on facts specifically relating to the person to be searched, and if the search is no more intrusive than necessary to obtain the truth respecting the suspicious circumstances, then the search is reasonable.").

[43/] See United States v. Vance, 62 F.3d 1152, 1156 (9th Cir. 1995) (pat down search that required defendant to "spread-eagle himself against a wall and have a stranger's hands touch his body" required "minimal suspicion"); United States v. deGutierrez, 667 F.2d 16, 19 (5th Cir. 1982) ("mere suspicion" sufficient in pat down search); United States v. Dorsey, 641 F.2d 1213, 1219 (7th Cir. 1981) (agreeing with Fifth and Ninth Circuits that "some suspicion is required to conduct a patdown search at the border" and noting that "[t]he suspicion justifying a patdown search, like that required for a strip search, must be based on objective factors and judged in light of the experience of the customs agents."). See also United States v. Lamela, 942 F.2d 100, 101-02 (1st Cir. 1991) (holding that there was reasonable suspicion for the pat-down searches conducted at the border therefore there was no need to determine whether they were routine and did not need to be supported by reasonable suspicion). See generally Roland, *supra* note 35, at 1091 n.38 (noting that "courts are not in agreement as to whether a pat-down search may be considered part of a non-intrusive, routine border search.").

[44/] Montoya de Hernandez, 473 U.S. at 541 n.4 (expressing "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."); Braks, 842 F.2d at 512-13 ("the only types of border search of an individual's person that have been consistently held to be non-routine are strip searches and body-cavity searches.").

[45/] See Vance, 62 F.3d at 1156 ("The established standard for a strip search at the border is 'real suspicion.'"); United States v. Des Jardins, 747 F.2d 499, 505 (9th Cir. 1984), opinion vacated

(continued...)

searches require reasonable suspicion.[48] One distinguished commentator has pointed out that the application of the reasonable suspicion standard to body cavity searches does not change the fact "that body cavity searches are more intrusive than other border searches and consequently require a stronger justification in terms of the probability that the individual subjected to the procedure is carrying contraband."[49]

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[45] (...continued)
in part, 772 F.2d 578 (5th Cir. 1985) ("a strip search must be based on 'real suspicion.'").

[46] See Gonzalez-Rincon, 36 F.3d at 864 (noting that strip search must be supported by reasonable suspicion); Vega-Barvo, 729 F.2d at 1345 ("A more intrusive search, the strip search, requires a particularized 'reasonable suspicion.'"); United States v. Adekunle, 980 F.2d 985, 987-88 (5th Cir. 1992), revised, 2 F.3d 559 (5th Cir. 1993) ("A strip search conducted at the border passes fourth amendment muster if it is supported by 'reasonable suspicion.'"). See also 4 LaFave, *supra* note 36, § 10.5(c), at 549-52 (discussing cases giving rise to "real" or "reasonable suspicion.").

[47] See Gonzalez-Rincon, 36 F.3d at 864 (noting in dictum that body cavity search must be supported by reasonable suspicion); United States v. Ogberaha, 771 F.2d 655, 658 (2d Cir. 1985), cert. denied, 474 U.S. 1103 (1986) (noting that the "reasonable suspicion standard . . . is flexible enough to afford the full measure of protection which the fourth amendment command.") (internal quotation omitted); United States v. Himmelwright, 551 F.2d 991, 995 (5th Cir.), cert. denied, 434 U.S. 902 (1977) (applying reasonable suspicion standard because of its flexibility). But see Woll, *supra* note 35, at 747 (arguing "that a body cavity search at the border is unreasonable under the fourth amendment unless it is based on probable cause and supported by a warrant.").

[48] See Adekunle, 2 F.3d at 562 (reasonable suspicion required for x-ray and continued detention of suspected alimentary canal drug smuggler); United States v. Oyekan, 786 F.2d 832, 837 (8th Cir. 1986) (applying reasonable suspicion standard); Vega-Barvo, 729 F.2d at 1345.

[49] 4 LaFave, *supra* note 36, § 10.5(e), at 555-56. See Roland, *supra* note 35, at 1093-94 (noting that "[b]ody cavity searches are considered more intrusive than strip searches, and courts have generally required a higher level of suspicion to justify such a search.") (footnotes omitted).

