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BORDER SEARCHES IN THE AGE OF TERRORISM

*Robert M. Bloom**

INTRODUCTION

The debate between individual freedom and the power of the executive—a contest hotly disputed throughout our nation's history—rages during times of national crisis. The terrorist attacks of September 11, 2001, represent a crisis of unprecedented magnitude. Reflecting on the likely effects of 9/11 on the legal world, Supreme Court Justice Sandra Day O'Connor captured this sentiment in a speech at New York University Law School mere weeks after that infamous day:

> The trauma that our nation suffered will [alter] and has already altered our way of life, . . . and it will cause us to reexamine some of our laws pertaining to criminal surveillance, wiretapping, immigration, and so on . . . . As a result, we are likely to experience more restrictions on our personal freedom than has ever been the case in our country.[1]

Justice O'Connor's words are likely prophetic when considering the effect that terrorism and national security concerns will have on Fourth Amendment jurisprudence. This article will focus on an area where terrorism and national

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[1] JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 206-07 (2007) (quoting a speech given by Justice O'Connor at New York University Law School on September 28, 2001).

security concerns are at their highest: border searches.

Despite any early, post-9/11 fears, such as those voiced by Justice O'Connor—that the judiciary would adopt its traditional posture of deference to the executive in times of national crisis[2]—the Supreme Court has in fact shown an unexpected willingness to review and restrict the power of the executive,[3] at least when faced with due process concerns. We refer to the string of cases concerning the status of those captured and detained by the United States during its "War on Terror;" cases in which the Court has, time and again, acted not in deference to the executive but out of fealty to one of "freedom's first principles": [4] individual rights.

The group of cases decided on June 28, 2004, *Rasul v. Bush*,[5] *Hamdi v. Rumsfeld*[6] and *Rumseld v. Padilla*,[7] were viewed by many as a harbinger of change.[8] In *Rasul*, the petitioners, twelve Kuwaitis and two Australians captured abroad and being held in military custody at the United States Naval Base at Guantanamo Bay, Cuba, brought suit in federal court in Washington, D.C., challenging the legality of their detention.[9] The government defended on procedural grounds,

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[2] *See* David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 238-39 Rudovsky notes:

> Historically, wars (both hot and cold) have placed great stress on constitutional rights, and these pressures have led the courts to countenance substantial limitations on liberty. The internment of Japanese-Americans during World War II, the suspension of the writ of habeas corpus during the Civil War, the imprisonment of strikers and dissidents during World War I, and the McCarthy tactics of the Cold War were all justified in the name of war. During each of these periods, the Supreme Court gave virtually complete deference to inflated Executive claims of imminent danger to the country.

Id. (footnotes omitted).

[3] *See* Steven R. Shapiro, *The Role of the Courts in the War Against Terrorism: A Preliminary Assessment*, 29 FLETCHER F. WORLD AFF. 103, 103 (2005).

[4] *See* Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008).

[5] 542 U.S. 466 (2004).

[6] 542 U.S. 507 (2004).

[7] 542 U.S. 426 (2004).

[8] *See* Shapiro, *supra* note 3, at 103 ("Whether process and transparency will be enough to preserve civil liberties in an age of terrorism remains to be seen. It is, nonetheless, more than the courts have often demanded in the past during other periods of national crisis. For that reason alone, it is an encouraging sign.").

[9] *Rasul*, 542 U.S. at 470-71.

arguing that U.S. courts lacked jurisdiction to hear the case.[10] The Supreme Court decided in favor of the petitioners, holding that the federal habeas statute confers on the district courts jurisdiction to hear petitioners' habeas corpus challenges.[11]

The legality of an American citizen's detention as an enemy combatant at a naval brig in Charleston, South Carolina, was at issue in *Hamdi*, where the Court held that, although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker.[12] The Court faced similar questions in *Padilla*, although it never reached the merits of the case, dismissing instead on procedural grounds.[13]

In 2006, in *Hamdan v. Rumsfeld*,[14] the Court again found in favor of the petitioner, a Yemeni national captured in Afghanistan and held at Guantanamo Bay.[15] In its decision, the Court held that the military commissions established by the President to try Guantanamo Bay detainees were not expressly authorized by any congressional act; that the military commission procedures violated the Uniform Code of Military Justice and did not satisfy the Geneva Conventions.[16] In the wake of the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006,[17] which specifically authorized the use of military commissions to try unlawful enemy combatants.[18]

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[10] *Id.* at 475.

[11] *Id.* at 485.

[12] Hamdi v. Rumsfeld, 542 U.S. 507, 508-39.

[13] Rumsfeld v. Padilla, 542 U.S. 426, 430 (holding Padilla's petition had been improperly filed in New York instead of South Carolina where he was being detained, the Court stated, "We confront two questions: First, did Padilla properly file his habeas petition in the Southern District of New York; and second, did the President possess authority to detain Padilla militarily. We answer the threshold question in the negative and thus do not reach the second question presented.").

[14] 548 U.S. 557 (2006).

[15] *Id.* at 566-67.

[16] *Id.*

[17] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948-50 (2006)).

[18] This congressional action cleared the way for Hamdan's war crimes trial by

This congressional action was the subject of *Boumediene v. Bush*[19] in 2008. At issue was Section Seven of the Act which denied the federal courts jurisdiction to hear habeas actions such as the case at bar.[20] The Court held, in part, that the petitioners—aliens designated as enemy combatants and held at Guantanamo Bay—were entitled to the habeas privilege.[21] The Court held that Section Seven operated as an unconstitutional suspension of the writ because the government had not implemented an adequate and effective substitute review process, as required by the writ's Suspension Clause.[22] In other words, these Guantanamo Bay detainees had the constitutional right to challenge their detention in U.S. federal courts.[23]

These decisions have been hailed as the Supreme Court's "harsh rebuke" of the Bush Administration and its efforts to curtail individual rights in the name of national security. These decisions have, some might say, tipped the scale in favor of

military commission, which commenced on July 21, 2008. His attempt to delay the trial, in light of the Supreme Court's decision in *Boumediene v. Bush*, was unsuccessful. The *Boumediene* decision was held to apply only to those detainees not yet facing any war crimes or criminal charges. Thus *Boumediene* has not prevented the trial by military commission of those detainees already facing charges, such as Hamdan, from moving forward. On August 6, 2008, a U.S. military jury found Hamdan guilty of providing material support for terrorism. His attorneys will likely appeal. *See* William Glaberson, *Panel Convicts bin Laden Driver in Split Verdict*, N.Y. TIMES, August 7, 2008, at A1; *see also* Scott Shane & William Glaberson, *Rulings Clear Military Trial of a Detainee*, N.Y. TIMES, July 18, 2008, at A1; Jerry Markon, *Detainee's Trial in Military System Begins Today*, WASHINGTON POST, July 21, 2008, at A03; *see infra* note 23 and accompanying text (for a brief discussion of the *Boumediene* decision and its impact on the Guantanamo Bay detainee cases generally).

[19] 128 S. Ct. 2229 (2008).

[20] *Id.* at 2242.

[21] *Id.* at 2262.

[22] *Id.* at 2274.

