10-1984

United States v. Montoya De Hernandez

Lewis F. Powell Jr.

lgs 01/03/85

PRELIMINARY MEMORANDUM

January 18, 1985 Conference
List 3, Sheet 2

No. 84-755-cfy UNITED STATES v. DE HERNANDEZ (cocaine smuggler)	Cert to CA9 (Goodwin & Tang) (pc) (Jameson, vdj, dissenting) Federal/Criminal	Timely

1. SUMMARY: The SG contends that CA9 erred in suppressing 88 cocaine-filled balloons excreted by resp, who was

CFR.

Lynda

detained at the border by Customs Officials for the period of time necessary to examine her bowel movements.

2. FACTS AND DECISION BELOW: Shortly after midnight on March 5, 1983, resp arrived at the Los Angeles airport on a flight from Bogota, Colombia. After passing through an immigration checkpoint, she proceeded to a Customs inspection area where, following a review of her travel documents, she was referred to a secondary inspection area. There, a Customs inpector inspected resp's passport and luggage and questioned her about her trip to the United States. The interview revealed that resp came from a source country for narcotics, had previously made numerous trips of short duration into the United States, had paid cash for her ticket, carried little extra clothing or toiletries, carried $5000 in cash, had no confirmed hotel reservations, had no family or friends in the United States, and spoke no English. Resp claimed she had come to the United States to purchase clothing and other merchandise for her husband's business, but acknowledged she had made no appointments to visit potential sellers. Based on his observations, the inspector immediately suspected that resp was carrying drugs internally, as she matched the common profile of such a drug smuggler.

The inspector referred resp to another room for a pat-down search, which failed to reveal contraband. He then asked resp if she would consent to an x-ray search of her abdominal cavity; she initially consented, but revoked the consent when she learned she would be handcuffed on the way to a hospital for the x-ray. Customs officials then contacted Customs Special Agent

Windes and requested him to seek a court order for an x-ray search. He declined to do so, but informed resp that she had three options: to consent to an x-ray search, remain in custody until she had a bowel movement, or return to Colombia on the next available flight. Resp chose the latter, but was informed that she would be kept under observation during her wait for the flight; if she excreted any contraband, she would be arrested. It turned out that no flight was available for many hours. Resp remained under the continuous observation of Customs officers in their waiting room for 16 hours, during which time she refused to eat or drink, or to use toilet facilities.

At approximately 3:00 p.m. on March 5, female officers subjected resp to a second strip search,[1] which failed to reveal any evidence of contraband. At this point, Special Agent Windes decided to seek a court order for x-ray and body cavity searches; his affidavit included the facts that resp had refused to eat, drink, or use toilet facilities during the 16-hour detention. At about midnight, a federal magistrate issued the order, and resp was transported to a hospital. There, a rectal examination revealed a balloon containing cocaine. Resp was arrested and placed in the prison ward of the hospital; over the next four days, she excreted 88 balloons containing 528.4 grams of cocaine.

Prior to trial, resp moved to suppress the cocaine on

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[1]It is not entirely clear either from the SG's brief or the court's opinions when the first strip search occurred. Apparently, it occurred at the time of the pat-down search, prior to the detention.

the ground that the affidavit supporting the court order for the body cavity search was tainted by information received during the unlawful detention of her for 16 hours. The DC denied the motion, holding that the Customs officials' initial questioning of resp had given them "a very substantial suspicion" that she was smuggling narcotics internally. This suspicion justified their seeking her consent to an x-ray search and upon her refusal, in detaining her until she could either be placed on a return flight or had a bowel movement that would confirm or deny their suspicions. Thus, the detention was lawful, and further information received during it that supported the court order was not tainted.

A divided panel of CA9 reversed. It held that the detention was unlawful and therefore, that the information obtained during the detention tainted the court order and the results of the body cavity search. Because at the time of the initial questioning, the Customs agents lacked the necessary "clear indication" resp was smuggling drugs internally that was required to obtain a court-ordered x-ray search, it was also unlawful for them to detain her without such a level of suspicion.

