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COMMENTS

PICTURE PERFECT? X-RAY SEARCHES AT THE UNITED STATES BORDER REQUIRE GUIDANCE

INTRODUCTION

Your plane touches ground in America: land of the free, home of the brave. You left Colombia with nothing but a tattered carry-on suitcase, the dress on your back, and a heart full of hopes and dreams – dreams of freedom, education, and opportunity. You get off the plane and are thrust into a whirlwind of hurried people, bright lights and unfamiliar scents. As you head toward Customs, your heart skips a beat as you think of the good fortune that lies ahead. It won't be easy, but you are in America, and you can do anything.

The man at Customs shouts at you. Your grasp on the English language is shaky at best, and you are at a loss for words. You sweat. You start mumbling, but your story – that you are going to stay with your sister, that you want to go to school and get a job – appears nonsensical in your broken English. A woman comes over and briskly pats you down. She finds nothing. You realize then that you are being herded away, taken to a small, dimly lit room. The shouting continues, but you don't understand, and you don't know how to defend yourself. Cold hands are all over you, searching endlessly for something to validate their suspicion. She is prodding, poking at your body, and you feel ashamed, inhuman. You feel your dreams tearing at the seams as she rips away your clothes. She forces you to bend over.

* * *

The United States Customs and Border Protection ("Customs") recently implemented a novel program that eliminates the need to subject a suspected internal drug smuggler to intrusive and undignified searches. This novel program pairs Customs with the Department of Radiology at the University of Miami School of Medicine ("Department of Radiology") and attempts to prevent illegal narcotics from being smuggled into the United States. Instead of having to perform invasive strip or body cavity

searches, Customs agents can X-ray the abdomen of an internal drug smuggling suspect, commonly known as a "balloon swallower." The X-rays, taken at the airports, are transferred instantly to radiologists who are able to determine whether the suspect swallowed drugs in order to smuggle them into the United States. The customs agents have a reply within a half an hour, and the need for degrading searches is eliminated.

Part I of this note details how a balloon swallower operates to smuggle illegal narcotics into the United States. Part II discusses the background of the Fourth Amendment, and it provides a brief history of non-routine border searches and the conflict among the circuits surrounding the level of suspicion required for customs agents to conduct these searches. This part also introduces the notions of intrusion and indignity commonly associated with non-routine border searches. Part III analyzes the partnership between Customs and the Department of Radiology and the objectives the partnership has at its origins. This section also describes how these mobile X-ray units operate. Part IV asserts what Customs officials must do in order to ensure that X-ray searches are not unreasonable or in violation of the Fourth Amendment. The reasonableness of an X-ray search must be evaluated according to its level of intrusiveness, and the level of intrusiveness will subsequently determine the level of suspicion required before this type of search can be conducted. It addresses the factors that can cause an agent to have reasonable suspicion, as well as the safeguards Customs officials must enact in order to prevent abuse of the system.

I. WHAT IS A BALLOON SWALLOWER?

A major trend in smuggling illegal narcotics into the United States involves the hiring of non-American drug runners to bring cocaine, heroin and other drugs into this country through their digestive tract.¹ These smugglers are referred to as "swallowers," "internal smugglers," "alimentary canal smugglers" or "internal drug carriers."² While a large number of swallowers entering the

1. *United States v. Vega-Barvo*, 729 F.2d 1341, 1350 (11th Cir. 1984) (explaining that a drug runner is typically a non-American citizen who will smuggle cocaine into the United States through his digestive tract); Alison Mylander Gregory, *Smugglers Who Swallow: The Constitutional Issues Posed by Drug Swallowers and Their Treatment*, 56 U. PITT. L. REV. 323, 327 (1994) (describing that a typical internal drug smuggler generally swallows heroin or other drug mixtures into a balloon or condom).

2. Gregory, *supra* note 1, at 324.

United States smuggle heroin from Nigeria,³ other commonly known countries where drug smuggling is prevalent and where smugglers swallow drugs in an effort to bring them into the United States are Colombia⁴ and Jamaica⁵.

Internal drug smuggling is "exceedingly difficult to detect."⁶ A typical swallower imports illegal narcotics to the United States by ingesting them through rubber objects.⁷ Generally, the drugs are held in either balloons or the fingers of rubber gloves and then covered in aluminum foil.⁸ This contraption is next wrapped in another balloon of prophylactic rubber which is then swallowed by the smuggler who subsequently enters the United States and excretes the balloons.⁹ A typical swallower can carry up to seventy of these balloons.¹⁰ Although a majority of alimentary canal smugglers are men, whose larger size generally allows them to ingest greater amounts of narcotics,¹¹ women are also involved¹² in this dangerous but efficient trend in drug smuggling. A single smuggler can average a net weight of about 300 grams of the drug by smuggling internally.¹³ Balloon swallowers most likely smuggle narcotics because of the lucrative financial reward they receive upon a successful smuggle.¹⁴ A swallower can earn anywhere from a hundred dollars to a few thousand dollars for completing a trip,¹⁵ and the amount of money earned is generally proportional to the weight of drugs smuggled.¹⁶

Swallowers are difficult to detect due to their unique method of operation,¹⁷ and Congress has recognized the challenge of catch-

3. *Id.* at 328.

4. *United States v. Montoya de Hernandez*, 473 U.S. 531, 532 (1985).

5. *Kaniff v. United States*, 2002 WL 370210, N.D.Ill., Mar 08, 2002.

6. *Montoya*, 473 U.S. at 538-39.

7. *United States v. Mejia*, 770 F.2d 1378, 1380 n.1 (Ct. App. La., 1983).

8. *Id.*

9. *Id.*

10. Gregory, *supra* note 1, at 327 (noting that a swallower will generally ingest approximately seventy drug-filled balloons or condoms).

11. *Id.* at 330-31.

12. *Id.*

13. *Id.* at 327.

14. *Id.* at 328 (explaining that despite the war on drugs, drug smuggling continues to be a productive business due to the "financial rewards" given to the successful smuggler).

15. *Id.* at 329.

16. *Id.*

17. *United States v. Vega-Barvo*, 729 F.2d 1341, 1350 (11th Cir., 1984) (discussing that a customs agent's suspicion will be stirred by different circumstances because swallowers follow a unique method of operation).

ing these smugglers.¹⁸ Because there are no visible external signs of alimentary canal smuggling, inspectors may have difficulty in obtaining the requisite amount of probable cause needed to arrest or search.¹⁹ Furthermore, the traditional use of drug detecting canines, patdowns, and searches of luggage are all ineffective methods to detect swallowed drugs.²⁰ Thus, the Supreme Court has held that, in order to protect the integrity of the United States border, and in light of the difficulties in detecting alimentary drug smuggling, a customs agent is entitled to stop, search and inspect any person whom he believes is carrying contraband.²¹ Such a search, however, triggers concerns under the Fourth Amendment.