[23] *Id.* at 2277. The *Boumediene* decision opened the door for the more than 270 detainees held at Guantanamo Bay to challenge their detention. *See* Robert Barnes, *Justices Say Detainees Can Seek Release*, WASHINGTON POST, June 13, 2008, at A01 (summarizing the *Boumediene* decision and providing a brief history of the Guantanamo Bay detainee cases). Those challenges have begun to move forward, with District Court Judge Thomas F. Hogan, who is overseeing a majority of the cases, urging expediency on all sides. *See* Matt Apuzzo, *Judge to White House: Guantanamo is Top Priority*, ASSOCIATED PRESS, July 8, 2008.

personal liberties.[24] However, these decisions reflect the Court's inclination toward a preservation of *due process* rights alone. All of the plaintiffs were already in custody and seeking a hearing to challenge their detention. The Fourth Amendment, on the other hand, goes to the issue of what the government can do to *investigate* terrorism. Specifically, Fourth Amendment jurisprudence, with reasonableness as its touchstone,[25] allows the Court to weigh or balance concerns of terrorism and national security as part of its decision-making process.[26] In this way, the Fourth Amendment provides the mechanism for considering terrorism concerns. Thus, the question of reasonableness—which balances the government interest (which surely includes the great destruction to life and property caused by terrorism) against the level of privacy intrusion on the individual—lends itself to Justice O'Connor's prediction more readily than do questions of due process. Our focus will be how terrorism and national security concerns affect Fourth Amendment determinations generally, as well as specifically in the border search area.

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[24] *See, e.g.*, David Stout, *Justices Rule Terror Suspects Can Appeal in Civilian Courts*, N.Y. TIMES, June 13, 2008, *available at* http://www.nytimes.com/2008/06/13/washington/12cnd-gitmo.html.

[25] *See* United States v. Knights, 534 U.S. 112, 118-19 (2001) ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999))); *see also* Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977); Terry v. Ohio, 392 U.S. 1, 19 (1968).

[26] The Fourth Amendment is made up of two clauses joined by the conjunction "and": "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." U.S. CONST. amend. IV. The first clause speaks to being secure against unreasonable searches and seizures and the second clause lays out the requirements for warrants including probable cause and specificity. For much of the history of the Fourth Amendment, in order to give meaning to the vague term "unreasonable," the Court read the two clauses together. So a search, to be reasonable, would require a warrant with justification and specificity, otherwise it would be per se unreasonable. However, for the last thirty years, the Court has opted to analyze reasonableness on its own—warrants and justification, therefore, are but a factor in determining reasonableness. The balancing test is reflective of this approach.

This article will first explore the history of border searches. It will look to the reorganization of the border enforcement apparatus resulting from 9/11 as well as the intersection of the Fourth Amendment and border searches generally. Then, it will analyze the Supreme Court's last statement on border searches in the *Flores-Montano*[27] decision, including what impact this decision has had on the lower courts. Finally, the article will focus on Fourth Amendment cases involving terrorism concerns after 9/11, as a means of drawing some conclusions about the effect the emerging emphasis on terrorism and national security concerns will likely have on border searches in this post-9/11 world.

I. HISTORY

A. Legislative

The government has restructured its border operation since 9/11. The United States Border Patrol (USBP), founded in 1924, has had many responsibilities during its history. It has often reflected changing societal concerns. As a result of 9/11 and the ensuing Homeland Security Act of 2002,[28] the USBP was moved from the dissolved Immigration and Naturalization Service to within the Department of Homeland Security (DHS). In this way, the Border Patrol and the inspection division of the Immigration and Naturalization Service were for the first time brought under a single umbrella: the newly-created Department of Homeland Security. USBP is now a segment of Customs and Border Protection under the directorate of Border and Transportation Security, which reports directly to the director of Homeland Security. Part of the primary mission of the DHS is to "prevent terrorist attacks within the United States" and "reduce the vulnerability of the United States to terrorism."[29] In recent testimony before the Senate Finance Committee, Ronald

[27] 541 U.S. 149 (2004).

[28] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

[29] 6 U.S.C. § 111 (2004).

Colburn, Deputy Chief of the U.S. Border Patrol, said "our main function is to prevent the illegal entry of terrorists, criminals, illegal aliens, illegal narcotics, contraband as well as smugglers who operate between ports of entry."[30] It is interesting to note that the first topic he mentioned was terrorists.

Greater cooperation between agencies has also resulted since 9/11. The Terrorist Screening Center (TSC) has been established so that the federal government can better process terrorist informants. The FBI and the DHS created watch lists of informants with the TSC acting as a central repository of such information. The TSC and the Terrorists Screening Database (TSDB) are administered by the FBI and include all individuals believed to have any degree of terrorism nexus. The TSDB included more than 200,000 names with each person being assigned a category of terrorist threat.[31]

After being consolidated within the DHS, the border agencies, which were renamed the U.S. Bureau of Customs and Border Protection, continued to be responsible for enforcing U.S. immigration laws, administering U.S. customs laws, and "securing the borders."[32] They were also given a new principal responsibility: "Preventing the entry of terrorists and the instruments of terrorism into the United States."[33] During the last decade manpower has nearly tripled. The number of border patrol agents has grown from approximately 5,900 in 1996 to approximately 18,000 today.[34] It should be pointed out that not only has there been greater scrutiny at the border, but there has been a tightening of the requirements to obtain a visa.[35] This

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[30] *Border Security Before the S. Comm. on Finance*, 2007 WL 2802236 (statement of Ronald Colburn, Deputy Chief, U.S. Border Patrol).

[31] *See* Rahman v. Chertoff, 244 F.R.D. 443, 446 (N.D. Ill. 2007).

[32] 6 U.S.C. § 542 (2002) (codifying the Reorganization Plan Modification for the Department of Homeland Security, H. Doc. 108-32 (2003)).

[33] 6 U.S.C. § 202(1) (2002).

[34] GAO, *Border Patrol*: *Costs and Challenges Related to Training New Agents: Hearing Before the Subcomm. on Mgmt., Investigations, & Oversight of the H. Comm. on Homeland Sec.*, GAO-07-997T (2007) (statement of Richard M. Stana, Dir., Homeland Sec. & Justice Issues).

[35] *See* James Glanz, *Study Warns of Lack of Scientists as Visa Applications Drop*, N.Y. TIMES, Nov. 20, 2003, at A28.

increase in personnel and restructuring demonstrates the heightened scrutiny at the border in light of the "War on Terror."

B. Courts

As early as 1886, the Supreme Court pointed out the importance of border searches.[36] The court in *Boyd v. United States* indicated that Congress had passed a statute[37] authorizing the seizure[38] of non-customed goods two months before it passed the Fourth Amendment. "[C]ustoms officials [had] 'full power and authority' to enter and search 'any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed.'"[39] Therefore, it was evident the drafters of the Constitution did not believe searches and seizures at the border were unreasonable.[40] This was reiterated in 1925 in *Carroll v. United States*.[41] This case involved the smuggling of alcohol during prohibition. The Court, in dicta, indicated that the rationale for the *per se* reasonableness of searches and seizures at the border went beyond merely collection of duty but was also derived from concerns of national security. The Court noted that "travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."[42]

Thus there is recognition that the nation can control whom and what may enter the country.[43] From its historical roots of preventing the entry of uncustomed goods, search and seizure at the border has extended to protection from the entry of

[36] *See* Boyd v. United States, 116 U.S 616 (1886).

[37] Act of July 31, 1789, 1 Cong. ch. 5, § 24, 1 Stat. 29, 43.

[38] United States v. Ramsey, 431 U.S. 606, 616 (1977).

[39] *Id.* (quoting Act of July 31, 1789, 1 Cong. ch. 5. § 24, 1 Stat. 29, 43).

[40] *See Boyd*, 116 U.S. at 623.

[41] 267 U.S. 132, 147-50 (1925).

[42] *Id.* at 154.