In United States v. Rivas, 368 F.2d 703 (9th Cir. 1966), the Ninth Circuit adopted a "clear indication" standard for body cavity searches. The court stated:

> An honest 'plain indication' that a search involving an intrusion beyond the body's surface is justified cannot rest on the *mere chance* that the desired evidence may be obtained . . . . There must exist facts creating a clear indication, or plain suggestion, of the smuggling. Nor need those facts reach the dignity of nor be the equivalent of 'probable cause' necessary for an arrest and search at a place other than a

(continued...)

[III.A.3] In general, "[a] search at the border of a traveler's luggage and personal effects is routine."[50/] And while "[i]t is permissible for the authorities to search automobiles, luggage, and goods entering the country,"[51/] courts have ruled that drilling into the body of a vehicle[52/], or in the

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[49/] (...continued)
border.

Id. at 710. See also Des Jardins, 747 F.2d at 505 (x-ray examinations require "'a clear indication' that the suspect is carrying contraband in a body cavity[.]"); United States v. Castrillon, 716 F.2d 1279 1280 (9th Cir. 1983). One commentator has noted that "[t]he clear indication standard, when applied in a border search context, has generally been interpreted to require a greater showing than reasonable suspicion, but a lesser showing than probable cause to validate the search." Roland, *supra* note 35, at 1094 (footnote omitted).

In Montoya de Hernandez, discussed more fully in Section III.B *infra*, the Supreme Court rejected the clear indication standard in favor of a reasonable suspicion standard when addressing the reasonableness of a detention at the border. 473 U.S. at 541. This "more general, but firm rejection of a third verbal standard" has led some courts to decline to adopt the "'clear indication' standard in the context of a body cavity search." Ogberaha, 771 F.2d at 658. Following Montoya de Hernandez, the Ninth Circuit has recognized in dictum that "body-cavity searches are of course considered nonroutine, and, unlike luggage searches must be supported by reasonable suspicion." Gonzalez-Rincon, 36 F.3d at 864.

[50/] United States v. Johnson, 991 F.2d 1287, 1291 (7th Cir. 1993) (footnote omitted); see United States v. Turner, 639 F. Supp. 982, 986 (E.D.N.Y. 1986)(noting that routine search may include "a person's luggage, personal belongings, outer clothing, wallet, purse, and even one's shoes.").

[51/] 4 LaFave, *supra* note 36, § 10.5(a), at 532-33 (footnotes omitted).

[52/] Cf. United States v. Rivas, 157 F.3d 364, 367 (5th Cir. 1998) (during processing, customs inspector drilled into frame of trailer and discovered a white powder which field tested positive for cocaine; dog's weak alert did not provide reasonable suspicion for the intrusion); United States v. Carreon, 872 F.2d 1436, 1442 (10th Cir. 1989)(reasonable suspicion required to dig hole into wall of camper).

plywood section of the hull of a boat are not routine searches.[53/] Generally, for these types of intrusions, reasonable suspicion of illegal activity is required.[54/]

B. ROUTINE AND NON-ROUTINE SEIZURES INVOLVING PERSONS

[III.B.1] Non-routine seizures of persons most commonly have arisen in the context of the detention of drug smugglers who conceal the contraband in their alimentary canal.[55/] What level of suspicion, if any, is required for non-routine seizures?

[III.B.2] In United States v. Montoya de Hernandez,[56/] the Supreme Court was confronted with the question of "what level of suspicion would justify a seizure of an incoming traveler for purposes other than a routine border search."[57/] The defendant in Montoya de Hernandez was suspected of carrying drugs in her alimentary canal.[58/] After rejecting a standard for prolonged detention based on a "clear indication" of drug smuggling,[59/] the Supreme Court ruled "that the detention of a traveler

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[53/] Cf. United States v. Puig, 810 F.2d 1085, 1086-87 (11th Cir. 1987) (reasonable suspicion supported drilling hole in polywood section of boat). See also United States v. Robles, 45 F.3d 1, 5 (1st Cir. 1995)(drilling into metal cylinder during airport search not routine because it destroyed property and involved use of force); United States v. Villabona-Garcia, 63 F.3d 1051, 1057 (11th Cir. 1995)(insertion of probe into transformers not routine); United States v. Sarda-Villa, 760 F.2d 1232, 1237 (11th Cir. 1985)(reasonable suspicion supported use of axe and crowbar to pry open layers of deck leading to hidden contraband).