Judge Jameson (dj, Montana) dissented. The agents had a strong suspicion she was smuggling drugs; this was sufficient to justify the first strip search. The detention to await resp's bowel movement was no more intrusive than a strip search, since both involve only "passive visual inspection of the body's surface and, in this case, its waste products." Thus, the detention was lawful. Body cavity and x-ray searches, on the other hand,

require a "clear indication" of illegal activity because they intrude beyond the body's surface. In addition, smuggling by ingestion into the alimentary canal does not leave the same external signs as body cavity smuggling does (e.g., unnatural gait, restricted body movements, evidence of lubricants); the reliable indicators of alimentary canal smuggling (refusal to eat, drink, or use toilet facilities) may only be observed over a period of time. Thus, "a reasonable period of detention, based on a real suspicion, is the least intrusive and most reliable means of identifying alimentary canal smugglers."

3. Contentions: The SG contends that cert should be granted because CA9's decision on the level of suspicion needed to justify a detention to await a bowel movement is in conflict with decisions of CA11. In United States v. Montoya-Ramirez, 729 F.2d 1352 (CA11 1984), CA11 ruled that a 12-hour detention to await the deft's bowel movement was not unreasonable. As in this case, the agents suspected the deft was smuggling drugs internally; after he refused to consent to an x-ray search, they detained him until he excreted 93 cocaine-filled condoms. The court ruled that neither the detention, nor the search of the results of the bowel movement, were unreasonable. In contrast, CA9 held that detentions must be based on the same high level of suspicion--a "clear indication" of internal drug smuggling--necessary to warrant a body cavity search. The SG does not contest the use of the "clear indication" standard for body cavity searches; it does contest the CA9's ruling that a detention to await a bowel movement requires the same level of suspicion.

Moreover, both CA5 and CA11 have ruled that x-ray searches at the border may be conducted on a reasonable suspicion that the suspect is smuggling drugs. Neither has required for x-ray searches the higher level of certainty usually applied only to body cavity searches. Finally, CA9's decision also runs counter to settled law holding that border searches are governed by somewhat less stringent standards than other searches.

The SG argues that cert should be granted to resolve these conflicts and prevent drug smugglers from succeeding in their "increasingly adept" methods of smuggling, merely by shifting their operations to points of entry in the Ninth Circuit. CA9's decision hamstrings the ability of Customs officials to do their job, and does so by restricting the use of a "foolproof and relatively unintrusive investigative measure."

4. DISCUSSION: The SG is correct that CA9's decision creates a conflict among the circuits. This appears to be a recurring area of Fourth Amendment law and one that has no small importance to the government's ability to restrict drug smuggling. A response should be called for.

5. RECOMMENDATION: I recommend CFR.

There is no response.

January 3, 1985 Simpson Opin in pets

January 18, 1985

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 84-755

Submitted ....., *19*... *Announced* ....., *19*...

UNITED STATES

VS.

De HERNANDEZ

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											

lgs 04/05/85 Renewed 4/6. Memo in fine - all 8 L 88 baloons in stomach) need, Lynda would Reverse & then in my tentative view also.

BENCH MEMORANDUM

To: Mr. Justice Powell April 5, 1985

From: Lynda

No. 84-755 United States v. de Hernandez

QUESTION PRESENTED

Whether resp, who was reasonably suspected of smuggling contraband drugs inside her body and who refused to submit to an x-ray search, could lawfully be detained at the border by Customs officials for the period of time necessary to examine her bodily wastes?

Although this case is not directly controlled by any of this Court's precedent, I am inclined to believe that CA9 should be reversed. As I discuss below, I believe this result follows logically from this Court's cases on border searches and a recent case, United States v. Sharpe, No. 83-529 (March 20, 1985), involving detentions. I also think that the facts amply demonstrate that the Customs officials acted on a reasonable suspicion that resp was carrying drugs internally. If you want a supplemental memo from me explaining why I think this is so, I will be happy to provide one. No

This Court's cases have long since established that searches and seizures at the country's borders are subject to different, more relaxed constitutional standards than typical Terry stops conducted within the country. E.g., United States v. Ramsey, 431 U.S. 606, 619 (1977). Such relaxed standards are based in part on Congress's broad constitutional power to regulate commerce, and have long been recognized as necessary to prevent smuggling and the entry of prohibited articles. Id. Consequently, routine border searches have never been thought to be subject to the warrant requirement or the usual requirement that a search be based on probable cause. Id., at 617-619.[1]

[1]The SG also argues that resp is entitled to lesser Fourth Amendment protection because she is an alien. Under my view of the case, the Court need not reach this question, and I believe it should avoid it if it can. Resp persuasively argues, however, that because resp had already been "admitted" by immigration officials before Customs officials began their investigation of

Footnote continued on next page.