[43] *See Ramsey*, 431 U.S. at 620.

undesirable people, drug interdiction, preventing the import of dangerous material, and, since 9/11, to working on preventing terrorists and instruments of terrorism from crossing the border.[44]

Moreover, there has been a long-standing recognition that border searches are *per se* reasonable. Historically, border searches have been allowed without the two primary protections of the Fourth Amendment: probable cause and the need for a warrant. Border search represents one of the original exceptions to the Fourth Amendment warrant requirement. Attempts to utilize the border search exception at places other than the border have not been successful.[45]

As time has passed, border searches have merged into the evolving administrative or regulatory search doctrine. These searches have one common element: they are not being done for the normal law enforcement goal of finding criminals but for goals unrelated to criminal investigation. The Fourth Amendment approach to these searches was introduced in *Camara v. Municipal Court*.[46] In this case involving inspections for housing code violations, the Court acknowledged that the traditional requirement of probable cause and resulting warrant for Fourth Amendment activity would not work; there was no individualized suspicion because health inspection would usually involve large areas of concern, not individual houses. As such, the Court turned to the reasonableness clause of the

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[44] *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

[45] These searches at locations other than the border have required some justification. *See, e.g.*, *Brignoni-Ponce*, 422 U.S. at 884 ("Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."); *Almeida-Sanchez*, 413 U.S. at 272-73 ("Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well. . . . But the search of the petitioner's automobile by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border, was of a wholly different sort. In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of unreasonable searches and seizures.").

[46] 387 U.S. 523 (1967).

Fourth Amendment and devised a balancing test. The Court balanced the need to search—the government interest—with the scope of the intrusion resulting from the search, saying that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[47] In the health inspection search, so as to limit the discretion of the inspector which might result in a greater intrusion, a standardized approach involving neutral criteria was required. Thus, on one hand, the Court considers the degree to which the seizure or search intrudes upon an individual's privacy, and, on the other hand, it considers the degree to which the seizure or search promotes the government interest. In analyzing reasonableness, the Court looks to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[48] Reasonableness of searches has become the touchstone of Fourth Amendment analysis.[49]

Border searches coupled with terrorism concerns also bring to mind a category of administrative searches sometimes referred to as "special needs" searches. Justice Blackmun, who coined the phrase in a high school search case, described special needs as those "beyond the normal need for law enforcement, mak[ing] the warrant and probable cause requirement impracticable."[50] He found the school setting to represent exceptional circumstances. Also included in this category of special needs are the search of a government employee's office for professional misconduct,[51] the search of a probationer's home,[52] or the suspicionless search of probationers.[53]

As we will see, border searches have fallen comfortably

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[47] *Id.* at 536-37.

[48] Illinois v. Lidster, 540 U.S. 419, 427 (2004) (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)).

[49] *See, e.g.*, Maryland v. Wilson, 519 U.S. 408, 411 (1997).

[50] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

[51] *See* O'Connor v. Ortega, 480 U.S. 709 (1987).

[52] *See* Griffin v. Wisconsin, 483 U.S. 868 (1987).

[53] *See* Samson v. California, 547 U.S. 843 (2006).

within this balancing framework. The important government interest side of balancing with regard to reasonableness has been the basis of border searches, as the Court indicated in *United States v. Ramsey*.[54] "[S]earches made at the border, pursuant to the long-standing 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."[55] On the intrusion side of the balance, since everyone is subject to such searches (the old adage "misery loves company"), there is less of an intrusion.[56] Thus ordinary or routine searches at the border can be made without a warrant or individual suspicion. In determining what is ordinary or routine, one must consider the objective of the border search: the vital national interest to protect against persons and things coming into our country. Given this interest, then, intrusions, including searches of outer clothing, luggage, shoes, pockets, contents of mail, wallets, and purses, are routine and require no justification.[57] When the scope of the intrusion increases to the extent that the border search is no longer routine, then some justification might be required.

This increasing justification reasoning is reminiscent of the approach in *Terry v. Ohio*[58] and elaborated on in *United States v. Sharpe*.[59] *Terry*, a case involving the so-called stop-and-frisk

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[54] 431 U.S. 606, 616 (1977).

[55] *Id.*

[56] *See* Delaware v. Prouse, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting). Justice Rehnquist in dissent opined:

> Because motorists, apparently like sheep, are much less likely to be "frightened" or "annoyed" when stopped en masse, a highway patrolman needs neither probable cause nor articulable suspicion to stop *all* motorists on a particular thoroughfare, but he cannot without articulable suspicion stop *less* than all motorists. The Court thus elevates the adage "misery loves company"'to a novel role in Fourth Amendment jurisprudence.

Id.

[57] *See* United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (seizure of photographs); United States v. Tsai, 282 F.3d 690 (9th Cir. 2002) (search of luggage and briefcase); United States v. Grayson, 597 F.2d 1225 (9th Cir. 1979) (examination of papers found in pockets); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) (search of purse).

[58] 392 U.S. 1 (1968).

[59] 470 U.S. 675 (1985).

doctrine, allowed for a search based upon less justification than probable cause because the intrusion was less than a full-scale arrest.[60] As the intrusion increases so too must the justification. In *Terry*, to determine whether the search was unreasonable, the Court devised a two-step analysis. First, the Court asked, was the Fourth Amendment activity justified at its inception?[61] Next, the Court found it necessary to analyze the scope of the search: the government's conduct "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."[62] To state it differently, the Court will take into account the purpose of the stop and the time and manner needed to effectuate that purpose. In considering the scope, the Court must examine whether law enforcement officers diligently pursued their purpose:

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.[63]

Again, as the justification increases, so can the scope of the search. The scope includes both the manner and length of detention.[64]

In *Illinois v. Caballes*,[65] for example, the respondent was stopped for speeding on an interstate highway.[66] As the first trooper on the scene was writing a warning ticket, a second trooper arrived with his drug-detection dog.[67] The dog signaled the presence of drugs in the trunk of the respondent's car, and

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[60] 392 U.S. at 25-26.

[61] *Id.* at 20.

[62] *Id.* at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

[63] *Sharpe*, 470 U.S. at 686.

[64] *See* Muehler v. Mena, 544 U.S. 93, 98-100 (2005); United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975).

[65] 543 U.S. 405 (2005).

[66] *Id.* at 406.

[67] *Id.*

the officers searched the contents of the trunk, found marijuana, and immediately arrested the respondent.[68] The question on which the Supreme Court granted certiorari was "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."[69] Although the Court recognized that a "seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission," [70] the facts did not support such a finding in *Caballes*. The duration of the stop, the Court concluded, was "entirely justified by the traffic offense and the ordinary inquiries incident to such a stop."[71] It should be pointed out that the dog was readily available and additional time was not necessary to secure the presence of the dog.[72] In the Court's view, conducting a dog sniff would not change the character of the stop unless the sniff itself infringed upon the respondent's constitutionally protected interest in privacy.[73] Since there is no Fourth Amendment reasonable expectation of privacy in a dog sniff, the Court found no such constitutionally protected privacy interest here,[74] and therefore the sniff was not a search subject to the Fourth Amendment.[75]

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[68] *Id.*

[69] *Id.* at 407.

[70] *Id.*

[71] *Id.* at 408.

[72] *See id.*

[73] *Id.*

[74] *Id.* ("We have held that any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'").

[75] *Id.* at 408 ("Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)); *see also* Muehler v. Mena, 544 U.S. 93, 101 (holding, in part, that there was no additional seizure within the meaning of the Fourth Amendment, and thus no further justification required for officers' questioning of respondent about her immigration status while executing a search warrant, because respondent's initial detention was lawful and her lawful detention was not prolonged by the questioning).