II. SEARCHES AND THE FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution provides for "the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."²² The Supreme Court has traditionally rooted its Fourth Amendment analysis on searches of property.²³ However, the Court abandoned the principles of property law that limited the application of the Fourth Amendment in *Katz v. United States*²⁴ and instead expanded its scope to "protect[] people, not places."²⁵ The majority in *Katz* upheld the idea that a man will "remain free from unreasonable searches and seizures" wherever he is.²⁶ In his concurrence, Justice Harlan established the now famous two-part test used to determine whether a protected privacy interest exists: (1) whether one exhibited an "actual (subjective) expectation of privacy" and (2) whether that "expectation be one that society is prepared to recognize as 'reasonable.'"²⁷ In essence, the Fourth Amendment is violated if state action impinges upon one's actual

18. *United States v. Montoya de Hernandez*, 473 U.S. 531, 532 (1985) (remarking that Congress, in recognition of the difficulties that internal drug smugglers detect, enacted Title 19 U.S.C. § 1582 which declares that "all persons coming into the United States from foreign countries shall be liable to detention and search authorized . . . [by customs regulations].").

19. *Id.* at 541.

20. Gregory, *supra* note 1, at 324.

21. *Montoya*, 473 U.S. at 539.

22. U.S. CONST. amend. IV.

23. Stephen Vina, *Virtual Strip Searches at Airports: Are Border Searches Seeing Through the Fourth Amendment?*, 8 TEX. WESLEYAN L. REV. 417, 422 (2002).

24. 389 U.S. 347 (1967).

25. *Id.* at 351.

26. *Id.* at 359.

27. *Id.* at 361 (Harlan, J., concurring).

expectation of privacy, as well as one's reasonable expectation of privacy.²⁸

Neither the majority nor the concurring opinions in *Katz*, however, clearly establish the definition of a search. Furthermore, in the case of an internal drug smuggler, the kind of action considered a violation of one's actual and reasonable expectation of privacy is still questionable. A search has two components, beginning with the "planning of the invasion" and continuing until there is "'effective appropriation' of the fruits of the search" to prove the offense.²⁹ Whenever the government executes this course of conduct, the Fourth Amendment is likely to apply.³⁰ As for the search of one's body, the court in *Skinner v. Railway Labor Executives' Association*³¹ held that a Fourth Amendment search occurs when the Government must extract physical evidence from a person's body, and/or if private medical facts may be revealed about the person by collecting that evidence.³²

Searches at the United States border, however, are an exception to the traditional Fourth Amendment requirements. The task of protecting our nation's borders is one burdened with an incalculable amount of responsibility.³³ The border search thus prospers as an exemption to the Fourth Amendment due to unique policy considerations that recognize the demanding duty of protecting the United States' borders.³⁴ The United States Government "has exercised the right to control the movement of people and goods across our national boundaries," even at the nation's outset.³⁵ In an unbroken chain of precedent, the Supreme Court has continuously held that routine inspections at the border in order to "effectuate this control" are not unreasonable searches in violation of

28. *Vina*, *supra* note 24, at 423.

29. *United States v. Davis*, 482 F.2d 893, 896 (9th Cir. 1973).

30. *Id.* at 897.

31. 489 U.S. 602 (1989).

32. *Greg Star, Airport Security Technology: Is the Use of Biometric Identification Technology Valid Under the Fourth Amendment?*, 20 TEMP. ENVTL. L. & TECH. J. 251, 259 (2002).

33. *United States v. Bravo*, 295 F.3d 1002, 1003-4 (9th Cir. 2002) (explaining that guarding our nation's borders is a job that carries with it an innumerable amount of responsibility, and it is necessary to guard the United States borders in order to protect security, health, and public well being).

34. *Vina*, *supra* note 24, at 424.

35. *United States v. Asbury* 586 F.2d 973, 975 (2d Cir. 1978) (citing *United States v. Glaziou*, 402 F.2d 8, 12 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); *Landau v. United States Attorney for Southern District of New York*, 82 F.2d 285, 286 (2d Cir. 1936), *cert. denied*, 298 U.S. 665 (1936)).

the Fourth Amendment.³⁶ Thus, border searches have a “unique” position in constitutional law,³⁷ arising from the belief that our international airports are viewed as “international gateways.”³⁸

In order to protect national security, it is considered reasonable to require one entering this country to identify that both himself and his belongings are legally able to come into the United States.³⁹ Customs agents are entrusted with the great task of defending our borders against those who attempt to arrive “without authorization” or for “improper purpose,”⁴⁰ such as those arriving with an agenda to further crime, transport hazardous substances to the United States, or threaten the safety and security of American citizens.⁴¹ Thus, routine inquiries regarding one’s reasons for coming to the United States and one’s travel plans incidental to his visit are questions that may be asked upon arrival even without any suspicion of wrongdoing.⁴² The Supreme Court has found that this theory holds particularly true when a customs agent recognizes peculiar responses to questions, as well as “unusual conduct, demeanor, or appearance.”⁴³

However, although the United States has a great interest in protecting itself at its borders,⁴⁴ some limitations do prevent unnecessary infringements on the privacy of foreigners entering our country. The next section will discuss the differences between routine and non-routine searches at the border.

36. *Asbury*, 586 F.2d at 975.

37. *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984) (stating that border searches “have a unique status in constitutional law” as they “are not subject to the probable cause and warrant requirements of the Fourth Amendment”).

38. *Bradley v. United States*, 164 F.Supp. 2d 437, 447-48 (D.N.J. 2001) (noting that because international airports are also considered to be international gateways, Customs agents at these airports are thus subject to the requirements and standards that apply to a border search).

39. *Thomas v. United States*, 372 F.2d 252, 254 (5th Cir. 1967).

40. *United States v. Mejia*, 720 F.2d 1378, 1381 (5th Cir. 1983).

41. *United States v. Bravo*, 295 F.3d 1002, 1006 (2001) (citing *United States v. Okafor*, 285 F.3d 842, 845 (9th Cir. 2002)).

42. *Mejia*, 720 F.2d at 1381 (explaining that even without a suspicion of illegal activity, the customs agent is not only entitled to ask questions but is also entitled to responses to his questions and does not have an obligation to put the person being questioned at ease).

43. *Id.*

44. *Bradley v. United States*, 164 F. Supp. 2d 437, 448 (D.N.J. 2001) (noting that a person coming into the United States has less privacy rights upon entering the country as opposed to a person already located in the interior of this country because of the interest the United States has in protecting itself at its borders).

A. *Routine Versus Non-routine Border Searches*

Congress has granted Customs officers virtually limitless authority to search and detain foreigners upon their arrival to the United States.⁴⁵ A customs agent need not have an objective justification, probable cause, or a warrant⁴⁶ to conduct a search, because the officer is perceived to be regulating the collection of duties and preventing contraband from entering this country.⁴⁷ Searches of one's luggage or clothing, patdowns, and frisks for weapons are considered routine searches that an agent may conduct regardless of his level of suspicion.⁴⁸ Because these searches only subject an entrant to a negligible amount of intrusion or indignity,⁴⁹ and because the person or item at inquiry is attempting to enter the United States from a foreign nation,⁵⁰ these types of searches are deemed reasonable.