Indeed, resp concedes that the actions of Customs officials in stopping and questioning her were reasonable; the question presented here is whether the initial seizure of resp, and the fruits of the eventual search, were made unlawful by the length of time the Customs officials detained her, once she refused to consent to an x-ray search.

This Court recently noted in New Jersey v. T.L.O., No. 83-712 (January 15, 1985), that what is a reasonable search or seizure "depends on the context within which the search takes place." Slip op., at 10. The Court ruled that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." Id., at 14. The Court, and you in particular, frequently have observed that the public and the government have an especially compelling interest in preventing drug trafficking. United States v. Place, No. 81-1617 (June 20, 1983), slip op., at 7; United States v. Mendenhall, 446 U.S. 544, 561-562 (1980) (Powell, J., concurring). All of these factors point toward requiring some lessened standard of reasonableness in the case at bar.

Notwithstanding the fact that the Court has held that some border searches without a warrant and without probable cause

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her, she is entitled to many of the same constitutional protections as citizens. This result would logically follow from language in Landon v. Plascencia, 459 U.S. 21 (1982).

are permissible, however, most of those cases have been based in part on the fact that the length of time the person was stopped was brief and the intrusion minimal. E.g., United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (Powell, J.). And, in United States v. Ramsey, supra, the Court expressly left open the possibility that a border search might be deemed unreasonable because of the "particularly offensive manner in which it is carried out." 431 U.S., at 618 n. 13. Thus, resp argues that the 16 hours she was detained makes unlawful the seizure of her and the resulting search that produced the evidence she was smuggling cocaine.

There is support, however, in this Court's cases justifying the length of the detention under the circumstances. In United States v. Sharpe, No. 83-529 (March 20, 1985), the Court noted that although brevity is an important factor in determining the reasonableness of the seizure of an individual based on a reasonable suspicion standard, the Court must also consider "the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." Id., slip op., at 10. Here, as noted above, the purposes of preventing drug trafficking and protecting the country at the border from the entry of unlawful articles are compelling law enforcement goals. Likewise, the SG persuasively argues that a long time period may often be required in cases of this type before the suspect will excrete the bodily wastes needed to be examined.

The Court in Sharpe also held that a detention of some length is more likely to be permissible when the police act diligently and do not unnecessarily prolong the detention. Id., at 9. This is especially true where the suspect's own actions have contributed to the added delay about which he complains. Id., at 12-13. Here, there is no allegation that the Customs officials did anything to add to the length of resp's detention. In fact, as the SG points out, the length of the detention was largely within resp's control, as she could have eliminated it entirely by consenting to an x-ray search, or by agreeing to excrete her wastes sooner.

Finally, the Sharpe Court noted that in determining the reasonableness of a detention based on reasonable suspicion, courts should look to whether alternatives to detention were available and whether the police acted unreasonably in failing to pursue them. Id., at 11. Here, Customs officials attempted to pursue the only other alternative to detention--conducting an x-ray search of resp. As noted above, however, resp refused to consent to such a search. The officials were unable to force an x-ray search because CA9 law requires a court order for such a search, issued on a "clear indication" that the suspect is carrying contraband internally. The officials believed that they did not have enough information to meet this heightened standard, and so, did not pursue a warrant until after the 16-hour detention, which produced additional information that enabled them to get the warrant. Thus, it cannot be said that the

Customs officials unreasonably failed to pursue less intrusive or more reasonable alternatives.

CA9's decision is based on the fact that under its case law, the Customs officials did not have enough information to support a court-ordered x-ray search; hence, according to CA9, detaining resp until she produced the same information was unlawful. The SG argues, however, that CA9 erred in requiring a warrant for an x-ray search based on less than probable cause. As noted above, warrants are generally not required for border searches. United States v. Ramsey, supra. Moreover, as the SG notes, the Fourth Amendment requires that "no warrants shall issue, but upon probable cause"; the SG argues that where a lesser standard applies, a warrant may not be required. In any event, I do not believe that the question of the standard of reasonableness governing x-ray searches at the border is necessarily before the Court. As resp notes, there is no evidence in the record on this point. Resp suggests that the Court assume that an x-ray search requires the same level of reasonableness as the detention at issue here. As this view appears to comport with the SG's position, I recommend it to the Court. Then, there will be no problem reconciling this case with CA9's opinion, yet the Court will not reach out to decide an issue that is not before it. I cannot imagine, and the SG does not argue, that an x-ray search would require a lesser degree of suspicion on the part of Customs officials than would a lengthy detention of the sort resp endured here.