United States v. Montoya de Hernandez[76] provides a useful framework for a *Terry* analysis in the border area. In this case, a woman entering the country from Bogota, Columbia, was suspected of being a so-called "balloon swallower."[77] She was held for almost sixteen hours before customs officials sought a court order for an x-ray, pregnancy test, and rectal examination, as she refused to use the toilet. During this period, she had not defecated, urinated, or had food or drink.[78] Ultimately, she was taken to a hospital where a physician removed a foreign substance from her rectum.[79] "[O]ver the next four days[, the woman] passed 88 balloons containing a total of 528 grams of 80 percent pure cocaine hydrochloride."[80] To determine the Fourth Amendment reasonableness of the intrusion, the Court balanced the intrusion with the legitimate governmental interest.

In looking at the government interest, the court recognized the government's broad power to conduct border searches to protect the nation by stopping and examining persons coming into the country.[81] "At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives."[82] This power is "qualitatively different at the international border than in the interior."[83] Because of this, the balance favors the government at the border. In this case, the Court highlighted the border concerns by pointing out the "veritable national crisis in law enforcement caused by smuggling of illicit narcotics."[84]

On the intrusion side of the equation, the Court evaluated

[76] 473 U.S. 531 (1985).

[77] *Id.* at 534 (explaining that a balloon swallower is one who hides drugs in their alimentary canal).

[78] *Id.* at 535.

[79] *Id.*

[80] *Id.* at 536.

[81] *Id.* at 538.

[82] *Id.* at 544.

[83] *Id.* at 538.

[84] *Id.*

the sixteen-hour detention and the ultimate examination of the rectum. The court of appeals evaluating the intrusion questioned the "humanity" of holding someone "until her bowels moved, knowing that she would suffer 'many hours of humiliating discomfort.'"[85] The Supreme Court, although finding the "intrusion beyond [a] routine" border search, opted for a lesser "reasonable suspicion" standard as opposed to a higher "clear indication" standard.[86] Finding that the government did have a "particularized and objective basis" [87] to meet the reasonable suspicion standard, the Court turned to the scope to ask if it was reasonably related to the justification. The Court expressed reluctance to get into an after-the-fact evaluation, and stated that the mere fact that there were less intrusive ways to accomplish the objective would not necessarily render the search unreasonable.[88] The Court rejected any time limits and instead opted for a common sense approach to evaluate the intrusion.[89]

Justice Brennan in dissent, upset about the length of detention and methods used in this case, thought that the justification should have been presented to a judicial officer, otherwise a great deal of authority is allocated to low-ranking officials. He argued:

> Something has gone fundamentally awry in our constitutional jurisprudence when a neutral and detached magistrate's authorization is required before the authorities may inspect 'the plumbing, heating, ventilation, gas, and electrical systems' in a person's home, investigate the back rooms of his workplace, or poke through the charred remains of his gutted garage, but *not* before they may hold him in indefinite involuntary isolation at the Nation's border to investigate whether he might be engaged in criminal wrongdoing. No less than those who conduct administrative searches, those charged with investigative duties at the border "should not be the sole

[85] *Id.* at 536.

[86] *Id.* at 541.

[87] *Id.* at 541-42 (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

[88] *Id.* at 542.

[89] *See id.* at 543.

> judges of when to utilize constitutionally sensitive means in pursuing their tasks," because "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy."[90]

Searches of persons such as that which occurred in *Montoya de Hernandez* are regarded as non-routine.[91] These searches require justification—usually reasonable suspicion. It should be pointed out that reasonable suspicion was all that was required in the very intrusive search in *Montoya de Hernandez*. So a border search which falls under the rubric of "routine" requires no further justification other than the fact that it occurs at the border. However, when the search involves greater intrusion, it is classified as "non-routine," and some additional level of justification is required.[92]

The last case involving border searches decided by the

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[90] *Id.* at 555-56 (Brennan, J., dissenting) (footnote omitted) (quoting United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 317 (1972)).

[91] *See id.* at 541-42 (majority opinion); *see also* United States v. Guadalupe-Garza, 421 F.2d 876, 878 (9th Cir. 1970)).

[92] The routine versus non-routine distinction usually focuses on the physical aspects of the search, such as disrobing, exposing intimate body parts, forced intrusions causing pain, and physical contact. *See, e.g.*, United States v. Braks, 842 F.2d 509 (1st Cir. 1988); *see also* Christine A. Coletta, Note, *Laptop Searches at the United States Borders and the Border Search Exception to the Fourth Amendment*, 48 B.C. L. REV. 971, 997-98 (2007).

In *Bradley v. United States*, the search included a pat down of Bradley's dress by a female inspector who then used her fingers to push on Bradley's breasts and inner and outer labia. 299 F.3d 197, 201 (3d Cir. 2002). This pat down was regarded as routine even though it included patting of the clothing outside sensitive areas. *Id.* at 204. Non-routine searches were regarded as strip searches, body cavity searches and pat downs that involved fondling or penetration. *Id.* at 205.

The category of routine border searches includes: pat down searches for weapons or contraband, the removal of shoes and outer garments, the emptying of pockets, purses and wallets, the use of drug sniffing dogs, the cutting of a spare tire, and x-ray searches of inanimate objects. *See* United States v. Cortez-Rocha, 383 F.3d 1093, 1100-01 (9th Cir. 2004) (cutting of spare tire); United States v. Kelly, 302 F.3d 291, 294-95 (5th Cir. 2002) (canine sniff); United States v. Beras, 183 F.3d 22, 24 (1st Cir. 1999) (pat down of defendant); United States v. Sandler, 644 F.2d 1163, 1169 (5th Cir. 1981) (pat down of defendant).

X-ray searches have been considered no more intrusive than a strip search and a more dignified alternative to a body-cavity search. *See* United States v. Vega-Barvo, 729 F.2d 1341, 1348 (11th Cir. 1984).

Supreme Court was *United States v. Flores-Montano*.[93] In *Flores-Montano*, the Court was faced with the question of whether the dismantling and search of a full gas tank needed additional justification.[94] After an initial inspection of a car, it was sent to a secondary inspection station.[95] A customs inspector tapped the gas tank and, when it sounded solid, requested a mechanic to remove the tank.[96] A mechanic arrived within twenty to thirty minutes and then spent between fifteen and twenty-five minutes disconnecting the gas tank from the car.[97] The inspector hammered off Bondo (a putty-like substance used to seal openings) and found thirty-seven kilograms of marijuana blocks.[98]

The Ninth Circuit relied on the *Montoya de Hernandez* routine/non-routine distinction in its analysis of the search, finding that such searches were non-routine and therefore required reasonable suspicion.[99] The court of appeals also relied on *United States v. Molina-Tarazon*,[100] one of its previous decisions. It is interesting to note the reasoning of the court in *Molina-Tarazon* as it specifically dealt with the search of inanimate objects as opposed to a body search. In determining that the search of the gas tank was non-routine, the court looked at three contributing factors: the force used to remove and disassemble the gas tank, the risk of harm involved in the procedure, and the diminished sense of security experienced by the individual whose vehicle was searched in such a manner.[101]

When *Flores-Montano* was before the Supreme Court, the government chose not to argue the need for any justification to disassemble and search the gas tank even though there was

[93] 541 U.S. 149 (2004).
[94] *See id.* at 150.
[95] *Id.*
[96] *Id.* at 151.
[97] *Id.*
[98] *Id.*
[99] *See id.* at 150-52.
[100] 279 F.3d 709 (9th Cir. 2002).
[101] *Id.* at 713-14.