Non-routine searches, on the other hand, are subject to certain limitations. A search becomes "non-routine" when it extends beyond the type of "routine" customs stop previously described.⁵¹ Whereas most people expect to have their luggage checked, they do not expect to be subjected to the intrusiveness of a strip search, a body cavity search, or an X-ray search.⁵² In order to conduct any of the latter non-routine border searches, a Customs agent is required to have some suspicion of drug smuggling or other illegal activity.⁵³ The question then becomes one of determining what exactly constitutes "suspicion".

B. *Definition of Suspicion and Other Tests Vary Among Circuits*

Over the last several decades, the circuits have offered differ-

45. *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984).

46. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (describing that the Executive Branch, since the origin of this Republic, has been granted by Congress "plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country").

47. *Id.*

48. *Vina*, *supra* note 24, at 425.

49. *Id.* at 426.

50. *Id.*

51. *United States v. Asbury* 586 F.2d 973, 975 (2nd Cir. 1978).

52. *Id.*

53. *Id.* at 975-6 (describing that a border official cannot perform a search that will cause a great intrusion of privacy unless he has "a suspicion of illegal concealment that is based upon something more than the border crossing, and the suspicion should be substantial enough to make the search a reasonable exercise of authority").

ing opinions regarding not only the definition of suspicion, but also the tests regarding how to determine suspicious activity. In 1978, the Second Circuit held in *U.S. v. Asbury*⁵⁴ that, to conduct a non-routine search, a border official must have a suspicion of illegal concealment that is substantiated beyond mere border crossing, and this suspicion must be confirmed prior to taking action beyond a routine search.⁵⁵ This opinion varied not only from the Ninth Circuit's decision that there must be "real suspicion," but also from the Fifth Circuit's adherence to its own "reasonable suspicion" standard.⁵⁶ The *Asbury* court relied on the theory that reasonableness should be determined by utilizing all the facts of each specific case.⁵⁷ The court considered factors such as excessive nervousness, unusual conduct, an informant's tip, information derived from a traveling companion, computerized information showing pertinent criminal propensities, and loose-fitting or bulky clothing to be indicative of illegal activity.⁵⁸ Other factors the court considered were an itinerary suggestive of wrongdoing, discovery of incriminating matter during routine searches, lack of employment or a claim of self employment, indications of drug addiction, inadequate luggage, and evasive or contradictory answers.⁵⁹ While the court recognized that the question of whether a search is reasonable should be determined by balancing the suspicion of the customs officer against the invasiveness or offensiveness of the intrusion,⁶⁰ this decision failed to establish a clear guideline as to when a non-routine search is acceptable.

Several years later, the question was addressed again in two other landmark cases in Louisiana and Florida. In 1983, the Fifth Circuit appeared to parallel the *Asbury* case in *U.S. v. Mejia*,⁶¹ also stating that as a search becomes more intrusive, it must be accompanied by a correspondingly higher level of suspicion of illegal activity.⁶² However, the Fifth Circuit adhered to its established

54. *Id.* at 975.

55. *Id.* at 975-76.

56. *Id.* at 976. The Ninth Circuit's "real suspicion" standard comes from *United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970), and the Fifth Circuit's "reasonable suspicion" standard comes from *United States v. Smith*, 557 F.2d 1206, 1208 (5th Cir. 1977).

57. *Id.*

58. *Id.* at 976-77.

59. *Id.*

60. *Id.* at 976.

61. *United States v. Mejia*, 720 F.2d 1378 (5th Cir. 1983).

62. *Id.* at 1382. The court describes that "the greater the level of suspicion, the more intrusive the search may be." *Id.*

"reasonable suspicion" standard.⁶³ In that case, Mejia, the defendant, arrived in New Orleans from Colombia and was subjected to a primary inspection by a customs official.⁶⁴ He was subsequently sent to a secondary area for more questioning because he did not speak English and "was arriving from a country known to be a source of narcotics."⁶⁵ The customs officers noticed several discrepancies in Mejia's statements, leading them to suspect that he was an internal drug smuggler.⁶⁶ At the request of the officers, Mejia consented to an X-ray exam, which revealed numerous foreign bodies in his abdomen that were later found to contain cocaine.⁶⁷ The defendant was consequently convicted of importing and possessing cocaine, but he contended that his consent to the X-ray exam was invalid because it was coerced under a totality of the circumstances test.⁶⁸

The *Mejia* court elaborated upon several factors. It first acknowledged previous decisions and upheld the idea of "reasonable suspicion" in order to conduct a non-routine border search.⁶⁹ Furthermore, it stated that one can consider information based on a smuggler profile, past experience and training of customs officers, and preliminary questioning of the entrant in determining whether there is reasonable suspicion.⁷⁰ The court also declared that intrusiveness can be measured by considering factors such as embarrassment, indignity, and invasion of privacy.⁷¹

One year later, in *U.S. v. Vega-Barvo*⁷², the Eleventh Circuit applied the reasonableness requirement for border searches to body searches.⁷³ Vega-Barvo was a single woman, traveling alone from Colombia, a country known as a common source of illegal

63. *Id.*

64. *Id.* at 1380.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1381-82 (explaining that "reasonable suspicion is sufficient" to perform a search at a national border, and that "full-blown probable cause" is not required).

70. *Id.* at 1382.

71. *Id.*

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

73. *Id.* at 1344. The court explains that they have previously applied the reasonableness requirement by using a flexible test that adjusts the level of suspicion necessary to perform a search in accordance with the level of intrusiveness of that search. *Id.* The greater the level of intrusiveness, the greater the level of suspicion necessary to perform the search. *Id.* The Supreme Court has used this approach to search the vehicles of illegal aliens near the border, and there "is no reason to believe that this same flexible approach would not apply to body searches." *Id.*

drugs.⁷⁴ Several factors regarding her entrance into the United States aroused suspicion among the officers, and she was thus taken to a search room for a patdown.⁷⁵ The search uncovered nothing, however, leading the officials to conclude that she was smuggling drugs internally.⁷⁶ Vega-Barvo was then transferred to a local hospital where she signed a consent form and was X-rayed.⁷⁷ Her X-rays displayed foreign bodies in her stomach, causing her to confess to swallowing 135 condoms filled with cocaine.⁷⁸ Prior to her trial, Vega-Barvo moved to suppress the cocaine on the grounds that the X-ray search violated her Fourth Amendment rights.⁷⁹

Although the *Vega-Barvo* court followed a test similar to that of *Mejia* in balancing the level of intrusiveness against the level of suspicion to determine the reasonableness requirement necessary for non-routine border searches,⁸⁰ the *Vega-Barvo* court introduced several new tests. The court first determined that a strip search can only be conducted if a customs agent has a particularized "reasonable suspicion," and that such standard is met if a person behaves in an "articulably suspicious manner."⁸¹ The court next declared, as in *Mejia*, that in order to determine the intrusiveness of a border search, the focus must be on the indignity of the search.⁸² The court extended this *Mejia* analysis, however, by recognizing three factors relating to the indignity suffered by an entrant subject to a non-routine border search.⁸³ These three factors were "the physical contact between the searcher and the person searched, exposure of intimate body parts and use of force," all factors which can potentially infringe upon one's right to privacy.⁸⁴

While all of these cases cast some light and insight on the question of how to conduct non-routine border searches, there still remained a lack of Supreme Court precedent setting forth the

74. *Id.* at 1341.

