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United States v. Montoya de Hernandez: Internal Drug Smuggling at the Border: The Supreme Court Lets Nature Take Its Course, 19 J. Marshall L. Rev. 759 (1986)

Lazaro Fernandez

CASENOTES

*UNITED STATES v. MONTOYA DE HERNANDEZ:** INTERNAL DRUG SMUGGLING AT THE BORDER: THE SUPREME COURT LETS NATURE TAKE ITS COURSE

The United States faces an ever increasing dilemma concerning narcotics smuggling across its borders.[1] In an effort to evade improved surveillance and detection techniques, smugglers have resorted to alimentary canal smuggling.[2] This method of smuggling

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* 105 S. Ct. 3304 (1985).

1. United States v. Montoya de Hernandez, 105 S. Ct. 3304, 3309 (1985) (veritable national crisis in law enforcement because of drug smuggling into the United States); United States v. Mendenhall, 446 U.S. 544, 561-62 (1980) (public has great interest in detecting narcotics smugglers). The United States Congress has recognized this enormous concern and has promulgated appropriate legislation. *See, e.g.*, 19 U.S.C. § 482 (1978). That section provides:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, . . .any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause ot suspect there is merchandise which was imported contrary to law; and if such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

Id. 19 U.S.C. § 1582 (1980) provides:

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

Id. 19 C.F.R. § 162.6 (1985) provides: "All 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." *Id.*

2. Alimentary canal smuggling is a fairly recent innovation of drug traffickers. The smuggler places the narcotics in a balloon or condom or a container of that type. Then the smuggler prepares himself by taking laxatives to clear his digestive system. At this point the narcotics are swallowed. Once swallowed, drugs are taken which prevent diarrhea and inhibit digestion during the journey. After the journey is completed the smuggler again takes another laxative to excrete the contraband. *See* United States v. Montoya de Hernandez, 731 F.2d 1369, 1374 (9th Cir. 1984) (Jame-

renders detection difficult because it cannot be visually perceived.[3] As a result, United States customs officials have responded with increasingly intrusive detection methods.[4] Although it is settled that border searches and seizures[5] are subject to less stringent fourth amendment[6] scrutiny than those occurring within the borders,[7] federal courts have not applied consistent standards to non-routine border searches.[8] In *United States v. Montoya de Hernandez*,[9] the

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son, J., dissenting) (describes process of alimentary canal smuggling) *rev'd*, 105 S. Ct. 3304 (1985). *See also* United States v. Vega-Barvo, 729 F.2d 1341, 1350 (11th Cir. 1984) (alimentary canal smuggling is a new trend where a non-American "mule" or "swallower" is hired to carry cocaine in his digestive tract to the United States), *cert. denied*, 105 S. Ct. 597 (1984).

3. *See Montoya de Hernandez*, 731 F.2d at 1374 (Jameson, J., dissenting) (there exist very few consistently apparent and reliable indications that a person is smuggling narcotics via his digestive tract); United States v. Mendez-Jimenez, 709 F.2d 1300 (9th Cir. 1983) (smuggling via the alimentary canal does not leave the external signs of smuggling exhibited by other methods of smuggling).

4. *See, e.g., Montoya de Hernandez*, 105 S. Ct. 3304 (1985) (twenty seven hour detention of suspect); United States v. Mosquera-Ramierz, 729 F.2d 1352 (11th Cir. 1984) (twelve hour detention of suspect); United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir. 1984) (x-ray of suspect's abdomen), *cert. denied*, 105 S. Ct. 597 (1984).

5. It is settled that border searches may take place at the "functional equivalents" of the border. Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973) (arrival of a non-stop flight originating abroad).

6. 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 places to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

7. *See* United States v. Ramsey, 431 U.S. 606 (1977) (border searches and seizures held not subject to the warrant and probable cause provisions of the fourth amendment); Carroll v. United States, 267 U.S. 132 (1925) (travelers crossing the border into the United States may be stopped without probable cause because of national self protection); Boyd v. United States, 116 U.S. 616 (1886) (border searches held not subject to usual fourth amendment considerations because the first Congress passed the original customs laws prior to passing the fourth amendment and thus were thought not to have intended for fourth amendment protections to apply). *See also* United States v. 12,200 Ft. Reels of Film, 413 U.S. 123, 125 (1973) where the Court stated:

> Import restrictions and searches of persons of packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad comprehensive powers '[t]o regulate commerce with foreign nations.' Art. I, § 8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.

Id. See generally Comment, *Beyond the Border of Reasonableness: Exports, Imports and the Border Search Exception*, 11 HOFSTRA L. REV. 733 (1983) (development of border search exception); Comment, *Intrusive Border Searches - Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276 (1967) (border searches not subject to probable cause requirement of the fourth amendment). For a discussion of the border search exception, see *infra* notes 43-56 and accompanying text.

8. For purposes of this note, non-routine searches are those which are more intrusive than routine brief luggage, purse,and pocket searches. *See, e.g.*, United States v. Quintero-Castro, 705 F.2d 1099, 1100 (9th Cir. 1983) (purse, luggage and pocket searches are routine and require no suspicion).