some justification (the tank "sounded solid").[102] In this way, the government deliberately raised the issue of what constitutes routine or non-routine. Keep in mind, a non-routine search would require some justification. However, the Supreme Court rejected the lower court's use of the *Montoya de Hernandez* routine/non-routine distinction when dealing with a search of property as opposed to an individual. The Court, in distinguishing privacy concerns of persons from those of property and, in particular, automobiles, said that "complex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles."[103] In this way, the Court seemed to discount the necessity of determining when a non-bodily search, such as an automobile search, would ever be characterized as non-routine; thus the routine/non-routine distinction appears inapplicable to property border searches. The Court said "[i]t is difficult to imagine how the search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile's passenger compartment."[104] In responding to the danger issue raised in *Molina-Tarazon*, the Court pointed out that gas tank searches could be conducted without damaging the vehicle, the process was easily reversible, and there was no evidence of any accidents resulting from disassembly.[105] Since the facts did not raise the issue of drilling or other permanent destruction of the vehicle, the court refused to consider it.[106] Even though a motorist's interest is "not insignificant" when the government removes, disassembles and reassembles a gas tank, it is outweighed by "the Government's interest of preventing the entry of unwanted persons and effects[, which] is at its zenith at the . . . border."[107] Persons crossing the border have a reduced

[102] *Flores-Montano*, 541 U.S. at 151.
[103] *Id.* at 152.
[104] *Id.* at 154.
[105] *Id.* at 154-56.
[106] *See id.*
[107] *Id.* at 152.

expectation of privacy.[108] Balancing the strong governmental interests and lesser privacy expectations, most searches at the border fall within a routine category. The Court has left a narrow opening if the process would have destroyed the property.[109] Within this possible exception, it appears as though the Court would only consider non-routine searches as those involving body searches, as demonstrated by the facts of *Montoya de Hernandez*, which included an intrusive body cavity search and x-ray examination, as well as a time of detention of over sixteen hours.

A question unresolved by *Flores-Montano* involves whether laptop computers should be regarded as property similar to an automobile. Laptop computers store a great deal of personal effects, including e-mails, photos, and financial material, often spanning many years:

> While not physically intrusive as in the case of a strip or body cavity search, the search of one's private and valuable personal information stored on a hard drive or other electronic storage device can be just as much, if not more, of an intrusion into the dignity and privacy interests of a person. This is because electronic storage devices function as an extension of our own memory. They are capable of storing our thoughts, ranging from the most whimsical to the most profound.[110]

Such capabilities bring to mind the sentiment expressed by the dissenting opinion in *Olmstead v. United States*[111] by Justice Brandeis, recognizing the importance of one's innermost thoughts:

> The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts,

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[108] *See* United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

[109] *Flores-Montano*, 541 U.S. at 154-56.

[110] United States v. Arnold, 454 F. Supp. 2d 999, 1000 (C.D. Cal. 2006), *rev'd*, 523 F.3d 941 (9th Cir. 2008).

[111] 277 U.S. 438 (1928).

> their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[112]

Nevertheless in cases after *Flores-Montano*, circuits have treated the computer as property not requiring any additional justification for searches. For example, the Fourth Circuit in *United States v. Ickes*,[113] recognizing the government's broad authority to conduct border searches, refused to carve out a First Amendment exception for computers at the border.[114] In expressing concern for protecting the sovereign from terrorists, the court stated: "Particularly in today's world, national security interests may require uncovering terrorist communications, which are inherently 'expressive.'"[115] The court was also reluctant to create a standard which would distract customs officials from "policing our borders and protecting our country."[116]

Additionally, the Ninth Circuit in *Arnold*,[117] overturning a lower court decision, interpreted *Flores-Montano* as not distinguishing automobiles from other property. According to the court, because the computer was property, it did not implicate the same concerns as the search of a person.[118] The

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[112] *Id.* at 478 (Brandeis, J., dissenting).

[113] 393 F.3d 501 (4th Cir. 2005).

[114] *Id.* at 506.

[115] *Id.* Ickes argued that *Ramsey* was willing to afford greater protection to expressive material. The Fourth Circuit pointed out that *Ramsey* did not draw such a line. *Ramsey* found it "unnecessary to consider the constitutional reach of the First Amendment in this area in the absence of existing statutory and regulatory protection" *Id.* at 507 (quoting United States v. Ramsey, 431 U.S. 620, 624 (1977)).

[116] *Id.* at 506.

[117] 523 F.3d 941 (9th Cir. 2008).

[118] *See id.* at 945-46; *see also* United States v. McAuley, 563 F. Supp. 2d 672, 677 (W.D. Tex. 2008) ("The Defendant would like the Court to believe that the search of his computer was unauthorized because he maintains a higher degree of privacy in his computer, due to the personal nature of information contained therein. The Defendant claims that any search of a computer is akin to a bodily search of a person and should be categorized as a non-routine search requiring a finding of reasonable suspicion in order to conduct such a search. The Defendant would have this Court impute the same level of privacy and dignity afforded to the sovereignty of a person's being to an inanimate object like a computer. The Court finds this argument without merit. Relying on the Supreme

court further cited *Flores-Montano* for the proposition that the distinction between routine and non-routine was simply inapplicable when dealing with property.[119] In this decision, there was no analysis of the intrusiveness of computer searches. U.S. Customs and Border Protection has elaborated on the search of computers, allowing for the taking, retaining, copying, and sharing of the information on these computers. These computers may be retained for a reasonable time.[120] The policy emphasizes that all this may be done without any individualized suspicion.[121]

In *United States v. Ramsey*,[122] a case involving a border search of an envelope, Justice Rehnquist indicated that a search of the envelope for contraband was different than reading correspondence in the envelope.[123] Arguably, to actually read the correspondence would violate the Fourth Amendment.[124] The Ninth Circuit's reading of *Flores-Montano* puts this idea into question, as any search of property at the border would now seem to be justified without the need for further justification. It bears mentioning that, given the huge intrusion resulting from computer searches, one would think that the balance would tip so as to require some level of justification. This proposition has

Court's reasoning in *Flores-Montano*, this Court cannot equate the search of a computer with the search of a person. The Court finds that the search of a computer is more analogous to the search of a vehicle and/or its contents.").

[119] *See id.* at 945; *see also* United States v. Lawson, 461 F.3d 697, 700 (6th Cir. 2006) ("An x-ray examination of a *person*, it is true, may require some level of suspicion . . . because it may permit greater intrusions into the privacy and dignity of the individual [, b]ut 'the same is not true about x-rays of objects.'") (quoting United States v. Okafor, 285 F.3d 842, 845 (9th Cir. 2002)) (citations omitted); United States v. Hernandez, 424 F.3d 1056, 1057 n.2 (9th Cir. 2005) ("As we explain, this routine/non-routine analytical framework has been denounced by the Supreme Court insofar as searches of property are concerned."); United States v. Camacho, 368 F.3d 1182, 1185 (9th Cir. 2004) ("The Supreme Court has now disapproved *Molina-Tarazon*.").

[120] U.S. CUSTOMS AND BORDER PROTECTION, POLICY REGARDING BORDER SEARCH OF INFORMATION (July 16, 2008), http://www.cbp.gov/linkhandler/cgov/travel/admissibility/search_authority.ctt/search_authority.pdf.

[121] *Id.*

[122] 431 U.S. 606 (1977).

[123] *Id.* at 623-24, 624 n.18.