75. *Id.* at 1343. The court considered Vega-Barvo's nervousness, in combination with the facts that she was traveling alone, that she was carrying only one piece of poor quality luggage, and that there were several inconsistencies regarding her employment to raise the requisite level of suspicion.

76. *Id.* at 1344.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1345.

82. *Id.* Precedent indicates that the level of indignity a search entails, not merely extensiveness alone, will determine the intrusiveness of a search.

83. *Id.* at 1346.

84. *Id.*

exact standards and level of suspicion necessary to perform these searches. The next section will discuss the Supreme Court decision that finally addressed the fundamental doctrines governing non-routine border searches.

C. *The Supreme Court Addresses the Issue*

In 1985, the long-awaited Supreme Court decision of *U.S. v. Montoya de Hernandez*⁸⁵ addressed the essential principles governing non-routine border searches. Respondent Montoya de Hernandez traveled from Bogota, Colombia to the Los Angeles International Airport, where she was questioned by customs agents who examined both her passport and luggage.⁸⁶ After this examination, the agents suspected that she was an alimentary canal smuggler and subsequently detained her for approximately 16 hours until customs agents received a court order authorizing a pregnancy test, an X-ray and a rectal examination.⁸⁷ The *Montoya* court held that detaining an entrant at the border "beyond the scope of a routine customs search and inspection[] is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal."⁸⁸ Although *Montoya* was a landmark case in that it determined that a customs official, based on a totality of circumstances test, must have reasonable suspicion to detain a suspect at the border, it left an extremely important question unanswered. As it was not specifically presented with the issue, *Montoya* failed to address what level of suspicion, if any, is necessary to conduct non-routine searches at the border, including strip searches, body cavity searches, or involuntary X-ray searches.⁸⁹

D. *Involuntary X-ray Searches: Inconsistencies Continue*

In spite of its holding in *Montoya*, the Supreme Court has yet to determine the level of suspicion necessary to justify an X-ray search of a person crossing the international border.⁹⁰ X-ray examinations raise the question of whether an involuntary X-ray exam-

85. 473 U.S. 531 (1985).

86. *Id.*

87. *Id.*

88. *Id.* at 541.

89. *Id.* at 541 n.1.

90. *Kaniff v. United States*, 2002 WL 370210 at 10, N.D.Ill., Mar 08, 2002.

ination is more similar to a strip search which would only require "reasonable suspicion," or whether the intrusion is substantial enough to warrant a greater level of suspicion.⁹¹ Though one's voluntary consent to an X-ray search does not generally implicate Fourth Amendment concerns,⁹² there remains only a minimal amount of case law regarding involuntary X-ray searches and the level of suspicion they require.

In one of the first modern cases regarding involuntary X-ray searches, the California Court of Appeals held in *U.S. v. Ek*⁹³ that the strict standard obligatory for a body cavity search is also applicable to an X-ray search.⁹⁴ The California Court found that even though an X-ray does not involve the same level of indignity associated with a strip or body cavity search, it is nonetheless more intrusive because the search can potentially be harmful to one's health.⁹⁵ The *Mejia* reasoning the following year contradicts the analysis in *Ek*. The *Mejia* court determined that an X-ray search is not "excessively intrusive" if performed by hospital personnel who question the patient about his health history and any previous exposure to X-rays prior to the X-rays being taken.⁹⁶

A more detailed analysis regarding non-routine X-ray searches occurred the year after *Mejia* in *Vega-Barvo*. That court held similarly to *Mejia* in concluding that an X-ray is no more invasive than a strip search. It evaluated X-ray searches in light of a three-part test to determine the effects this type of search may have on one's personal dignity.⁹⁷ It concluded that X-rays do not require any sort of physical contact between the searcher and the person searched, nor do they expose any intimate body parts

91. Steven R. Vina, *Protecting our Perimeter: "Border Searches" Under the Fourth Amendment*, Report for Congress, at <http://www.thememoryhole.org/crs/more-reports/RL31826.pdf>

92. *Id.* The court explains that if one consents to an X-ray examination, the court is not required to discuss the level of suspicion that would justify an involuntary X-ray examination.

93. 676 F.2d 379 (9th Cir. 1982)

94. *Id.* at 382.

95. *Id.* (noting that while an X-ray search is not necessarily as humiliating as other types of non-routine body searches, it can potentially have harmful effects on one's health and "goes beyond the passive inspection of body surfaces").

96. *United States v. Mejia*, 720 F.2d 1378, 1382 (5th Cir. 1983). The Court interpreted the X-ray search performed on defendant as not excessively intrusive. *Id.* Defendant's X-ray was taken in a hospital by hospital employees, and he was asked questions both about his medical history and any exposure he may have had to X-rays prior to the X-rays being taken. *Id.* Neither customs agents nor hospital employees executed a physical search on *Mejia's* body, nor did they subject him to "indignity or embarrassment." *Id.*

97. *United States v. Vega-Barvo*, 729 F.2d 1341, 1348 (11th Cir. 1984).

to the searcher.⁹⁸ Furthermore, a hospital will not usually perform an X-ray search without the patient's consent.⁹⁹ In light of these factors, the court held that utilizing an X-ray to search one's intestinal cavity is more dignified and less intrusive than other types of non-routine searches.¹⁰⁰ The *Vega-Barvo* court compared an X-ray to the use of an emetic used to induce vomiting, and found the former to be much less humiliating.¹⁰¹ For these reasons, the X-ray was determined to be a "relatively unintrusive" search.¹⁰²

The 1985 *Montoya* case, as previously mentioned, said little regarding X-ray searches, although Justice Stevens' concurrence is worth noting. Stevens believed that anyone not pregnant who was reasonably suspected of alimentary canal smuggling can be required by customs agents to acquiesce to an X-ray examination as "incident to a border search."¹⁰³ This idea, however, is controversial. In his dissent, Justice Brennan claimed that Stevens failed to consider the harmful effects that X-rays can potentially have on one's health.¹⁰⁴ Brennan reasoned that warrant and probable cause requirements could safeguard and govern Justice Stevens' usage of X-rays for the purpose of detecting drugs in the alimentary canal or other criminal-investigative purposes.¹⁰⁵

In 2002, the *Kaniff v. U.S.*¹⁰⁶ court noted that the Fifth, Eighth and Eleventh circuits are all in accord that an agent's reasonable suspicion that one is an internal smuggler may be enough to justify an X-ray search, even if the examination lacked consent.¹⁰⁷ In *Simpson v. State*,¹⁰⁸ decided one year later by the Georgia Appellate Court, the court expanded the *Kaniff* analysis by

98. *Id.* at 1347-48. The court discusses the difference between a passenger required to walk through a magnometer and a passenger being subjected to a pat-down search. Furthermore, the Court recognizes that a significant factor in the constitutionality of searches at the United States border is the amount of embarrassment caused by the exposure of private body parts.