[54/] See, e.g., Villabona-Garcia, 63 F.3d at 1057 (noting that before he inserted probe into transformer, customs inspector had "reasonable suspicion that something was amiss."); Puig, 810 F.2d at 1086-87 (11th Cir. 1987) (reasonable suspicion supported drilling hole in polywood section of boat); United States v. Moreno, 778 F.2d 719, 720-21 (11th Cir. 1985) (search (drilling fuel tank of boat) justified since one of the Customs' agents remembered that vessel, suspected of being involved in narcotics smuggling, had secret compartments).

[55/] See 4 LaFave, *supra* note 36, § 10.5(b), at 537- 46 (discussing extended detentions). See also United States v. Juvenile (RRA-A), 229 F.3d 737, 743 (9th Cir. 2000) ("The government has more latitude to detain people in a border crossing context . . . but such detentions are acceptable only during the time of the extended border searches[.]").

[56/] 473 U.S. at 531.

[57/] Id. at 540.

[58/] Id. at 532-34.

[59/] Id. at 541 (noting that the Fourth Amendment's stress on reasonableness was not "consistent with the creation of a third verbal standard in addition to 'reasonable suspicion' and (continued...)

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."[60/]

[III.B.3] Once reasonable suspicion exists to detain a traveler, such detention can continue "for the period of time necessary to either verify or dispel the suspicion."[61/] Under the reasonable suspicion standard, the detention of those suspected of alimentary canal smuggling has been held lawful for periods ranging from ninety minutes to twenty-four days.[62/] As noted by several well-

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[59/] (...continued)
'probable cause'; we are dealing with a constitutional requirement of reasonableness, not mens rea . . . and subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question.").

[60/] Id. at 541 (footnote omitted). In adopting this standard, the Court in Montoya de Hernandez explained:

> The 'reasonable suspicion' standard has been applied in a number of contexts and effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause. It thus fits well into the situations involving alimentary canal smuggling at the border: this type of smuggling gives no external signs and inspectors will rarely possess probable cause to arrest or search, yet governmental interests in stopping smuggling at the border are high indeed. Under this standard officials at the border must have a 'particularized and objective basis for suspecting the particular person' of alimentary canal smuggling.

Id. at 541-52.

[61/] Montoya de Hernandez, 473 U.S. at 544.

[62/] See United States v. Rodriguez, 74 F.3d 1164, 1165 (11th Cir. 1996) (90 minute detention involving two bowel movements supported by reasonable suspicion); United States v. Onumonu, 967 F.2d 782, 784-85 (2d Cir. 1992) (four days before bowel movement; six days total); Esieke, 940 F.2d at 34-35 (one and a half days before bowel movement; three days total); United States v. Odofin, 929 F.2d 56, 57 n.11 (2d Cir.), cert. denied, 502 U.S. 850 (1991) (twenty-four days before bowel movement); United States v. Yakubu, 936 F.2d 936, 937 (7th Cir. 1991)(twenty hours); United States v. Mosquera-Ramirez, 729 F.2d 1352, 1355-57 (11th Cir. 1984)(twelve hours).

known commentators, "[t]his means that if, as in de Hernandez, the suspect declines to submit to an x-ray, then the detention on reasonable suspicion may continue until a bowel movement occurs."[63/]

IV. THE FUNCTIONAL EQUIVALENCY DOCTRINE

[IV.1] In some instances, "it is not feasible to conduct a search at the actual border."[64/] A search and seizure that does not technically occur at the border may still fall within the border exception, as long as it takes place at the functional equivalent of the border.[65/]

[IV.2] In Almeida-Sanchez v. United States,[66/] the Supreme Court noted in dicta that the border search exception could apply to searches that "take place not only at the border itself, but at its functional equivalents as well."[67/] The Court illustrated this principle with the following two examples.