United States Supreme Court established a uniform standard of requisite suspicion for non-routine border searches and seizures. The *de Hernandez* Court held that customs officials may detain travelers entering the country, *incomunicado*,[10] for long periods of time as long as the officials possess a "reasonable suspicion" of alimentary canal smuggling.[11]

On March 5, 1983, Montoya de Hernandez arrived at the Los Angeles International Airport from Bogota, Colombia.[12] Customs officials determined that she matched the "drug courier profile"[13] and therefore questioned her about the purpose of her trip. The officials suspected her of being a "balloon swallower."[14] Subsequently, customs officials took de Hernandez to a private room at the airport in order for the officials to conduct a pat down and strip search.[15] The search revealed that she had a certain "firmness" in her abdomen.[16]

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9. 105 S. Ct. 3304 (1985).

10. De Hernandez requested customs officials to call, or allow her to call, her family to inform them of her fate and to receive confirmation of her representations. This request was denied. *Montoya de Hernandez*, 105 S. Ct. at 3307. De Hernandez also requested that officials allow her to contact an attorney, or that the officials contact her attorney, again she was refused. Joint appendix at 47, United States v. Montoya de Hernandez, 105 S. Ct. 3304 (1985).

11. *Montoya de Hernandez*, 105 S.Ct. at 3312-13. From the beginning of de Hernandez' detention until she was formally arrested 27 hours elapsed. *Id.* at 3314 (Brennan, J., dissenting).

12. The customs officials considered Bogota, Colombia a "source" city for narcotics. *Montoya de Hernandez*, 105 S. Ct. at 3307. This was one of a series of characteristics which the officials considered the "drug courier profile." De Hernandez matched the profile because she paid cash for her ticket, had $5,000 in cash in her possession, had made several trips recently to the United States, had no family or friends in the United States, had only one piece of luggage, had no hotel reservations, did not speak English, and claimed that she was to go shopping in taxi cabs. *Montoya de Hernandez*, 731 F.2d 1369, 71 n.3. For a discussion of the drug courier profile see Comment, *Drug Courier Profiles In Airport Stops: Legitimate Equivalents of Reasonable Suspicion?*, 14 SW. U.L. REV. 315 (1985).

13. *See supra* note 12 for a discussion of the drug courier profile.

14. *Montoya de Hernandez*, 105 S. Ct. at 3307. A balloon swallower is one who attempts to smuggle narcotics into the country via his or her alimentary canal. *Id.* The officials formulated their suspicion from the drug courier profile factors. *Id.*

15. *Id.* The customs officials requested a female official to take de Hernandez to the private room and conduct the pat down and strip search. The Ninth Circuit, as well as other circuits, has held that pat down and strip searches are not as intrusive as body cavity searches or prolonged detentions. *See, e.g.*, United States v. Vega-Barvo, 729 F.2d 1341, 45 (11th Cir. 1984) (body cavity is most intrusive followed by strip search then pat-down search), *cert. denied*, 105 S. Ct. 597 (1984); United States v. Sanders, 663 F.2d 1, 3 & n.4 (2nd Cir. 1981) (removal of an artificial leg not as intrusive as a body cavity search); United States v. Afanador, 567 F.2d 1325, 29 n.3 (5th Cir. 1978) (strip search not as intrusive as a body cavity search).

16. *Id.* De Hernandez asserted that she was pregnant. In hindsight it is apparent that de Hernandez was not pregnant and indeed was smuggling drugs. This however, should not taint fourth amendment analysis. The reasonableness of a search or seizure is examined from the facts known at its inception. As Justice Frankfurter wrote:

> It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History

Officials then requested de Hernandez to undergo an x-ray examination, which she eventually refused.[17] Customs officials then informed de Hernandez that she could not leave until she produced a monitored bowel movement.[18] Throughout the detention, officials refused de Hernandez' requests to telephone her family or an attorney.[19]

During the early hours of the *incomunicado* detention, officials attempted to obtain a court order authorizing an x-ray. A ranking official, however, initially refused to contact a judge believing that a court order would not issue at that time. Subsequently, sixteen hours into the detention, the officials decided that they had acquired sufficient information to procure a court order authorizing an x-ray examination and a rectal probe.[20] Eight hours thereafter, twenty four hours after the initial detention, a telephonic court order finally issued.[21] Officials then transported de Hernandez to a hospital where

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bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.

Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting).

17. *Montoya de Hernandez*, 105 S. Ct. at 3307. De Hernandez initially consented to undergo the x-ray examination. Only after being informed that she would have to be handcuffed and taken to a hospital did she withdraw her consent. *Id.* De Hernandez was also given the option of returning to Colombia on the next available flight. She agreed to this but the next available flight, which was the next day, flew to Mexico City. That airline refused to take de Hernandez because she did not possess a Mexican visa and thus could not land in Mexico City. *Id.*

18. *Id.* Officials directed de Hernandez to excrete into a wastebasket so that they could examine her body wastes for drugs. *Id.*

19. *Id.* (Officials deny her requests to make a telephone call). *See also* Joint appendix at 47, United States v. Montoya de Hernandez, 105 S. Ct. 3304 (1985) (de Hernandez was refused permission to contact an attorney).