Finally, I would point out that practical considerations support reversing CA9. As the SG notes, drug smuggling of this type does not produce many external signs, not even as many as body cavity smuggling would. See SG's brief 32-33. To require a "clear indication" that a person was smuggling drugs internally before Customs officials could detain him would virtually eliminate Customs' ability to stop this type of smuggler.

All things considered, I recommend that you vote to reverse CA9. If you would like for me to investigate any of these points in more depth, I would be happy to do so.

Irey (SG)

Facts: from Columbia, she had made no. of trips to U.S.; knew no one in U.S., was carrying $5000; said she had come to shop & then return; Those constituted

Strip search disclosed no evidence

Customs suspected she was carrying drugs internally. Offered to allow her to leave

She was not legally w/in U.S but was here physically.

She refused X-Rays

CA9 applied a "clear indication" of criminal conduct — an intermediate standard bet. "reasonable suspicion" & "probable cause"

Govt interest at "border" is high.

The search here would have been "reasonable" away from border, so but clearly was reasonable when one is going thru customs at border.

Away from border, probable cause would be necessary

Frey (cont.)

No probable cause is required at the border.

CAG has developed a new doctrine as to searches of body - strip searches, alimentary canal. The latter presents special problems as it cannot be detected w/o X-Ray ~~of~~ or special exam by doctor. There are no "external signs."

The longer the suspect requires to have X-Ray or go to bathroom, the greater reason there is to believe she has drugs internally.

There are statutes allowing medical exam at border.

X-ray is routine procedure.

Resp. never was X-Rayed.

Horstman (Resp) (Good argument in a bad case)

Defends CA9. If we need the facts in CA5 & CA11 cases, they are distinguishable from this case.

CA9's "clear indication" standard has been applied in numerous cases to convict in "alimentary" cases. See n. 30.

Length of detention alone is unduly intrusive – 27 hrs. detention

The functions of Immigration & Customs officers are different.

Resp. had been "admitted" for immigration,

The "reasonable suspicion" standard was not met in this case

Frey (Reply)

Facts in CA11 cases may have been stronger than here – may have constituted probable cause.

Immigration & Customs have interchangable functions.

A citizen of U.S. would be treated same way. Would not be allow to leave

84-755 U.S. v de Hernandez (2A's)

(88 baloon case)

There was reasonable suspicion that Resp. was smuggling drugs inside her body. CA9's "clear indication" standard is unacceptable

Border searches - because of Govt's compelling to prevent improper entry of contraband or aliens - are subject to lesser Const. standards.

The 16 hr detention here was long, but was not an unlawful seizure.

Resp., by submitting to X-Ray or excreting her waste, could have avoided this detention.

Relevant Cases: U.S. v. Place (5 0's); many cp. on "reasonableness" to drug traffic

Do not to attack standards for X-Ray exams

The Chief Justice Rev.

At the border, Govt interest in compelling ~~[illegible]~~ in preventing drugs being brought in.

Detention here was long but Resp caused it.

Reasonably suspicion test applies - not CA9's standard

Justice Brennan Aff'm

Agree Govt interest is important but treatment of Resp. was unjustified under ~~[illegible]~~ any standard. Was clearly unreasonable.

Resp. was not allowed to leave country

Justice White Rev.

Agree with C.J.

Justice Marshall Affirm

Agree with WJB.
Resp. was held too long
w/o a court order being obtained.

Justice Blackmun Rev.

No external signs of alimentary

Justice Powell Rev

See my notes

Justice Rehnquist Rev.

Nothing to add

Reasonable suspicion at border justifies this

Justice Stevens Rev.

Close case.

Only alternatives are to Rev. or require probable cause test

There are smuggling situations

Border is different from anywhere else.