> [S]earches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.[68/]

[63/] 2 LaFave, Israel & King, Detection and Investigation of Crime, § 3.9(f), at 274 (2d ed. 1999)(footnote omitted). See Esieke, 940 F.2d at 35 ("[A]n otherwise permissible border detention does not run afoul of the Fourth Amendment simply because a detainee's fortitude leads to an unexpectedly long period of detention.").

[64/] United States v. Graham, 117 F. Supp. 2d 1015, 1018 (W.D. Wash. 2000).

[65/] See, e.g., Moreno, 778 F.2d at 721 ("[A] search may constitute a border search even though it does not technically occur at the border. [A] border search may be conducted at any location considered the 'functional equivalent of the border[.]'").

[66/] 413 U.S. at 266.

[67/] Id. at 272.

[68/] Id. at 273 (footnote omitted).

Almeida-Sanchez concerned a roving patrol on a highway 20 miles from the border.[69/] The Court determined that the search of the automobile in that case did not fall within the functional border exception and, in the absence of probable cause or consent, violated the Fourth Amendment.[70/]

[IV.3] The justification for the functional equivalent component to the border search exception is that "it is in essence no different than a search conducted at the border; the reason for allowing such a search to take place other than at the actual physical border is the practical impossibility of requiring the subject searched to stop at the physical border."[71/] The Eleventh Circuit has described the test for determining whether a search took place at the functional equivalent of the border as encompassing the following three factors: "[i] reasonable certainty that the border was crossed[72/]; [ii]

[69/] Id.

[70/] Id. See also United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) ("Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.") (footnote omitted).

[71/] Niver, 689 F.2d at 526 (quoting United States v. Garcia, 672 F.2d 1349, 1363-64 (11th Cir. 1982)); United States v. Cardenas, 9 F.3d 1139, 1148 (5th Cir. 1993), cert. denied, 511 U.S. 1134 (1994).

[72/] See Niver, 689 F.2d at 526 ("a border crossing must be demonstrated by more than reasonable suspicion or probable cause."); United States v. Mayer, 818 F.2d 725, 728 (10th Cir. 1987) (applying "reasonable certainty" standard that border was crossed); cf. United States v. Laughman, 618 F.2d 1067, 1072 n.2 (4th Cir. 1980), cert. denied, 447 U.S. 925 (1980)(noting that there can be no search at the functional equivalent of the border "without some degree of probability that the vessel has crossed a border."). Surveillance by law enforcement personnel is one way of establishing a border crossing. See United States v. Stone, 659 F.2d 569, 572-73 (11th Cir. 1981); United States v. Driscoll, 632 F.2d 737, 739 (9th Cir. 1980). Rejecting the contention that to establish a valid border search, the government also had to demonstrate that the craft had left foreign land, the court in Stone observed:

> Such an added requirement . . . is tenable neither in law nor logic. In no case has a border search been invalidated because the object's departure from foreign soil was not demonstrated. Instead, a legion of cases have made clear that the propriety of a border search rests on the 'critical fact' of whether or not a border crossing has occurred[.]

659 F.2d at 573.

no opportunity for the object of the search to have changed materially since the crossing[73/]; and [iii] the search must have occurred at the earliest practicable point after the border crossing."[74/] Other courts have taken similar approaches.[75/] Examples of the functional equivalent of the border include where a ship docks after arriving from foreign waters,[76/] an international airport,[77/] or a fixed

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[73/] See, e.g., United States v. Carter, 760 F.2d 1568, 1576 (11th Cir. 1985) (recognizing that "government must establish that the object searched was in the same condition as when it crossed the border.").