20. *Montoya de Hernandez*, 105 S. Ct. at 3308. Customs officials at the airport had contacted their supervisor at the initiation of the detention for purposes of obtaining a court order for an x-ray examination or a rectal probe at that time. However, the supervisor concluded that the facts then known were insufficient to support a court order. *Montoya de Hernandez*, 731 F.2d at 1317. This admission by the supervisor of the officials on duty, highlights one of the most perplexing aspects of the *de Hernandez* Court's decision. The *de Hernandez* Court completely overlooked the fact that the supervising customs official had made a determination that they did not possess sufficient facts to support a court order. In that way the Court condoned the officials in seizing de Hernandez until they observed her long enough to gather enough information to take to the magistrate. A detention which is not constitutional at its inception, however, cannot be made constitutional by facts gleaned from it. United States v. Di Re, 332 U.S. 581, 595 (1948). ("[a] search is not made legal from what it turns up"). *Accord* United States v. Guadalupe-Garza, 421 F.2d 876, 879-80 (9th Cir. 1970) (evidence obtained during a strip search which was not justified at its inception was not to be considered in assessing the constitutionality of the strip search).

21. *Montoya de Hernandez*, 105 S. Ct. at 3308. For some reason the officials' supervisor did not "[g]et around to contacting a magistrate for eight hours." *Id.* at 3314 n.13 (Brennan, J., dissenting). What caused the eight hour delay in procuring a court order was never discussed by the Court. One can only speculate that the customs officials where not in much of a hurry, realizing that de Hernandez had not used the restroom in at least sixteen hours and probably could not hold out much longer. This lack of diligence is completely excused by the Court. *Cf.* United States v. Sharpe, 105 S. Ct. 1568, 75 (1985) (in determining whether a detention is too long the

a rectal probe revealed a cocaine-filled balloon.[22] At this point, twenty seven hours after her detention commenced, officials formally arrested de Hernandez and informed her of her *Miranda* rights.[23]

Holding that her detention was reasonable under the fourth amendment, the United States District Court for the Central District of California denied de Hernandez' motion to suppress evidence of the seized cocaine.[24] The district court reasoned that the facts known to the customs officials, taken in light of de Hernandez' refusal to submit to an x-ray examination, justified the prolonged detention and did not violate the fourth amendment.[25] The court subsequently convicted de Hernandez of possession of cocaine with intent to distribute[26] and of illegal importation of cocaine.[27]

On appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed the convictions.[28] The Ninth Circuit Court recognized the highly intrusive character of such a prolonged deten-

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court must examine whether officials acted diligently); United States v. Place, 462 U.S. 696, 709 (1983) (court must consider whether police acted diligently in determining whether detention was too long). *See generally* 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2, at 40 (1978) (discussing requirement of diligence by officials in detentions).

22. *Montoya de Hernandez*, 105 S. Ct. at 3308. In the subsequent four days, de Hernandez excreted a total of eighty-eight cocaine-filled balloons, amounting to 528 grams of eighty percent pure cocaine. *Id.*

23. *Id.*

24. Joint appendix at 37, United States v. Montoya de Hernandez, 105 S. Ct. 3304 (1985). For a discussion of district court's holding, see *infra* note 25.

25. *Id.* At the suppression hearing the district court stated:

> I'm going to deny the motion to suppress the cocaine that she excreted. It seems to me that, under all the circumstances, the officers were justified in having a very substantial suspicion that this lady may very well be bringing in cocaine, to the point where they were justified in seeking and proposing an x-ray.
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> Having refused the x-ray, I am of the view. . . it is my understanding that, under all those circumstances, they were justified in saying, "If you do not agree to an x-ray, we are not obliged to let you go. We will just keep you for a while until, A, we can send you back home; or, B, you have a regular bodily function that might indicate you are carrying something."

Id. See also infra note 56 for comment as to this reasoning.

26. *Montoya de Hernandez*, 105 S. Ct. at 3308. Her actions violated 21 U.S.C. § 841(a)(1) (1982) which reads in pertinent part:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-
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> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . .

27. *Montoya de Hernandez*, 105 S. Ct. at 3308. Her actions violated 21 U.S.C. § 952(a) (Supp. 1985) which reads in pertinent part:

> (a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance. . . .

Id.

28. United States v. Montoya de Hernandez, 731 F.2d 1369 (9th Cir. 1984).

tion.[29] Accordingly, the court reasoned that a corresponding level of suspicion was necessary to justify the detention.[30] The Court labelled the appropriate standard as a "clear indication"[31] of alimentary canal smuggling. The court defined "clear indication" as "[a]n honest 'plain indication' that a search [or seizure]. . .is justified. . .[beyond a] *mere chance* that desired evidence may be obtained."[32] The Court then concluded that the facts known to the officials at the inception of the detention did not give rise to a clear indication, and thus it violated the fourth amendment.[33]

On certiorari, the United States Supreme Court reversed.[34] In addressing whether the "clear indication" standard was the appropriate standard for prolonged detentions of travelers at the border, the Court concluded that the clear indication standard applied in the Ninth Circuit was too rigorous.[35] According to the Supreme Court the appropriate standard was the "reasonable suspicion" stan-

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29. The Court initially stated that as searches or seizures become more intrusive a correspondingly higher level of suspicion was required to justify it. *Id.* at 1371. The Court then noted that more intrusive searches or seizures are subject to the "clear indication" standard. *Id.* (For a discussion of the "clear indication" standard see *infra* notes 31-37 and 57-59). The Court then concluded that the facts in *de Hernandez* were almost indistinguishable from those in United States v. Quintero-Castro, 705 F.2d 1099 (9th Cir. 1983), where they were held insufficient to support a clear indication, and likewise were insufficient to do so in *de Hernandez*. *Montoya de Hernandez*, 731 F.2d at 1372.