99. *Id.* (Explaining that much indignity results when a person is physically forced by an agent to submit to a search, and that "the constitutionality of nonconsensual bodily searches has proved a troublesome question for courts").

100. *Id.* at 1348.

101. *Id.*

102. *Id.*

103. *United States v. Montoya de Hernandez*, 473 U.S. 531, 545 (1985) (Stevens, J., concurring).

104. *Id.* at 550 (Brennan, J., dissenting) (noting that Justice Stevens must have been convinced that "the health effects of x-irradiation on human beings stand established as so minimal as to be little cause for concern").

105. *Id.*

106. *Kaniff v. United States*, 2002 WL 370210, N.D.Ill., Mar 08, 2002.

107. *Id.* at 10.

108. 588 S.E.2d 445 (Ga. App. 2003).

providing a clarification of the reasonableness standard. The Georgia Court determined that an examination is reasonable if an agent possesses "objective, articulable facts" that can justify the intrusion of an X-ray search as to the particular place and person to be searched.¹⁰⁹ The court explained that, upon an agent's possession of reasonable suspicion that one is an alimentary canal smuggler, the suspected smuggler may be transferred to a hospital for an X-ray exam.¹¹⁰ The examination, however, may not be physically forced, despite the fact that the suspect may not have voluntarily consented to it.¹¹¹

The aforementioned cases, though somewhat explanatory, leave many issues unresolved. The exact level of suspicion required to perform a non-routine search such as an X-ray examination remains unknown. Similarly, the questions of how intrusive an actual X-ray exam is, and the amount of personal information that can be discovered by those performing the X-ray examination also remain unanswered. Furthermore, though an X-ray may not be mentally or emotionally degrading to one's state of mind, it is unclear whether an X-ray's hazardous or taxing effects on the human body outweigh these mental conditions. These questions will continue to be deliberated until the Supreme Court answers the challenge of this controversial issue.

III. THE PARTNERSHIP BETWEEN CUSTOMS AND THE UNIVERSITY OF MIAMI

Doctors at the Department of Radiology have begun to play a key role in drug enforcement at our nation's borders.¹¹² A "unique program" pairs Customs with the Department of Radiology in an attempt to combat drug smugglers¹¹³ at airports around the country, including Miami International Airport, Ft. Lauderdale International Airport, and airports in New Jersey, Houston, Baltimore and San Juan.¹¹⁴ The program brings suspected drug smugglers to portable facilities at these airports in order to determine whether

109. *Id.* at 449.

110. *Id.*

111. *Id.*

112. *X-ray Vision: Doctors Play Key Role in Drug Enforcement*, UNIVERSITY OF MIAMI MEDICINE, Fall, 2003, at 4 [hereinafter *X-ray Vision*].

113. *Id.*

114. Interview with Dr. Luis Rivas, Assistant Professor of Radiology and Chief of Trauma and Emergency Radiology, University of Miami, in Coral Gables, Fla. (November 12, 2003) [hereinafter *Rivas Interview*].

there are foreign bodies in the suspect's digestive system.¹¹⁵ The images are then stored on a database that is shared by Customs and the Department of Radiology.¹¹⁶ After the initial X-ray, the radiologists are immediately paged and the images are digitized and transferred to the doctors' computers at the medical center for analysis.¹¹⁷ The Customs agents have a reply within a half an hour as to whether the suspect is an alimentary canal smuggler.¹¹⁸ Dr. Luis Rivas, assistant professor of radiology and chief of trauma and emergency radiology at UM/Jackson, stated that the program has been working well, although he did not have exact statistics regarding the number of successful arrests made after the X-ray examinations.¹¹⁹ Nonetheless, Dr. Rivas noted that the Customs agents in Miami "have a good track record" as to the number of suspects subjected to these X-ray examinations and the amount of suspects who actually tested positive for foreign matters in their digestive tract.¹²⁰ In Puerto Rico, a similar program using mobile X-ray equipment to detect internal drug smuggling has achieved "[i]n the first half of 2002 . . . a more than 200 percent increase in apprehended swallower cases over the entire previous fiscal year."¹²¹

In previous years, Customs officials in Miami had to take suspected internal drug smugglers to Jackson Memorial Hospital for the X-ray examination.¹²² The new program, however, allows the agents to preserve both manpower and time as it saves officials repeated trips to and from the hospital.¹²³ Furthermore, Dr. Rivas believes that this partnership is not limited to protecting United States borders and keeping illegal drugs out of the nations' communities.¹²⁴ From a medical standpoint, he explains that the program simultaneously protects the health and safety of the suspects.¹²⁵ The ingestion of hazardous drugs for smuggling pur-

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Jesus Betancourt, Mobile X-ray Equipment Aids in Catching Drug Swallowers, U.S. Customs Today at <http://www.cbp.gov/xp/CustomsToday/2002/October/prswallow.xml>

122. *X-ray Vision*, *supra* note 114, at 4.

123. *Id.*

124. *Id.*

125. *Id.*

poses, especially cocaine,¹²⁶ can be deadly.¹²⁷ If a swallowed balloon or other object containing heroin or cocaine ruptures in the stomach, the drug can travel directly into the bloodstream.¹²⁸ Additionally, the packets may create a bowel obstruction in the digestive tract.¹²⁹ As this partnership provides the radiologists capabilities for both quick analysis of X-rays and a means of electronic communication with the customs agents, the doctors have the ability to call immediately for emergency care if warranted.¹³⁰ Thus, while the main objective of this partnership is to prevent illegal narcotics from entering and being distributed within the United States, the program does have at its origin a dual purpose.¹³¹

V. ENSURING PROGRAM'S CONFORMITY WITH THE FOURTH AMENDMENT

As previously discussed, one's expectation of privacy is reduced when seeking entrance to the United States,¹³² and the government's interest in protecting the border has been found to be of greater consequence than the privacy rights of the individual.¹³³ In light of this interest, the question becomes whether the government has unlimited authority to subject anyone entering the United States to a non-routine border search. The ease of the new X-ray program, coupled with the lack of requirement for a warrant or probable cause, will make it relatively easy for customs agents to abuse the system based on lack of reasonable suspicion or inarticulable hunches. As there is currently no Supreme Court decision governing the level of suspicion necessary to conduct a non-routine border search, it is imperative that Customs agents working with the Department of Radiology comply with specific requirements to ensure that no suspect's Fourth Amendment rights are unnecessarily violated.

In order to discover what standards should govern the procedure, it is important to first consider how an X-ray exam works and whether it is considered to be a "search" in connection with the Fourth Amendment. This should be followed by analyzing the level of intrusiveness that an X-ray search demands. Finally, one

126. *Rivas Interview*, *supra* note 116.