[124] *See id.* at 624.

been supported by some lower courts which have indicated that it is one thing to allow for a perusal of a document to verify that it contains no contraband but another thing entirely to read a document, such as a diary, which could deal with very personal matters.[125]

Lower courts have expanded on what is appropriate under *Ramsey*. In *United States v. Seljan*,[126] border inspectors as part of a currency interdiction program opened a FedEx box and discovered a letter. They quickly scanned the letter and saw indication of pedophilic activity. The defendant argued that to actually read the letter required some justification. The court found scanning (reading a few words) to be reasonable even without justification. Raising the issue of terrorism, the court said that there should not be "unreasonable constraints" on custom officials examining documents, as such constraints could result in overlooking detection plans for explosive devices, instructions for an attack, chemical formulas for poison, or other types of information related to terrorism.[127] In the en banc decision, Chief Judge Kozinski in his dissent points out that the founders had great concern for protecting "the privacy of thoughts and ideas." This is clearly indicated by the inclusion of the term "papers" in the actual text of the Fourth Amendment. Kozinski further points out that giving custom official free reign to search unless they destroy property or invade the body is

[125] *See, e.g.*, United States v. Soto-Teran, 44 F. Supp. 2d 185, 191 (E.D.N.Y. 1996). For photocopying or closely reading documents, usually reasonable suspicion is required. *See* United States v. Schoor, 597 F.2d 1303, 1306 (9th Cir. 1979); *Soto-Teran*, 44 F. Supp. 2d at 191.

[126] 497 F.3d 1035 (9th Cir. 2007), *aff'd en banc* No. 05-50236, 2008 U.S. App. LEXIS 22056 (Oct. 23, 2008).

[127] United States v. Seljan, 2008 U.S. App. Lexis 22056, at *29 n.9 (9th Cir. 2008) (en banc). In the en banc decision, Judge Callahan concurrence stated, "'[p]articularly in today's world, national security interests may require uncovering terrorist communications, which are inherently expressive.'" *Id.* at *48 (Callahan, J. concurring) (quoting United States v. Ickes, 393 F.3d 501, 506 (4th Cir. 2005)). Judge Callahan concurring also points out that Congress pursuant to 19 U.S.C. § 1583 restricts custom inspectors from searching international mail weighing sixteen ounces or less sent via the U.S. Postal Service. A person could therefore avoid the reading of the contents of her correspondence if she sent it via U.S. Postal Service as opposed to Federal Express. *Id.* at *55-56.

simply too much leeway.[128] Despite Kozinki's eloquence, the Ninth Circuit's reading of *Flores-Montano* would seem to allow for the reading of a laptop's contents without further justification.[129]

It should be reiterated that the only exception with regard to property searches mentioned in *Flores-Montano* was the possibility that some inanimate object searches would become non-routine when they involved the destruction of property. Destruction of property and the reusability of the car appeared to be important factors. The Court in *Flores-Montano* commented in a footnote that they had no reason to consider drilling, as the case involved removal, disassembly, and reassembly.[130] In a Ninth Circuit case after *Flores*, the situation involved the cutting open of a spare tire. The court found that this was not unreasonably destructive, as the vehicle could still be operated safely.[131]

II. TERRORISM AND THE BORDER

In the government briefs for *Flores-Montano*, the issue of terrorism was raised. The United States pointed out that gas tanks could not only be used to smuggle narcotics but also be used as instruments of terror.[132] To emphasize this point, the Government referenced the case of Ahmed Ressam, a would-be terrorist who had explosives hidden in the trunk of his vehicle which were to be detonated at Los Angeles International Airport.[133] The Government argued that if a trunk can be searched without reasonable suspicion but a gas tank cannot be,

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[128] *Id.* at *57-72 (Kozinski, C.J., dissenting).

[129] These cases raise many concerns especially when considering laptop searches at the border. Apparently, the Department of Homeland Security is routinely searching laptops as American reenter the United States from abroad. With the discretion allotted to border patrol agents, it is not surprising that selective ethnic groups could be targeted for more extensive searches. *See* Austin Bogues, *Laptop Searches in Airports Draw Fire at Senate Hearing*, N.Y. TIMES, June 26, 2008, at A17.

[130] United States v. Flores-Montano, 541 U.S. 149, 154 n.2 (2004).

[131] *See* United States v. Cortez-Rocha, 383 F.3d 1093, 1096 (9th Cir. 2004).

[132] Brief for the United States at 18, United States v. Flores-Montano, 541 U.S. 149 (2004) (No. 02-1794), 2003 WL 22873083.

[133] United States v. Ressam, 221 F. Supp. 2d 1252 (W.D. Wash. 2002).

it will encourage terrorists to hide materials in the gas tank.[134] A brief by the Washington Legal Foundation, a public interest law center with its objective of promoting national security, also strongly argued for suspicionless searches as an important means to prevent terrorist attacks. Thus, the Court was certainly made aware of the terrorist threat.[135]

In overturning *United States v. Molina-Tarazon*,[136] which required reasonable suspicion for a fuel tank search, the Court may have been considering the terrorist threats when it said "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."[137] The concern over terrorists at the border can also be found in the circuits. The Third Circuit states: "[I]t is beyond peradventure, as the Seventh Circuit has noted, that 'the events of September 11, 2001, only emphasize the heightened need to conduct searches' at our borders."[138]

Terrorism objectives fall comfortably into the category of cases involving so-called "special needs" searches.[139] The Government made an unsuccessful argument of special needs in *City of Indianapolis v. Edmond*.[140] In *Edmond*, a traffic checkpoint program, using roadblocks, designed to interdict illegal narcotics was held to violate the Fourth Amendment because its primary purpose was to detect crime.[141] However, once it is established that there are needs beyond normal law enforcement, balancing to determine reasonableness kicks in. In conducting this balance, courts consider the government interest, including the weight and immediacy of the government objective, as well as whether the search will accomplish this

[134] Brief for the United States, *supra* note 132, at 18.

[135] *See* Brief of Wash. Legal Found. & Allied Educ. Found. as Amici Curiae Supporting Petitioner, United States v. Flores-Montano, 541 U.S. 149 (2004) (No. 02-1794), 2003 WL 22873084.

[136] 279 F.3d 709 (9th Cir. 2002).

[137] United States v. Flores-Montano, 541 U.S. 149, 152 (2004).

[138] United States v. Bradley, 299 F.3d 197, 202 (3d Cir. 2002) (quoting United States v. Yang, 286 F.3d 940, 944 n.1 (7th Cir. 2002)).

[139] *See supra* notes 50-53 and accompanying text.

[140] 531 U.S. 32, 48 (2000).

[141] *Id.*

objective. The nature and character of the intrusion is weighted against this government interest. It is interesting to note that the *Edmond* court in dicta indicated that a roadblock could be employed without a warrant or reasonable suspicion to "thwart an imminent terrorist attack."[142]

A case involving a search in the New York subway to address terrorism concerns presents a useful illustration of this balancing, as well as a special needs search.[143] The court indicated that terrorism was indeed a special need.[144] Moreover, the court felt it was not necessary to demonstrate any specific impending threat and instead talked about the objective of preventing a pervasive threat from spreading.[145] Further, in light of the fact that there were thwarted plots in the New York subway as well as recent bombings in Madrid, London, and Moscow, the threat was imminent and the risk high. Although the court recognized the Fourth Amendment protects an individual's right in the contents of packages brought into subways, it felt the intrusion was not great: passengers received notice of the search and could decline the search as long as they left the subway, and the search was limited only to containers that could contain explosives and to only a visual inspection unless it was necessary to manipulate.[146] Further, the officers would not read printed or written material or request any personal bodily inspection.[147] The search itself only lasted a matter of seconds, and there was no danger of the arbitrary use of power and no discretion exercised by the police because they stopped everyone.[148] With regard to the effectiveness of the search, the court gave great deference to law enforcement officials who had "'a unique understanding of, and responsibility

[142] *Id.* at 44.

[143] *See* MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006).

[144] *See id.* at 263.

[145] *See id.* at 272. *See also* Board of Education v. Earls, 536 U.S. 822 (2002) (employing the same approach and speaking of a general threat resulting from a pervasive drug problem among our nation's youth as sufficient immediacy).