30. *Id.* at 1371-72.

31. *See supra* note 29. *See also Montoya de Hernandez*, 105 S. Ct. at 3310. (Court noted that Ninth Circuit required a clear indication of alimentary canal smuggling). For a discussion of the clear indication standard of suspicion see *infra* notes 53-56 and accompanying text.

32. Rivas v. United States, 368 F.2d 703 (1966) (emphasis in original). In *Rivas*, the Court wrote:

> Appellant urges "there must be a clear indication of the possession of narcotics" before a search at a border may be made. . . . While we know of no accepted meaning of that term in law or as a word of art, it can be readily defined.
>
> "Indication" is defined as "an indication; suggestion." "Clear" is defined as "free from doubt;" "free from limitation;" "plain."

Id. at 710 (citation omitted).

33. *Montoya de Hernandez* at 1373. The Ninth Circuit noted:

> In this case, the officers had a strong suspicion that de Hernandez was carrying drugs in her body, but for more than 16 hours they did not apply for a court order. The officers decided instead to wait for nature to provide the stronger evidence that would support an order. *Id.* at 1371.
>
> Here, if the facts apparent upon arrival would not authorize the issuance of a warrant, [on clear indication], it is difficult to hold that the same facts would authorize the long detention which eventually did produce some additional evidence in support of a warrant. *Id.* at 1372.
>
> We find that, in the instant case, the evidence available to the customs officers when they decided to hold de Hernandez for continued observation was insufficient to support the 16-hour detention. *Id.* at 1373.

34. *Montoya de Hernandez*, 105 S. Ct. at 3304.

35. *Id.* at 3310-11. *See infra* notes 59-80 and accompanying text for discussion of the Ninth Circuit's clear indication standard compared with standards in other circuits.

dard.[36] The Court explained that the reasonable suspicion standard was not as strict as the clear indication standard.[37] The *de Hernandez* Court concluded that the customs officials had a reasonable suspicion of alimentary canal smuggling and thus the detention was not violative of the fourth amendment.[38]

Justice Rehnquist, writing for a majority of the Court,[39] initially examined the justification for the relaxed fourth amendment protection at the border. According to Justice Rehnquist, the government has a heightened interest in protecting the integrity of the border[40] and the individual's expectation of privacy is lower at the border.[41] The Court then balanced de Hernandez' privacy interests against the government's interests in protecting the integrity of the border and concluded that the balance weighed in the government's favor.[42]

To support its reasoning, the *de Hernandez* Court primarily relied on *Carroll v. United States*,[43] *United States v. Ramsey*,[44] and related cases.[45] The *Carroll* Court stated that, unlike travelers

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36. *Montoya de Hernandez*, 105 S. Ct. at 3311. For a discussion of the reasonable suspicion standard applied in various circuits see *infra* notes 65-86 and accompanying text.

37. *Id.* at 3310-11 (stating that another court of appeals had adopted a less strict labelled standard) reasonable suspicion.

38. *Montoya de Hernandez*, 105 S.Ct. at 3312-13.

39. *Id.* at 3306. (Burger, C.J., White, Blackmun, Powell, O'Connor, J.J., joined the opinion of the Court; Stevens, J., filed an opinion concurring in judgment; Brennan, J., filed a dissenting opinion in which Marshall, J., joined).

40. *Montoya de Hernandez*, 105 S. Ct. at 3309. (For a discussion of border searches see *infra* notes 43-56 and accompanying text). Border searches may occur at the functional equivalents of the border. *See supra* note 5.

41. *Montoya de Hernandez*, 105 S. Ct. at 3310.

42. *Id.* The *de Hernandez* Court reasoned that the government's interest was heightened by the "veritable national crisis in law enforcement caused by smuggling of illicit narcotics." *Id.* at 3309. Beyond that, the Court also favored the government because of the border search scenario. Moreover, de Hernandez was said to have had less of an expectation of privacy. Although it may be true that an individual's expectation of privacy is less at the border, it is just as true that individual's do not expect to be strip searched or x-rayed or detained indefinitely merely because they are crossing the border. Justice Brennan stated:

> I do not imagine that decent and law-abiding international travelers have yet reached the point where they "expect" to be thrown into locked rooms and ordered to excrete into wastebaskets, held *incommunicado* until they cooperate, or led away in handcuffs to the nearest hospital for exposure to various medical procedures. . . .

Id. at 3321. (Brennan, J., dissenting). It is evident that the court had substantial concern for the government's interests and failed to adequately consider the intrusion into a presumably innocent individual.

43. 267 U.S. 132 (1925).

44. 431 U.S. 606 (1977).