127. *X-ray Vision*, *supra* note 114, at 4.

128. *Id.*

129. *See supra* text accompanying note 126.

130. *X-ray Vision*, *supra* note 114, at 4.

131. *Rivas Interview*, *supra* note 116.

132. *Kaniff v. United States*, 2002 WL 370210 at 6, N.D.Ill., Mar 08, 2002.

133. *Montoya*, 473 U.S. at 540.

must consider what level of suspicion corresponds with this level of intrusiveness.

A. *The X-ray Exam as a Search*

An abdominal X-ray, such as the type used in this program,¹³⁴ typically provides a picture of abdominal organs and structures, including the stomach, liver, spleen, diaphragm and both the large and small intestines.¹³⁵ Generally, a patient lies on his back on a table, and an apron or shield made of lead is placed over the pelvic area in order to prevent the X-ray exposure to that area.¹³⁶ A woman's ovaries, however, are unable to be protected during this test as they are too close to the abdominal organs that require the X-ray exam.¹³⁷ The patient must hold his breath during the exam, and in order to prevent the pictures from blurring, he cannot move while the X-ray is being taken.¹³⁸ While a "supine abdominal X-ray" picture is taken with the patient lying on his back, the technician can also take an X-ray of the patient as he is standing up.¹³⁹ This erect abdominal view can depict whether there is a blockage of the intestines, as well as whether there is air leaking through a hole in the stomach or intestines.¹⁴⁰ The whole process takes approximately five to ten minutes, and the pictures can usually be developed within five minutes.¹⁴¹

The Supreme Court has encountered several different scenarios regarding what constitutes a search of the human body. In *Skinner v. Railway Labor Executives' Association*,¹⁴² the Supreme Court decided that breath, blood and urine tests are considered searches under the Fourth Amendment.¹⁴³ The Court explained that a search occurs when one's skin is penetrated with the intention of receiving a blood sample.¹⁴⁴ Furthermore, the court

134. *Rivas Interview*, *supra* note 116.

135. Renee Spengler, RN, BSN, *Abdominal X-ray*, WebMD Health at <http://my.webmd.com/content/healthwise/88/21951.htm?lastselectedguid={5FE84E90-BC77-4056-A91C-9531713CA348}> (December 22, 2003).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Skinner v. Ry. Labor Executives' Ass'n.*, 489 U.S. 602 (1989).

143. Greg Star, *Airport Security Technology: Is the Use of Biometric Identification Technology Valid Under the Fourth Amendment?*, 20 TEMP. ENVTL. L. & TECH. J. 251, 258 (2002).

144. *Id.* at 259.

acknowledged that in addition to the specific issue being tested for, the collection and examination of one's blood or urine can potentially reveal "a host of private medical facts about an [individual], including whether he or she is epileptic, pregnant, or diabetic."¹⁴⁵ Consequently, the court held that the collection and analysis of one's urine sample "intrudes upon expectations of privacy that society has long recognized as reasonable."¹⁴⁶ While an X-ray exam is not a physical intrusion or piercing of the skin in a literal sense, the fact that it enables one to view images underneath the skin generally considered private renders it a search within the ambit of the Fourth Amendment.

B. Intrusiveness

To determine the intrusiveness of a non-routine body search, one must consider whether the definition of intrusiveness concerns "whether one search will reveal more than another," or whether it is construed "in terms of the indignity that will be suffered by the person being searched."¹⁴⁷ The *Vega-Barvo* court considered whether an X-ray search is more or less intrusive than a body cavity search.¹⁴⁸ It determined that although an X-ray does not infringe upon one's dignity as much as a search of one's body cavities, an X-ray can potentially reveal much more than a body cavity search.¹⁴⁹ Furthermore, the exposure to potential health risks or injury is also relevant to the intrusiveness of a search. In light of these concerns, the intrusiveness level of an X-ray search should be evaluated using three factors: (1) How revealing is the search and how much personal medical information can be discovered from performing this X-ray examination? (2) What harmful or taxing effects can an X-ray examination have on the human body, and how likely are these effects to occur? (3) Does one suffer a loss of dignity when undergoing an X-ray examination? The following sections analyze each of these factors.

1. Medical Information Revealed

The amount of personal medical information that can be revealed by an X-ray exam may correlate to the intrusiveness of

145. *Skinner*, 489 U.S. at 617.

146. *Id.*

147. *United States v. Vega-Barvo*, 729 F.2d 1341, 1345 (11th Cir. 1984).

148. *Id.*

149. *Id.*

the search.¹⁵⁰ Previously, courts found that both the collection and analysis of blood and urine can display numerous medical facts about an individual that he may have otherwise desired to keep private, including whether one is "epileptic, pregnant or diabetic."¹⁵¹ These searches have thus been found to intrude upon one's privacy and implicate the Fourth Amendment.¹⁵² In addition, another type of analysis, the retina scan, can reveal medical conditions including high blood pressure, AIDS, pregnancy, as well as whether one suffers from diabetes, arteriosclerosis, and hypertension.¹⁵³ Because the retina scan can reveal information that would be otherwise irretrievable if not for the physical intrusion, it also can be considered a search.¹⁵⁴

Analogous to these searches, the X-ray is a search within the ambit of the Fourth Amendment "because the machine's primary purpose is to locate items 'where there is normally an expectation of privacy. . . .'"¹⁵⁵ There are several conditions that can be discovered if one is subjected to an X-ray search of his abdomen. The X-ray can reveal problems in the urinary tract, or it can show a blockage or perforation of the intestine.¹⁵⁶ The X-ray can also reveal problems such as abdominal masses, enlarged organs, or an accumulation of fluid in the abdominal area.¹⁵⁷ Certain types of abnormal calcifications, such as kidney stones or gallstones as well as trauma to the abdominal tissue are also medical conditions that can be revealed by an abdominal X-ray.¹⁵⁸ Thus, an X-ray exam of one's abdomen in search of foreign bodies may also reveal other medical information that one may have wanted to keep private due to its personal nature. These other discoverable medical conditions correlate to the intrusion level of an X-ray and the level of suspicion necessary to perform the X-ray.

150. *Skinner*, 489 U.S. at 617.

151. *Star*, *supra* note 149, at 259.

152. *Id.*

153. *Id.* at 255.

154. *Id.* at 261.

155. *Vina*, *supra* note 24, at 430.

156. David Webner, M.D., *Abdominal Film*, MEDLINEplus Medical Encyclopedia at <http://www.nlm.nih.gov/medlineplus/ency/article/003815.htm#Definition>; see also Jefferey Heit, M.D., Department of Internal Medicine, *Abdominal Film*, Yahoo Health Encyclopedia at <http://health.yahoo.com/health/encyclopedia/003815/0.html> (February 13, 2004).

157. *Webner*, *supra* note 162.