Would not object to requiring X-Ray of aliens entering U.S.

Justice O'Connor Rev

Reject CA9's standard

Border is special

Reasonable bases standard applies, & this standard was fully met here.

Sally - Joan Not

Lynda

LFP

Pp 7-11

Circulated: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Recirculated: 5/14/85

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–755

Renewed
Joan
5/15

UNITED STATES, PETITIONER *v.* ROSA ELVIRA MONTOYA DE HERNANDEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May —, 1985]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Rosa Elvira Montoya de Hernandez was detained by Customs officials upon her arrival at the Los Angeles airport on a flight from Bogota, Colombia. She was found to be smuggling 88 cocaine-filled balloons in her alimentary canal, and was convicted after a bench trial of various federal narcotics offenses. A divided panel of the United States Court of Appeals for the Ninth Circuit reversed her convictions, holding that her detention violated the Fourth Amendment to the United States Constitution because the Customs inspectors did not have a "clear indication" of alimentary canal smuggling at the time she was detained. 731 F. 2d 1369 (1984). Because of a conflict in the decisions of the Courts of Appeals on this question and the importance of its resolution to the enforcement of Customs laws, we granted certiorari. —— U. S. ——. We now reverse.

Respondent arrived at Los Angeles International Airport shortly after midnight, March 5, 1983, on Avianca Flight 080, a direct 10-hour flight from Bogota, Colombia. Her visa was in order so she was passed through Immigration and proceeded to the Customs desk. At the Customs desk she encountered Customs Inspector Talamantes, who reviewed her documents and noticed from her passport that she had made at least 8 recent trips to either Miami or Los Angeles. Talamantes referred respondent to a secondary Customs'

desk for further questioning. At this desk Talamantes and another inspector asked respondent general questions concerning herself and the purpose of her trip. Respondent revealed that she spoke no English and had no family or friends in the United States. She explained in Spanish that she had come to the United States to purchase goods for her husband's store in Bogota. The Customs inspectors recognized Bogota as a "source city" for narcotics. Respondent possessed $5,000 in cash, mostly $50 bills, but had no billfold. She indicated to the inspectors that she had no appointments with merchandise vendors, but planned to ride around Los Angeles in taxicabs visiting retail stores such as J. C. Penney and K-Mart in order to buy goods for her husband's store with the $5,000.

Respondent admitted that she had no hotel reservations, but stated that she planned to stay at a Holiday Inn. Respondent could not recall how her airline ticket was purchased. When the inspectors opened respondent's one small valise they found about 4 changes of "cold weather" clothing. Respondent had no shoes other than the high-heeled pair she was wearing. Although respondent possessed no checks, waybills, credit cards, or letters of credit, she did produce a Colombian business card and a number of old receipts, waybills, and fabric swatches displayed in a photo album.

At this point Talamantes and the other inspector suspected that respondent was a "balloon swallower," one who attempts to smuggle narcotics into this country hidden in her alimentary canal. Over the years Inspector Talamantes had apprehended dozens of alimentary canal smugglers arriving on Avianca Flight 080. See J. A., at 42; *United States* v. *Mendez-Jimenez*, 709 F. 2d 1300, 1301 (CA9 1983).

The inspectors requested a female Customs inspector to take respondent to a private area and conduct a patdown and strip search. During the search the female inspector felt respondent's abdomen area and noticed a firm fullness, as if respondent were wearing a girdle. The search revealed no

contraband but the inspector noticed that respondent was wearing two pair of elastic underpants with a paper towel lining the crotch area.

When respondent returned to the Customs area and the female inspector reported her discoveries, the inspector in charge told respondent that he suspected she was smuggling drugs in her alimentary canal. Respondent agreed to the inspector's request that she be x-rayed at a hospital but in answer to the inspector's query stated that she was pregnant. She agreed to a pregnancy test before the x-ray. Respondent withdrew the consent for an x-ray when she learned that she would have to be handcuffed en route to the hospital. The inspector then gave respondent the option of returning to Colombia on the next available flight, agreeing to an x-ray, or remaining in detention until she produced a monitored bowel movement that would confirm or rebut the inspectors' suspicions. Respondent chose the first option and was placed in a Customs' office under observation. She was told that if she went to the toilet she would have to use a wastebasket in the women's restroom, in order that female Customs inspectors could inspect her stool for balloons or capsules carrying narcotics. The inspectors refused respondent's request to place a telephone call.