[146] *MacWade*, 460 F.3d at 273.

[147] *Id.*

[148] *Id.*

for, limited public resources, including a finite number of police officers.'"[149] Therefore, the court did not inquire greatly into the effectiveness, instead opting to determine if it was reasonably effective to accomplish the government objective of deterring and detecting a terrorist attack on the subway system.[150] The fact that searches were done at random subway stations did not alter its effectiveness because expert testimony indicated that terrorists want predictable and vulnerable targets and the random nature of the program generated uncertainty, which deters attacks.[151]

The case of *Tabbaa v. Chertoff*[152] deals squarely with issues of terrorism at the border and probably describes the present state of Fourth Amendment doctrine at the border. The case was a civil action in which the plaintiffs claimed, among other things, that their Fourth Amendment rights were violated by the border patrol.[153] Based on intelligence, the U.S. Bureau of Customs and Border Patrol planned an inspection operation to carefully screen individuals who attended the Reviving the Islamic Spirit (RIS) Conference at the Sky Dome in Toronto, Canada.[154] It should be noted that an estimated 13,000 people from across North America attended the RIS Conference.[155] The intelligence indicated that persons with terrorist ties as well as known terrorists would be attending the conference.[156] Everyone who attended, upon their re-crossing the border, was subject to a screening procedure which permitted border officials

[149] *Id.* (quoting Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 454 (1990)).

[150] *Id.* at 273-75.

[151] It should be pointed out that even though the justification for these searches is to protect our national security against the threat of terrorism and not to obtain evidence to use in criminal prosecutions, the evidence resulting from such searches is often used in ordinary (non-terrorist) criminal prosecutions. *See* Robert Bloom & William J. Dunn, *The Constitutional Infirmity of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment*, 15 WM. & MARY BILL RTS. J. 147, 193 (2006).

[152] 509 F.3d 89 (2d Cir. 2007).

[153] *Id.* at 91.

[154] *Id.* at 93-94.

[155] *Id.* at 94.

[156] *Id.* at 93.

to fingerprint and photograph them.[157] Plaintiffs, who had attended the conference for religious reasons, had no criminal records and there was no evidence they had committed a crime or were associated with terrorists.[158] Nevertheless, plaintiffs, after they had affirmatively indicated they had been to the conference, were ordered to pull their cars into a separate area and enter a nearby building.[159] While their cars were searched, the plaintiffs were frisked, questioned, fingerprinted, and photographed. Each of the plaintiffs was "detained and searched for between four and six hours."[160] The frisk involved CBP officers forcefully kicking the plaintiffs' feet open and almost knocking them to the ground in order to effectuate the search.[161] Plaintiffs were not, however, subject to strip, body cavity or involuntary x-ray searches.[162]

The issue before the court in *Tabaa* was whether the detention and search was so invasive as to be beyond a routine border search. The Second Circuit was asked to determine the precise line between what is routine and what is not routine.[163] The court has held that "[r]outine searches include those searches of outer clothing, luggage, a purse, wallet, pockets, or shoes which, unlike strip searches, do not substantially infringe

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[157] *Id.* at 93-94.

> In response to this intelligence information, CBP prepared an Intelligence Driven Special Operation ("IDSO"). An IDSO is a directive to particular ports of entry to undertake special enforcement actions to meet specific concerns raised by intelligence information. Under the IDSO in this case, the Buffalo port of entry, among others, was instructed to identify and examine persons associated with the RIS conference or other similar conferences taking place in Toronto who sought entry to the United States. The Buffalo port was directed to contact the National Targeting Center ("NTC") of CBP if persons identified in the IDSO were encountered in order to determine whether the individuals posed a particular threat.

Tabbaa v. Chertoff, No. 05-CV-582S, 2005 WL 3531828, at *3 (W.D.N.Y. Dec. 22, 2005) (citations omitted).

[158] *Tabbaa*, 509 F.3d at 94.

[159] *Id.*

[160] *Id.* at 95.

[161] *Id.*

[162] *Id.* at 98-99.

[163] *See generally* Unites States v. Irving, 452 F.3d 110, 123 (2d Cir. 2006).

on a traveler's privacy rights."[164] More invasive searches, like "strip, body cavity, or involuntary x-ray searches" are not routine and require reasonable suspicion level of justification.[165] The spectrum between a full body cavity search and the time of detention in *Montoya de Hernandez* and quick searches at the border of clothing and luggage usually accomplished in a short time is great. The question the court faced in this case was: Where does this terrorist-style processing fall within the spectrum?

Plaintiffs argued the search was not routine.[166] First, plaintiffs alleged that being selected for intrusive questioning, photographing and fingerprinting in a separate building with other Muslims created a stigma, whereas searches of cars or luggage to which everyone is subject does not create such a stigma.[167] They further argued that CBP threatened to detain them until they cooperated, and finally argued that a time of detention of four to six hours should not be considered routine.[168] The court analyzed each aspect of the procedure taken by the CBP and concluded that none of the factors were non-routine.[169] Even the kicking of the feet was not as invasive as lifting a shirt.

The court did, however, recognize that the cumulative effect of several routine searches could reach the level of non-routine, but did not find such a cumulative effect in this case.[170] Stigmatization did not reach the level of a body cavity or strip

[164] *Id.* (citing United States v. Grotke, 702 F.2d 49, 51-52 (2d Cir. 1983)).

[165] United States v. Montoya de Hernandez, 473 U.S. 531, 541 n.4 (1985).

[166] *Tabbaa*, 509 F.3d at 97-101.

[167] *Id.* at 98-99.

[168] *Id.* at 99-101.

[169] *Id.* at 101. *See* United States v. Silva, 715 F.2d 43, 47 (2d Cir. 1983) (noting that questions about citizenship, the length and purpose of an applicant's trip to Canada, and what items she had acquired or bought in Canada are all routine). Likewise, pat-down searches have repeatedly been found to be routine, even when they were followed by the lifting of an applicant's shirt or forced removal of shoes. *See, e.g.*, United States v. Charleus, 871 F.2d 265, 268 (2d Cir. 1989) (noting "the light touching of appellant's back followed by a lifting of his shirt arguably straddles the line between the two categories of border searches," it can be considered a routine search because the "potential indignity . . . failed to compare with the much greater level of intrusion associated with a body or full strip search.").

[170] *Tabbaa*, 509 F.3d at 99.

search or involuntary X-ray as in *Montoya de Hernandez*. "Because the decisive factor in the analysis is invasiveness of privacy—not overall inconvenience . . . searches of plaintiffs, considered in their entirety, were routine in the border context, albeit near the outer limits of what is permissible absent reasonable suspicion."[171]

With regard to the threatening behavior, the court cited *Ramsey* for the proposition that threatening extended detention for failing to comply with screening measures is "an important aspect of the 'longstanding right of the sovereign to protect itself' at the border, and therefore is 'reasonable simply by virtue of the fact that [it] occur[s] at the border.'"[172] "In other words, border crossers cannot, by their own non-compliance, turn an otherwise routine search into a non-routine [search]."[173]

The four to six hour time of detention falls somewhere between the sixteen hours in *Montoya de Hernandez* and the one-hour delay in *Flores-Montano*.[174] The court asked itself whether the detention was reasonably related to the justification for it.[175] Although the court recognized the inconvenience of the four to six hour detention, it suggested that such a time-frame, by itself, would not render the search non-routine especially in the border context.[176]

CONCLUSION

Congress has shown a willingness to defer to the executive branch. After *Hamdan* indicated that a specific Congressional enactment was required,[177] Congress acted accordingly. The

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[171] *Id.*

[172] *See id.* at 100 (quoting United States v. Ramsey, 431 U.S. 606, 616 (1972) (alterations in original)).