158. *Id.*

2. Harmful Effects of X-ray Examinations

Unlike a urine test, a blood test or a breathalyzer, an X-ray exam can have significant effects on the human body. Some have argued that the medical effects created by an X-ray examination should control the issue of intrusiveness.¹⁵⁹ X-ray exams, notwithstanding the fact that they only use low levels of radiation, may create a slight risk of damage to any cells or tissue exposed to the radiation.¹⁶⁰ Overexposure to X-rays can create a risk of tissue destruction or acute burns to the skin,¹⁶¹ and routine X-rays have been said to take approximately six days off the life expectancy of a person.¹⁶² In spite of these dangers, the risk of damage created by the X-ray is considered relatively minor in comparison with the potential benefits of the test.¹⁶³

Another effect that must be considered, however slight, is the effect that radiation can have on a pregnant woman. Generally an abdominal X-ray will not be performed on a pregnant woman because the exposure to radiation could potentially damage the developing fetus.¹⁶⁴ Radiation can cause the fetus to have birth defects or growth retardation, and it also can potentially be fatal.¹⁶⁵ Exposure to X-rays is measured in units of radiation absorbed doses ("rads"),¹⁶⁶ and during a diagnostic X-ray, one is exposed to anywhere between .20 and 5,000 millirads, or .2 and 5 rads, dependent upon what sort of X-ray is utilized.¹⁶⁷ Diagnostic X-rays that use less than 5 rads have not been reported to cause birth defects or growth retardation.¹⁶⁸ While X-rays of the neck, head, chest or outer extremities generally expose a fetus to less than 1 rad, X-rays of the pelvis and abdomen can result in higher

159. Vina, *supra* note 24, at 430.

160. Renee Spengler, RN, BSN, *Abdominal X-ray*, WebMD Health at <http://my.webmd.com/content/healthwise/88/21951.htm?lastselectedguid={5FE84E90-BC77-4056-A91C-9531713CA348}> (December 22, 2003).

161. Vina, *supra* note 24, at 430.

162. *United States v. Montoya de Hernandez*, 473 U.S. 531, 561 (1985) (Brennan, J. dissenting) (citing Gregg, *Effects of Ionizing Radiations on Humans*, in 2 *Handbook of Medical Physics* 404 (R. Waggener ed. 1982)).

163. Spengler, *supra* note 166.

164. Barry Herman, M.D., *Radiation and Pregnancy*, WebMD Health at http://my.webmd.com/content/article/6/1680_51838.htm?lastselectedguid={5FE84E90-BC77-4056-A91C-9531713CA348}.

165. *Id.*

166. *X-Ray Radiation and Pregnancy*, HealthGoods at http://www.healthgoods.com/Education/Health_Information/Pregnancy/x_ray_and_pregnancy.htm.

167. See Herman, *supra* note 170.

168. *Id.*; *The Safety of X-rays During Pregnancy*, American Academy of Family Physicians at <http://www.aafp.org/afp/990401ap/990401b.html>.

exposures.¹⁶⁹ Even if one is not yet pregnant but merely trying to conceive, it remains unwise to be exposed to radiation if it is not absolutely necessary.¹⁷⁰

3. X-ray Searches and the Loss of Dignity

While some non-routine body searches can subject a person to extreme indignity, X-rays have been determined to "cause less embarrassment, indignity, and invasion of privacy than . . . an ordinary strip search."¹⁷¹ The *Vega-Barvo* analysis is beneficial in determining the invasiveness of an X-ray examination. An X-ray requires little, if any, physical contact between the searcher and the person being searched.¹⁷² The searcher is not stroking or prodding at one's body, and the X-ray eliminates the awkwardness or invasiveness one might feel resulting from an agent's search of his rectal or other body cavity. Furthermore, an X-ray does not display intimate body parts that would cause embarrassment or humiliation on part of the suspect.¹⁷³ Whereas a strip or body cavity search can be extremely degrading in that it exposes one's naked body to unfamiliar persons in threatening situations, an X-ray does not require such shameful measures. Though X-rays may reveal parts of the body not typically seen by an outsider, the level of privacy or modesty attached to these body parts is comparatively low, as they do not conjure up the same thoughts or suggestions associated with a naked body. Thus, a search through an X-ray examination is not as humiliating or intrusive as a strip or body cavity search.¹⁷⁴ Lastly, in contrast to other non-routine searches, an X-ray examination is not likely to require the use of force by the searcher.¹⁷⁵ The only time a question of force may be encountered is when a suspect absolutely refuses to give consent to the X-ray.

An X-ray examination also resolves the problem of using other undignified measures that can result in extreme humiliation on part of the suspect. In *Montoya*, the inspectors held the respondent for approximately 16 hours in order to wait for her

169. *Id.*

170. *Id.*

171. *Kaniff v. United States*, 2002 WL 370210 at 10, N.D.Ill., Mar 08, 2002 (citing *United States v. Reyes*, 821 F.2d 168, 171 (2nd Cir. 1987), noting *United States v. Mejia*, 720 F.2d 1378, 1382 (5th Cir. 1983)).

172. *United States v. Vega-Barvo*, 729 F.2d 1341, 1348 (11th Cir. 1984).

173. *Id.*

174. *United States v. Vega-Barvo*, 729 F.2d 1341, 1348 (11th Cir. 1984).

175. See *supra* note 99.

bowels to move, even though they know she would suffer through hours of "humiliating discomfort."¹⁷⁶ An X-ray exam potentially eliminates this procedure as it can lessen the need for the retrieval and search of one's relieved bodily functions.¹⁷⁷ Even though the passing of bowel movements can, like urination, be considered a routine bodily function that is not subject to a warrant requirement,¹⁷⁸ a search of a person's feces can be deemed so grossly intrusive as to "shock the conscience."¹⁷⁹ Thus, as compared to other types of non-routine searches at the border, an X-ray examination can eliminate the use of more intrusive and humiliating methods of searching the suspect.

C. Level of Suspicion Needed to Safeguard Abuse

Courts apply a reasonable suspicion standard when it is necessary for a customs agent to conduct a mildly intrusive search on a person suspected of being an alimentary canal smuggler.¹⁸⁰ The intrusiveness level of the search correlates directly with the level of suspicion the customs agent must have of the suspect's wrongdoing.¹⁸¹ As analyzed, an X-ray search is considered to be relatively intrusive. Although the humiliation suffered by the suspect as the result of an X-ray search is slight, the amount of private information that can be learned by the examiner, as well as the risk of harmful effects to the patient, can be significant. While these effects seem to justify a higher level of suspicion, one factor remains to be considered. Alimentary canal smugglers place themselves in extremely precarious positions by smuggling drugs

176. *United States v. Montoya de Hernandez*, 473 U.S. 531, 536 (1985) (discussing the "humanity" of the customs agents' decision to hold respondent until she had a bowel movement, even with the knowledge that she would suffer "many hours of humiliating discomfort" if she did not choose to have an X-ray examination).

177. *Gregory*, *supra* note 1, at 356.