[74/] United States v. Hill, 939 F.2d 934, 937 (11th Cir. 1991); United States v. Santiago, 837 F.2d 1545, 1548 (11th Cir. 1988). The practice by the Customs Service to conduct routine border searches at the final destination of the goods has been sanctioned by the courts. See, e.g., United States v. Gaviria, 805 F.2d 1108, 1113-14 (2nd Cir. 1986), cert. denied, 481 U.S. 1031 (1987); United States v. Caminos, 770 F.2d 361, 364-65 (3rd Cir. 1985); United States v. Sheikh, 654 F.2d 1057, 1069-70 (5th Cir. 1981), cert. denied, 455 U.S. 991 (1982). As summarized by the court in Gaviria:

> [W]hen goods physically enter the United States at one point, and are subsequently transferred to another port of entry, then the final port of entry will be considered the functional equivalent of the border for the purposes of a customs search, only if: (1) it is the intended final destination of the goods; (2) the goods, upon arrival, remain under a customs bond until a final search is undertaken by Customs; and (3) there is no evidence that anyone has tampered with the goods while in transit.

Id. at 1114.

[75/] See, e.g., Mayer, 818 F.2d at 728 (recognizing Eleventh Circuit's three- part test and noting that other circuits have taken similar approaches).

[76/] See, e.g., Moreno, 778 F.2d at 721 (noting that vessel "had neither touched land nor cleared customs since reentering United States waters" and that "[t]he customhouse dock, as the initial point of landfall, thus constituted the functional equivalent of the border."). See generally, Note, *supra* note 17, at 732 (asserting that "[f]or vessels arriving in the United States, the point of landing is clearly the most reasonable place to conduct a border search and should be recognized as a functional equivalent of the border.").

[77/] See, e.g., Oriakhi, 57 F.3d at 1295 (noting that defendant did not dispute that "J.F.K Airport search[] w[as] conducted at the functional equivalent of the border."); Brown, 499 F.2d at 832 (search of defendants "at O'Hare International Airport upon their arrival on a nonstop flight from Acapulco constituted a border search.")(footnote omitted).

automobile checkpoint near the border.[78/] In all circumstances, "an actual border crossing must have occurred to justify a search."[79/]

V. CONCLUSION

[V.1] Homeland Security Director Ridge has indicated that the terrorism threat represents a "permanent condition" and that Americans are going to have to learn to live with that threat.[80/] In the continuing effort to combat terrorism – from suicide bombers,[81/] to biological agents[82/] and dirty

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[78/] See United States v. Jackson, 825 F.2d 853, 860 (5th Cir. 1987), cert. denied sub nom. Ryan v. U.S., 484 U.S. 1011 (1988) ("To justify searches at checkpoints labeled the functional equivalent of the border the government must demonstrate with 'reasonable certainty' that the traffic passing through the checkpoint is 'international' in character . . . [T]his test means that border equivalent checkpoints intercept no more than a negligible number of domestic travelers."); United States v. Bowen, 500 F.2d 960, 966 (9th Cir. 1974), aff'd on other grounds, 422 U.S. 916 (1975)(fixed checkpoint not found to be the functional equivalent of the border because there was no "reasonable certainty, or even probability, that [vehicle] or its contents had crossed an international border"; the "border-patrol agent had no reason to believe that all or even most of the cars passing through their checkpoint had recently, or ever, crossed the border.").

Even if a fixed checkpoint does not qualify as the functional equivalent of the border, the Supreme Court has upheld the use of such checkpoints to stop vehicles and question their occupants absent any suspicion that illegal aliens are aboard the vehicles. United States v. Martinez-Fuerte, 428 U.S. 543 (1976). Searches by border patrol agents at checkpoints not deemed to be the functional border equivalents, on the other hand, require probable cause. United States v. Ortiz, 422 U.S. 891 (1975); see 4 LaFave, *supra* note 36, § 10.5(i) at 587 (noting that "Ortiz appears to proscribe all warrantless searches without consent or probable cause at such traffic checkpoints, although much of the analysis was directed to the fact that searches at this particular checkpoint were done in a highly selective basis at the discretion of the officers manning the checkpoint.").

[79/] Jackson, 825 F.2d at 859.

[80/] Ron Fournier, Ridge Says Terrorism A "Permanent Condition," Vows National Strategy, Associated Press, Apr. 29, 2002.