[173] *See id.*

[174] *See* United States v. Flores-Montano, 541 U.S. 149, 155 n.3 (2004) ("Respondent points to no cases indicating the Fourth Amendment shields entrants from inconvenience or delay at the international border.").

[175] *See Tabbaa,* 509 F.3d at 100 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 542 (1985)); s*ee also* United States v. Sharpe, 470 U.S. 675, 682-85 (1985).

[176] *See Tabbaa*, 509 F.3d at 100-01.

[177] *See supra* notes 14-18 and accompanying text.

Court overturned the act, in part, in *Boumediene*.[178] Recently Congress has once again shown deference to the executive branch by allowing for expansion of its surveillance power, including immunity for phone companies that cooperated with the National Security Agency.[179] The Court appears to be the only branch of government that will review the executive power in accordance with the checks and balances envisioned by our founding ancestors. One is reminded of Justice O'Connor's words in *Hamdi*, in which she warned that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[180]

Will the reasonableness clause of the Fourth Amendment take into account terrorism concerns?[181] The Supreme Court has only specifically addressed the Fourth Amendment and its relation to national security issues such as terrorism in 1972. In *United States v. United States District Court (Keith)*,[182] the Court sought to address executive branch surveillance in a national security context. In *Keith*, electronic wiretaps were used against U.S. citizens who were suspected of conspiracy to bomb U.S. government property.[183] These wiretaps were authorized by the U.S. Attorney General but without any court authorization.[184] Justice Powell for the unanimous Court balanced the government interest to protect national security against the invasion on individual privacy.[185] While the Court was prepared to accept some different Fourth Amendment rules in this context, it emphasized that some Fourth Amendment

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[178] Boumediene v. Bush, 128 S. Ct. 2229 (2008). *See supra* note 18 and accompanying text.

[179] *See* Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. TIMES, July 10, 2008, at A1.

[180] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2006).

[181] *See* John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 810-11 (2006) ("[F]or reasonableness to work in the interpretation of the right that limits police authority to search and seize, courts must put a thumb on the government's side of the scale when they craft doctrine.").

[182] 407 U.S. 297 (1972).

[183] *Id.* at 299-300.

[184] *Id.* at 299.

[185] *Id.* at 314-21.

safeguards were still necessary (e.g., warrants).[186]

Is there a greater acceptance by the Court of police power since 9/11? To the extent that the Court has discussed this, it has indicated a greater sensitivity to police methods. In *United States v. Drayton*,[187] the Court pointed out greater cooperation in the age of terrorism between citizens and the police: "[B]us passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them."[188] As previously mentioned, *City of Indianapolis v. Edmonds*,[189] a case involving a traffic checkpoint program designed to interdict illegal narcotics, was held to violate the Fourth Amendment because its primary purpose was to detect crime. Nonetheless, the Court in dicta mused that a suspicionless roadblock would be permissible if employed to "thwart an imminent terrorist attack."[190]

This article has analyzed the likely outcomes of the law and the flexibility with which the Fourth Amendment can be manipulated to accomplish the objectives of limiting individual rights at the border. The reasonableness approach to the Fourth Amendment, with its balancing analysis, supplies the method for the Court to consider terrorism. Justice Brennan, dissenting in *New Jersey v. T.L.O.*,[191] described this balancing as "Rohrschach-like" and characterized the Court's reasoning as "preordained."[192] With the flexibility inherent in such balancing, one is reminded of the words of Justice Felix Frankfurter: "It is true also of journeys in the law that the place you reach depends

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[186] For a comprehensive discussion of *Keith*, the executive's use of warrantless NSA surveillance and the Fourth Amendment, see Bloom & Dunn, *supra* note 151. In response to *Keith* and President Nixon's abuse of power during the Watergate scandal, Congress conducted an extensive inquiry into the activities of the nation's intelligence agencies (the Church Committee hearings). The result of these hearings was the passage of the Foreign Intelligence Surveillance Act (FISA) in 1978. *See id.* at 155-56.

[187] 536 U.S. 194 (2002).

[188] *Id.* at 205.

[189] 531 U.S. 32 (2000).

[190] *Id.* at 44.

[191] 469 U.S. 325 (1985) (Brennan, J., dissenting).

[192] *Id.* at 358.

on the direction you are taking. And so, where one comes out on a case depends on where one goes in."[193]

To the extent that the American public has been polled since 9/11, there is generally support for greater security measures even if these measures infringe on individual privacy.[194] Will the reasonable balancing allowed by the Fourth Amendment provide for the insinuation of popular sentiment into court decisions? The courts have always provided a safeguard for constitutional protection. The protection remains regardless of public outcry. The Constitution was designed to protect law abiders and law breakers. The words of Chief Justice Tauro of the Massachusetts Supreme Judicial Court, in declaring that the death penalty was unconstitutional under the Massachusetts Constitution, come to mind:

> [J]udges cannot look to public opinion polls or election results for constitutional meaning as has been suggested. It is our duty to interpret the Constitution to the best of our personal abilities and judgment. Our constitution requires that we be 'as free, impartial and independent as the lot of humanity will admit.' If we succumb to contemporary public opinion we lose that requisite independence and impartiality demanded of us and fail totally in our purpose.[195]

Terrorism has changed the landscape. Given the enormous dangers to life and property from terrorist acts, it has increased the government's interest exponentially.[196] In analyzing terrorism, we are forced to make accommodations. As Justice Scalia wrote in *Anderson v. Creighton*, "regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable."[197] This is also true in our

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[193] United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

[194] *See* Robert C. Power, *Changing Expectations of Privacy and the Fourth Amendment*, 16 WIDENER L.J. 43, 44 (2006).

[195] Commonwealth v. O'Neal, 339 N.E.2d 676, 692 (Mass. 1975) (quoting MASSACHUSETTS DECLARATION OF RIGHTS, art. 29).

[196] *See* MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006).

[197] 483 U.S. 635, 643-44 (1987).

Fourth Amendment analysis of reasonableness.

Nevertheless, I am reminded of Justice Potter Stewart's words. Justice Stewart, in 1971, referencing the Fourth Amendment, observed:

> [T]his basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won . . . a right of personal security against arbitrary intrusions by official power. If times have changed, . . . the changes have made the values served by the Fourth Amendment more, not less, important.[198]

The balancing of individual rights with security concerns was addressed by Israel's Chief Justice of the Supreme Court Aharon Barak in 2004, when he ordered the removal of a portion of the West Bank Security Wall due to its burden on the Palestinians:

> We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it any easier . . . This is the destiny of a democracy: she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance.[199]

If the war on terrorism is fought in a way that ignores our democratic ideals, we have lost the war.

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[198] Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (footnote omitted).

[199] Gareth Evans, President, Int'l Crisis Group, 2005 Wallace Wurth Lecture at the University of New South Wales, Sydney: The Global Response to Terrorism 10 (Sept. 27, 2005) (alteration in original) (transcript available at http://www.unsw.edu.au/news/pad/articles/2005/sep/FINALWurthLectureTerrorismGE.pdf); *see also* Michael S. Greco, President's Message, *A False Choice: The American People Should Not Be Forced to Choose Between Freedom and Security*, A.B.A. J., April 2006, at 6, 6 ("The [P]resident has a sacred obligation under the Constitution to protect both the nation's safety and its constitutionally-guaranteed freedoms–and to honor the doctrine of separation of powers. His failure to do so would compromise the very principles and ideals that we are fighting to protect.").