178. *Id.* at 357 (noting the decision of *Ewing v. State*, 310 N.E.2d 571 (Ind. App. 1974) where the Indiana Court of Appeals held that a urine sample can be tested without the requirement of a warrant because urination is considered to be a "routine bodily function").

179. *Id.* at 356.

180. *Montoya*, 473 U.S. at 541 (explaining that the "reasonable suspicion" standard is applicable "in a number of contexts and effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause. It thus fits well into the situations involving alimentary canal smuggling at the border" because this kind of internal smuggling cannot be detected by the naked eye, and inspectors will not generally have probable cause necessary to arrest or search).

181. *United States v. Ek*, 676 F.2d 379, 382 (9th Cir. 1982).

in this manner.¹⁸² Internal drug smuggling can be fatal if the swallowed balloons burst or leak inside the smuggler's stomach.¹⁸³ The question then becomes how much mercy the government should take on these people who have little value for their own lives. Because the measures that balloon swallows take to commit their crimes are extreme and degrading, it is essential for "law enforcement officials to take comparably extreme measures to stop their drug trafficking."¹⁸⁴ While considerations of the effects an X-ray may have on the human body are not to be brushed aside, the risks to the lives of drug smugglers triggered from an X-ray exam are much less significant than the risk of death a smuggler faces by his own decision to transport drugs internally. Thus, in light of these factors, a greater level of suspicion is not necessary. The reasonable suspicion standard required to detain a passenger¹⁸⁵ should also be applicable to X-ray searches.

While *Montoya* declares that reasonable suspicion requires an officer to have a "particularized and objective basis" for suspecting the entrant,¹⁸⁶ this standard can still produce vague and ambiguous instruction. It is important for customs agents to have exact instructions on the parameters of their search, including what to look for and how many factors are necessary to determine the requisite level of suspicion. The *Asbury* standards¹⁸⁷ are useful in discerning what factors an agent must meet to form an objective basis of suspicion. These factors, however, are not exhaustive. One of the most important factors that the *Asbury* standards do not consider is that of the agent's experience. A trained officer can "perceive and articulate meaning in given conduct which would be wholly innocent to the untrained eye."¹⁸⁸ An agent's training, therefore, in combination with other factors, should be a constant consideration in determining the suspicion level of a suspect. Further, there should be a sliding scale that balances the officer's training and experience with the number of factors he needs to attain. The more experience an officer has, the more he will be able to recognize the probable signs that one is an internal drug

182. See *X-ray Vision*, supra note 114, at 4.

183. *Id.*

184. Gregory, supra note 1, at 326.

185. *Montoya*, 473 U.S. at 541.

186. *Id.* (citing *United States v. Cortez* 449 U.S. 411, 417, 101 S. Ct. 690, 695 66 L.Ed.2d 621 (1981); *id.*, at 418, 101 S. Ct., at 695, citing *Terry v. Ohio*, 392 U.S. 1, 21, n.18, 88 S. Ct. 1868, 1879, n. 18, 20 L.Ed.2d 889 (1968)).

187. *United States v. Asbury* 586 F.2d 973, 976-7 (2nd Cir. 1978).

188. *United States v. Santibanez Garcia*, 132 F. Supp. 2d 1338, 1344 (M.D. Fla, 2000) (citing *United States v. Mendenhall*, 446 U.S. at 563, 100 S. Ct. 1870).

smuggler. Conversely, the less training an agent has, the more factors he should be required to recognize as he does not have the same knack for detecting a balloon swallower as an experienced officer.

Even the most trained officer, however, cannot rely on mere hunches. Thus, there are several factors that cannot constitute suspicion if they are not accompanied by any other outlandish behavior. While the inconsistencies in one's trip description may indicate a sign of illegal activity,¹⁸⁹ this factor alone is not dispositive. Many entrants to the United States do not speak English or Spanish, and the language barrier and inability to properly communicate may account for some of that inconsistency. Furthermore, dependence upon drug profiles or informant's tips may also lead to false positives as profiles may be overbroad, and informant's tips may be wrong. Although excessive nervousness and unusual conduct may also seem like surefire signs of drug smuggling, these two characteristics may be attributed to non-related factors such as anxiety disorder or mental illness.¹⁹⁰

Even if an officer has reasonable suspicion to submit a suspect to an X-ray search, another way for an officer to safeguard against abuse is to give the suspect the option to return to the place from which he came rather than enter the United States.¹⁹¹ This alternative gives the suspected smuggler the ability to choose whether he will be subjected to the laws and procedures that govern his entrance into the United States. If the suspect does not want to be subjected to an X-ray examination, he has the capacity to return to his country of origin.¹⁹² This option will serve to alleviate two problems: on one hand, the illegal narcotics will not

189. U.S. v. Mejia, 720 F.2d 1378, 1380 (5th Cir. 1983); United States v. Vega-Barvo, 729 F.2d 1341, 1342 (11th Cir. 1984).

190. National Mental Health Association, *What is Mental Illness?* at <http://www.nmha.org/infoctr/factsheets/11.cfm> (discussing that anxiety is a disorder indicative of mental illness, and symptoms of mental illness include "changes in mood, personality, personal habits and/or social withdrawal"); NAMI Nevada County The County's Voice on Mental Illness, *Warning Signs of Mental Illness* at <http://www.nccn.net/~ncami/warnings.htm> (listing signs of mental illness to include restless traveling from place to place, flat or inappropriate emotions, confused disordered thinking, undue or continuing anxiety, and delusions); The Kim Foundation, *Warning Signs of Mental Illness* at <http://www.thekimfoundation.org/html/signs.html>.

191. United States v. Montoya de Hernandez, 473 U.S. 531, 565 (1985) (Brennan, J. dissenting) (describing that if the suspect does not want to consent to examinations or detentions, "the Nation's customs and immigration interests are fully served by sending the traveler on his way elsewhere.")

192. See *id.*

enter the United States, and on the other, the suspected smuggler will not be subjected to any kind of privacy infringement.

CONCLUSION

The partnership between Customs and the Department of Radiology may only be a small endeavor, but its effects are widespread and significant. This procedure assures the American people both that the war on drugs continues to be fought, and that drug smuggling suspects who enter the United States will be treated in a way that will not cause them to suffer from a loss of dignity. While there are currently no guidelines handed down by the Supreme Court regarding the level of suspicion necessary for an agent to conduct a non-routine X-ray search, an agent only needs reasonable suspicion in order to subject a suspect to this type of exam. An X-ray examination may subject one to significant amounts of risk, and it can also reveal to the examiner other medical conditions that the suspect had desired to keep private. These considerations are balanced by the fact that there is little indignity suffered by a suspect who undergoes an X-ray search. Because these factors demonstrate that an X-ray examination is not overly intrusive, a customs agent should not be required to have probable cause or obtain a warrant before continuing with the procedure. This partnership is instrumental, and it should not be hindered as it is an essential attack on the drug war. Although the war on drugs is not currently the conflict at the forefront of the American mind, Customs and Border Protection and the Department of Radiology at the University of Miami School of Medicine have taken one small step to ensure that this war has not been forgotten.

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