45. *E.g.*, United States v. Villamonte-Marquez, 462 U.S. 579 (1983); United States v. Martinez-Fuerte, 428 U.S. 543 (1976). The *de Hernandez* Court also emphasized Boyd v. United States, 116 U.S. 616 (1886), in bolstering its conclusion. In *Boyd* the Court wrote:

> [The first customs] act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the

within the United States, international travelers may be detained at the border until a determination is made that they are entitled to enter.[46] According to the *Carroll* Court the government's interest in "national self protection" justified the distinction.[47] Looking to *Carroll*, Justice Rehnquist reemphasized the government's interest in protecting the integrity of the border and concluded that de Hernandez was afforded lesser fourth amendment protection because her detention occurred at the border.[48]

Additionally, the *de Hernandez* Court looked to *United States v. Ramsey*[49] to support the distinction. In *Ramsey* customs officials had opened and inspected an arriving first-class international letter without obtaining a search warrant.[50] The *Ramsey* Court concluded that the search of the letter, being a border search, was exempt from the warrant and probabe cause requirements of the fourth amendment and was not violative of the fourth amendment because officials possessed the statutorily required level of suspicion.[51] The *de Hernandez* Court likewise reasoned that because de Hernandez was an international traveler entering the country, her detention was not

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> members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the [fourth] amendment.

Id. at 623.

46. *Carroll*, 267 U.S. at 154.

47. *Id.*

48. *Montoya de Hernandez*, 105 S. Ct. at 3309. The border search exception is basically a product of historical analysis. Boyd v. United States, 116 U.S. 616 (1886). In *Boyd*, Justice Bradley focused on the temporal relation between the passage of the first customs laws and the passage of the fourth amendment. The *Boyd* Court noted that the first Congress passed the original customs act, Act of July 31, 1789, ch. 5, § 24, 1 stat. 29, before passing the fourth amendment. Because of this, the Court reasoned that customs searches were not within fourth amendment considerations. *Boyd*, 116 U.S. at 623.

There is evidence, however, that the reason for the prior passage of customs laws was merely the pragmatic reason of acquiring desperately needed funding for the newly formed government. *See generally* Note, *Beyond the Border of Reasonableness: Exports, Imports, and the Border Search Exception*, 11 *Hofstra L. Rev.* 733, 739-52 (1983) (analysis and criticism of historical justification for the border search exception). Because the first Congress was primarily concerned with obtaining funding to stabilize the national government, it withheld consideration of the Bill of Rights until later. Once funding was available, the Congress was able to concentrate on the Bill of Rights. *Id.* at 742-43. Accordingly, Congress' intention was not necessarily to immunize border searches from the protections of the fourth amendment. Moreover, the first Congress could not possibly have foreseen the privacy intrusions, which are medically and technologically possible today. Thus the historical basis for the border search exception may not justify technologically advanced intrusions.

49. 431 U.S. 606 (1977).

50. *Id.* at 609-10.

51. *Ramsey* concerned 19 U.S.C. § 482 which provides: "Any. . . officers. . .authorized to board or search vessels may. . .search any. . .envelope, wherever found, in which he may have a *reasonable cause to suspect* there is merchandise which was imported contrary to law. . . ." *Id* (emphasis added). The *Ramsey* Court concluded that the statutory standard of "reasonable cause to suspect" was appropriate because of the border search exception.

subject to the probable cause and warrant requirements of the fourth amendment.[52]

The Court next considered what standard of suspicion was constitutionally mandated for such a detention. The Court recognized that the "clear indication" language used in the Ninth Circuit came from the Supreme Court's own decision in *Schmerber v. California*.[53] The *de Hernandez* Court emphasized that the "clear indication" language did not refer to a fourth amendment standard of suspicion applicable at the border.[54] The Court explained that it had never pronounced the clear indication standard as an intermediate fourth amendment standard and that only the Ninth Circuit had adopted it as such.[55] The *de Hernandez* Court concluded that the reasonable suspicion standard was the appropriate standard because it adequately balanced the competing interests of the individual and the government.[56] The Court noted that under the reasonable suspi-

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52. *Montoya de Hernandez*, 105 S. Ct. at 3309. The *de Hernandez* Court thus took a broad construction of precedent and read it together with the customs regulations, for instance 19 U.S.C. § 1582 (1982) and 19 C.F.R. § 162.6 (1985), and concluded that an international traveler may be detained for purposes beyond a routine border search so long as officials possess a reasonable suspicion of alimentary canal smuggling. *Montoya de Hernandez*, 105 S. Ct. at 3311.

53. 384 U.S. 757 (1966). *Schmerber*, however, was not a border search case. Schmerber was arrested for driving under the influence of alcohol. Subsequently police took a blood sample from Schmerber without his consent or a warrant. The *Schmerber* Court wrote:

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

Id. (emphasis added). In *Schmerber*, police already had probable cause to arrest. Therefore, *Schmerber* placed the clear indication standard above the probable cause standard because it was something the police needed in addition to probable cause. Thus the *de Hernandez* Court correctly concluded that the clear indication standard was not applicable in the border search scenario. *See generally* Comment, *Intrusive Border Searches-Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276, 282 (1967) (In *Schmerber*, clear indication created two tests; one, for probable cause to arrest and the other, for probable cause to search); Note, *From Bags to Body Cavities: The Law of Border Search*, 74 COLUM. L. REV. 53, 80 n.171 (1974) (clear indication was imposed over and above probable cause). *But see infra* notes 58-80 and accompanying text. (Proposing that the clear indication standard as defined and applied in the Ninth Circuit was a valid border search standard).