[81/] See Dan Eggen, *FBI Warns of Suicide Bombs*, WASH. POST, May 21, 2002, at A4 (reporting that walk-in suicide bombings in the United States are inevitable); David Von Drehle, *Terror Taken Up A Notch*, WASH. POST, May 13, 2002, at A1 (reporting that "sheer number of suicide belt-bombers attacking Israel . . . and the diversity of their backgrounds, has increased fear among terrorism experts that the tactic will be exported to the United States.").

[82/] Biological agents may well be among the categories of weapons which terrorists (continued...)

bombs[83/] – careful scrutiny at the border,[84/] and beyond, will be imperative.[85/] The border exception to the Fourth Amendment provides the government with the necessary flexibility to detain and search persons and goods in its endeavor to protect the mainland and its citizens against acts of terrorism.

[82/] (...continued)
surreptitiously will attempt to bring to the United States. See generally, Frist Says Bioterrorism Remains A Serious Threat, Risk Is Increasing, Associated Press, Apr. 26, 2002 (noting that "between 11 and 17 countries either have stockpiled biological weapons or have bioweapons programs, including such threats as anthrax, botulinum toxin, tularemia, smallpox, plague and ebola."); Michael R. Gordon, *U.S. Says It Found Lab Being Built To Produce Anthrax*, N.Y. TIMES, March 23, 2002 (reporting discovery of "a laboratory under construction in Kandahar, Afghanistan, where American officials believe Al Qaeda planned to develop biological agents.").

[83/] These "devices consist of radioactive material packed next to conventional explosives. They do not produce catastrophic destruction characteristic of nuclear explosions, but they can contaminate areas enough to force a prolonged evacuation." Mitchel Maddux, *Heading off terror on the waterfront*, Apr. 23, 2002, NORTHJERSEY.COM.

[84/] See, e.g., Company Unveils Liquid Analysis Device for Border Use, Associated Press, July 3, 2002 (reporting development of technology that "can ultrasonically check the contents of tanker trucks, rail tanker cars, barrels and smaller containers."); INS Orders Thorough Searches of Yemeni Nationals Entering and Leaving Country, Associated Press, June 12, 2002 (reporting that INS "has told agents to inspect baggage belonging to Yemeni citizens for large sums of money, thermos bottles and night-vision goggles); Jeannine Aversa, Customs Moving to Block Entry of Nuclear Weapons but Offers no Guarantees, Associated Press, May 30, 2002 (reporting that U.S. Customs oversees approximately 300 points of entry and "is looking to use more sophisticated scanning and detection technology at seaports and land crossings.").

[85/] See, e.g., Elizabeth Becker, *Border Watch Stepped Up; Snags Are Seen for Agency*, N.Y. TIMES, Jun. 26. 2002, at A19 (reporting that "the Dutch port of Rotterdam had been added to its international system to protect sea cargo destined for the United States."); Customs Service Will Begin Inspecting U.S.- Bound Cargo Ships at Port of Singapore, Associated Press, Jun. 5, 2002 (reporting that agreement had been reached between Singapore and the United States allowing the Customs Service to inspect American-bound cargo containers in Singapore's seaport, one of the busiest in the word); Port Security After Sept. 11 Dominates Shipping Association Meeting, Associated Press, May 22, 2002 (reporting that "[a]s officials in the United States grappled with new terrorist threats, a two-day meeting of the Caribbean Shipping Association ended . . . with maritime officials pledging to tighten security on ships headed to U.S. ports."); Bill Miller, *Study Urges Focus On Terrorism With High Fatalities, Cost*, WASH. POST, Apr. 29, 2002, at A3 (reporting that Commissioner Bonner has indicated "the detonation of a nuclear device hidden in a ship's cargo container could cause massive damage and indefinitely shut down the shipping industry. Bonner said the United States must win agreements with other countries that have 'megaports' in which cargo is checked at the point of origin.").

VI. **POSTSCRIPT**

[VI.1] Fourth Amendment jurisprudence recognizes an exception to the warrant requirement for routine searches and seizures which take place at the border or its functional equivalent. Mr. Iraola's timely article analyzes the rationale for this exception and the caselaw discussing routine and non-routine searches. The world has been transformed since September 11 and the resulting expectation of privacy that Americans share diminished. In light of that transformation, only time will tell whether even the narrow restrictions on border searches survive.

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