54. *Montoya de Hernandez*, 105 S. Ct. at 3310.

55. *Id. See supra* note 53.

56. *Id.* The Court then went on to examine whether de Hernandez' detention was reasonably related in scope to the circumstances which initially justified it. *Id.* at 3311. The Court concluded that it was, reasoning that because de Hernandez refused to submit to an x-ray examination, the detention to monitor her bowel movements was the only viable alternative for the officials to dispel their suspicions. *Id.* at 3312. The Court's rationale, however, fails to withstand close scrutiny. Basically, the Court's proposition was that de Hernandez had a choice. She could submit to a *voluntary* x-ray or be detained until she excreted. Under those circumstances it is extremely difficult to accept the voluntariness of the x-ray examination. Thus, using

cion standard, officials needed a "particularized and objective basis for suspecting the particular person of alimentary canal smuggling."[57]

Although correct in applying the reasonable suspicion standard rather than the clear indication standard, the *de Hernandez* Court nevertheless failed to reach the proper disposition. First, the Court failed to recognize that the reasonable suspicion standard should adjust according to the corresponding intrusion. As a result, the Court failed to recognize that the Ninth Circuit's clear indication standard was merely the mislabeled equivalent of a flexible reasonable suspicion standard.[58] In misinterpreting the Ninth Circuit's standard as too strict, the Court applied a too lenient analysis to the facts. Second, the Court did not adequately adhere to the traditional requirements for articulable and individualized suspicion when applying the reasonable suspicion standard.[59]

The *de Hernandez* Court failed to recognize that the various circuit courts which most frequently hear border search cases[60] generally have reached consistent outcomes, albeit applying differently termed standards of suspicion.[61] These courts have recognized the same interests and have conducted their analyses in the same general manner.[62] These courts have recognized that the suspicion stan-

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fallacious reasoning, the Court manages to convert what is supposedly a consensual search procedure into a non-consensual detention. Clearly, under such circumstances the suspect does not actually have any choice. The Ninth Circuit characterized de Hernandez' choice as "hardly voluntary" and a "Hobson's choice." *Montoya de Hernandez*, 731 F.2d at 1372.

57. *Montoya de Hernandez*, 105 S. Ct. at 3311.

58. For a discussion of suspicion standards in various circuits, see *infra* notes 65-80 and accompanying text.

59. *See infra* notes 81-88 and accompanying text.

60. The Fifth, Ninth, and Eleventh Circuits confront a large number of border search cases because of geography. The Fifth Circuit encompasses the entire state of Texas which has a large border with Mexico. The Ninth Circuit, encompasses Arizona and California and thus also has a large border with Mexico. The Eleventh Circuit encompasses Florida and accordingly contends with large numbers of travelers arriving from South America.

61. *See, e.g.*, United States v. Vega-Barvo, 729 F.2d 1341, 1344 (11th Cir. 1984) (an intrusive search requires a particularized reasonable suspicion), *cert. denied*, 105 S. Ct. 597 (1984); United States v. Quintero-Castro, 705 F.2d 1099, 1100 (9th Cir. 1983) (a strip search requires a real suspicion whereas x-ray and body cavity searches require a clear indication); United States v. Himmelwright, 551 F.2d 991, 995 (5th Cir. 1977) (reasonable suspicion standard is flexible enough to adequately afford fourth amendment protection), *cert. denied*, 434 U.S. 902 (1977).

62. *See, e.g.*, United States v. Vega-Barvo, 729 F.2d 1341, 1344 (11th Cir. 1984) (at the border reasonableness is determined by balancing the individual's privacy interests against the governmental interest in controlling the flow of contraband, and the reasonable suspicion standard is flexible and adjusts the strength of suspicion required for a search to the intrusiveness of the search), *cert. denied*, 105 S. Ct. 597 (1984); United States v. Ek, 676 F.2d 379, 382 (1982) (9th Cir. 1982) ("[a]s a search becomes more intrusive, it must be justified by a correspondingly higher level of suspicion of wrongdoing"); United States v. Afanador, 567 F.2d 1325, 1328-29 (5th Cir.

dard they applied was a "flexible" standard and have adjusted it according to the particular corresponding intrusion.[63] The courts reason that the greater the intrusion into the individual's privacy the greater the corresponding suspicion must be.[64]

This reasoning is illustrated in cases from several circuits. In *United States v. Sanders*,[65] a second circuit decision, the defendant attacked the constitutionality of a search of his artificial leg. The *Sanders* Court initially found that the search of the artificial leg was not highly intrusive.[66] The Second Circuit recognized that the reasonableness of non-routine border searches and seizures[67] must be determined by balancing the level of suspicion against the intrusiveness of the customs official's conduct.[68] The *Sanders* court concluded that in light of Sander's evasive and contradictory story, computerized information indicating his suspected prior criminal activity, and his unusual itinerary the search was reasonable.[69]

In *United States v. Afanador*,[70] a fifth circuit decision, customs officials received a tip that a particular stewardess arriving from Colombia would be carrying cocaine. Upon the flight's arrival officials subjected the whole crew to strip searches, and discovered cocaine on the suspected stewardess and another one as well.[71] The *Afanador* Court concluded that only the search of the suspected stewardess met the reasonable suspicion standard.[72] This was because what constituted reasonable suspicion for one search did not justify the other search.[73]

Similarly, the Eleventh Circuit, in *United States v. Vega-Barvo*,[74] upheld an x-ray examination of a suspected smuggler be-

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1978) (reasonable suspicion standard is a flexible standard which demands higher levels of suspicion for greater intrusions).

63. *See supra* note 62.

64. *E.g., Afanador*, 567 F.2d at 1329 nn.3-4 (the facts supported a strip search, but a more intrusive search may not have been justified).

65. 663 F.2d 1 (2d Cir. 1981).

66. *Id.* at 3. In *Sanders* the Court concluded that the removal and search of Sanders' artificial leg was not as intrusive as a body cavity search and thus the officials suspicion did not need to rise to a level sufficient to justify a body cavity search. *Id.* at 3 n.4.

67. For a discussion of non-routine border searches and seizures, see *supra* note 8.

68. *Sanders*, 663 F.2d at 3.

69. *Id.* at 3-4.

70. 567 F.2d 1325 (5th Cir. 1978).

71. *Id.* at 1328. In *Afanador* the officials had received a tip that a Vidal-Garcia, a stewardess arriving from Colombia, was carrying cocaine. Upon arrival the officials subjected Vidal-Garcia and Afanador, a stewardess on the same flight, to strip searches and discovered cocaine on both. The *Afanador* Court concluded that Vidal-Garcia's search was reasonable, but that Afanador's was not. *Id.* at 1331.

72. *Id.* at 1330-31.

73. *Id.* at 1328.

74. 729 F.2d 1341 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 597 (1984).

cause of the suspect's inconsistent and contradictory story and her inability to explain the purposes of her trip.[75] The court explained that the reasonable suspicion standard is a "flexible" standard "which adjusts the strength of suspicion required for a particular search to the intrusiveness of that search."[76] The Court concluded that the facts known to the officials were sufficient to justify an x-ray examination to which the defendant had consented.[77]

Moreover, the Ninth Circuit had likewise recognized that "as a search becomes more intrusive, it must be justified by a correspondingly higher level of suspicion of wrongdoing."[78] In *de Hernandez* the Ninth Circuit likened the different levels of suspicion to a "continuum".[79] Clearly, the difference between the various circuits appears to be one of nomenclature. In *de Hernandez* the Ninth Circuit merely erred in labelling the point on the continuum "clear indication." Thus in reviewing the Ninth Circuit's treatment of the issue, the Supreme Court misinterpreted the Ninth Circuit's clear indication standard and characterized it as too strict.[80] In turn, the Court applied a much too lenient standard.

In determining whether the detention was reasonable under the reasonable suspicion standard, the *de Hernandez* Court needed to inquire whether there were specific and articulable facts which justified the detention.[81] Also, under precedent, the Court needed to determine whether the detaining officers had " 'a particularized and objective basis for suspecting the particular person' of alimentary canal smuggling."[82] Generalized suspicion alone, as when an individ-

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75. *Id.* at 1343.
76. *Id.* at 1344.
77. *Id.* at 1350.
78. United States v. Ek, 676 F.2d 379, 382 (9th Cir. 1982).
79. *Montoya de Hernandez*, 731 F.2d at 1370, *rev'd*, 105 S. Ct. 3304 (1985).
80. *Montoya de Hernandez*, 105 S.Ct. at 3310-11 (holding that other circuits have adopted a "less strict standard based upon reasonable suspicion").
81. *See* United States v. Cortez, 449 U.S. 441, 447 (1981) (detention must be justified by some objective manifestation that the person is, or is about to be, engaged in criminal activity); United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976) (some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (roving border patrol may stop vehicles only if they are aware of specific articulable facts that reasonably warrant suspicion of wrongdoing); Terry v. Ohio, 392 U.S. 1, 21 & n.18 (1968) (central teaching of Court's fourth amendment jurisprudence is that a police officer must be able to point to specific and articulable facts which reasonably warrant the intrusion).
82. *Cortez*, 449 U.S. at 417-18. *Accord* United States v. Castaneda-Castaneda, 729 F.2d 1360, 1363 (11th Cir. 1984) (reasonable suspicion standard required a showing of articulable facts which were particularized as to the person and place to be searched); United States v. Mejia, 720 F.2d 1378, 1382 (5th Cir. 1983) (facts beyond merely matching a drug courier profile must exist to support a reasonable suspicion); United States v. Guadalupe-Garza, 421 F.2d 876, 879 (9th Cir. 1970) (there must exist objective, articulable facts which support a suspicion that something is concealed on the body of the person to be searched).

ual fits the "drug courier profile,"[83] is insufficient to justify greater levels of intrusion.[84]

Unfortunately, the *de Hernandez* Court failed to adequately adhere to those guidelines. In *de Hernandez* the facts did not provide a sufficient level of suspicion to justify an *incommunicado* detention of an unprecedented duration. De Hernandez was able to explain the purpose of her trip, she was not visibly nervous, she produced documentation to confirm her reasons for coming to the United States, and she presented evidence of being employed.[85] There was no evidence of passport tampering, no informant's tip, no evidence of laxatives or lubricants. In short, there were no objective, articulable or particularized facts to support a reasonable suspicion of alimentary canal smuggling to justify a 27 hour *incommunicado* detention.[86] De Hernandez merely matched the "drug courier profile." Such generalized suspicion has never been sufficient to justify a detention of the magnitude in *de Hernandez*.[87] The *de Hernandez* Court, unfortunately, failed to closely analyze the facts[88] and upheld

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83. For a discussion of the drug courier profile, see *supra* note 12. *See also* Note, *Search and Seizure-Defining the Outer Boundaries of the "Drug Courier Profile": Florida v. Royer, 103 S. Ct. 1319 (1983)*, 17 CREIGHTON L. REV. 973 (1984) (although drug courier profile may be useful in law enforcement, there still must be specific articulable facts to justify a seizure).

84. *See, e.g.*, United States v. Mejia, 720 F.2d 1378, 1382 (5th Cir. 1983) (fitting profile by itself not sufficient for non-routine search); United States v. Afanador, 567 F.2d 1325, 1330 (5th Cir. 1978) (generalized suspicion as when individual fits the profile will not, without more, justify a strip search).

85. Joint appendix at 11, 14-15, 53 *Montoya de Hernandez*, 105 S. Ct. 3304 (1985).

86. Brief for Respondent at 41, *Montoya de Hernandez*, 105 S. Ct. 3304 (1985). *Cf.* United States v. Vega-Barvo, 729 F.2d 1341, 1343, 1350 (11th Cir. 1984) (nervousness, inconsistencies in explanation of trip, had no business documents), *cert. denied*, 105 S. Ct. 597 (1984); United States v. Couch, 688 F.2d 599 (9th Cir. 1982) (officials had received informant's tip); United States v. Aman, 624 F.2d 911 (9th Cir. 1980) (defendant had restricted body movements, possessed lubricants, marijuana).

87. *See, e.g.*, United States v. Mejia, 720 F.2d 1378 (5th Cir. 1983) (fitting a profile may be used to identify individuals who may warrant closer inspection, but by itself it is not sufficient for non-routine searches and seizures); United States v. Himmelwright, 551 F.2d 991, 995 (5th Cir. 1977) (a generalized suspicion, as when one fits the drug courier profile will not justify a strip search), *cert. denied*, 434 U.S. 902 (1977).

88. The *de Hernandez* Court boldly asserted that "the facts, and their rational inferences,. . . clearly supported a reasonable suspicion that respondent was an alimentary canal smuggler." *Montoya de Hernandez*, 105 S. Ct. at 3311. The Court supported the assertion by "not belabor[ing] the facts." *Id.* The Court reasoned that because the "trained customs inspectors" had "encountered many alimentary canal smugglers" their suspicion was more than a "hunch." *Id.*

The available evidence shows however, that customs officials erroneously suspect innocent travelers of being alimentary canal smugglers an overwhelming amount of the time. In *de Hernandez*, Justice Brennan noted:

> [T]he number of highly intrusive border searches of suspicious-looking but ultimately innocent travelers may be very high. One physician who at the request of customs officials conducted many "internal searches" —rectal and vaginal examinations and stomach-pumping —estimated that he found contra-

a detention of unprecedented length on a record with minimal if any articulable individualized suspicion. The Court should have carefully scrutinized the particular facts before it and recognized that the reasonable suspicion standard required more to justify such a prolonged detention.

The *de Hernandez* Court has significantly weakened fourth amendment protections at the border. In failing to require an appropriate degree of suspicion to justify a detention of unprecedented length, the Court has virtually mutilated the "flexibility" of the reasonable suspicion standard. Now officials may be able to justify highly intrusive searches and seizures based on minimal levels of suspicion. This unduly favors the government's security interests at the expense of the individual's privacy interests. The reasonable suspicion standard, if applied properly, can adequately accommodate all interests involved. The Court must recognize, however, that it is a flexible[89] standard and apply it accordingly. As searches and seizures become more intrusive, requisite suspicion levels must be heightened. The Court must resist the temptation to emasculate the fourth amendment in the face of a "veritable national crisis in law enforcement"[90] caused by drug smuggling. The right of the people to be secure in their persons should not be so easily violated. The fourth amendment, not the law of nature, must be the prevailing law at the border.

Lazaro Fernandez

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band in only 15 to 20 percent of the persons he had examined. It has similarly been estimated that only 16 percent of women subjected to body-cavity searches at the border were in fact found to be carrying contraband. It is precisely to minimize the risk of harassing so many innocent people that the Fourth Amendment requires the intervention of a judicial officer.

Id. at 3319 (Brennan, J., dissenting) (footnotes omitted).

89. *See supra* notes 62-73 and accompanying text.

90. *Montoya de Hernandez*, 105 S. Ct. at 3309.