Respondent sat in the Customs office, under observation, for the remainder of the night. During the night Customs officials attempted to place respondent on a Mexican airline that was flying to Bogota via Mexico City in the morning. The airline refused to transport respondent because she lacked a Mexican visa necessary to land in Mexico City. Respondent was not permitted to leave, and was informed that she would be detained until she agreed to an x-ray or her bowels moved. She remained detained in the Customs office under observation, for most of the time curled up in a chair leaning to one side. She refused all offers of food and drink, and refused to use the toilet facilities. The Court of Appeals noted that she exhibited symptoms of discomfort "consistent

with heroic efforts to resist the usual calls of nature." 731 F. 2d, at 1371.

At the shift change at 4:00 p. m. the next afternoon, almost 16 hours after her flight had landed, respondent still had not defecated or urinated or partaken of food or drink. At that time Customs officials sought a court order authorizing a pregnancy test, an x-ray, and a rectal examination. The federal magistrate issued an order just before midnight that evening, which authorized a rectal examination and involuntary x-ray, provided that the physician in charge considered respondent's claim of pregnancy. Respondent was taken to a hosptial and given a pregnancy test, which later turned out to be negative. Before the results of the pregnancy test were known, a physician conducted a rectal examination and removed from respondent's rectum a balloon containing a foreign substance. Respondent was then placed formally under arrest. By 4:10 a. m. respondent had passed 6 similar balloons; over the next 4 days she passed 88 balloons containing a total of 528 grams of 80% pure cocaine hydrochloride.

After a suppression hearing the District Court admitted the cocaine in evidence against respondent. She was convicted of possession of cocaine with intent to distribute, 21 U. S. C. § 841(a)(1) and unlawful importation of cocaine, 21 U. S. C. §§ 952(a); 960(a).

A divided panel of the United States Court of Appeal for the Ninth Circuit reversed respondent's convictions. The Court noted that Customs inspectors had a "justifiably high level of official skepticism about respondent's good motives, but the inspectors decided to let nature take its course rather than seek an immediate magistrate's warrant for an x-ray." 731 F. 2d, at 1371. Such a magistrate's warrant required a "clear indication" or "plain suggestion" that the traveller was an alimentary canal smuggler under previous decisions of the Court of Appeals. See *United States* v. *Quintero-Castro*, 705 F. 2d 1099 (CA9 1983); *United States* v. *Mendez-Jimenez*, 709 F. 2d 1300, 1302 (CA9 1983); but cf. *South Dakota* v.

Opperman, 428 U. S. 367, 370 n. 5 (1976). The court applied this required level of suspicion to respondent's case. The court questioned the "humanity" of the inspectors' decision to hold respondent until her bowels moved, knowing that she would suffer "many hours of humiliating discomfort if she chose not to submit to the x-ray examination." The court concluded that under a "clear indication" standard "the evidence available to the customs officers when they decided to hold [respondent] for continued observation was insufficient to support the 16-hour detention." 731 F. 2d, at 1373.

Petitioners contend that the Customs inspectors reasonably suspected that respondent was an alimentary canal smuggler, and this suspicion was sufficient to justify the detention. In support of the judgment below respondent argues, *inter alia*, that reasonable suspicion would not support respondent's detention, and in any event the inspectors did not reasonably suspect that respondent was carrying narcotics internally.

The Fourth Amendment commands that searches and seizures be reasonable. What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. *New Jersey* v. *T. L. O.*, slip op., at 10–15, —— U. S. —— (1985). The permissibility of a particular law enforcement practice is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *United States* v. *Villamonte-Marquez*, 103 S. Ct. 2573, —— (1983); *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979); *Camara* v. *Municipal Court*, 387 U. S. 523 (1967).

border

Here the seizure of respondent took place at the international border. Since the founding of our Republic Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of du-

ties and to prevent the introduction of contraband into this country. See *United States* v. *Ramsey*, 431 U. S. 606, 616–617 (1977), citing Act of July 31, 1789, c. 5, 1 Stat. 29. This Court has long recognized Congress' power to police entrants at the border. See *Boyd* v. *United States*, 118 U. S. 616, 623 (1886). As we stated recently:

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

Ramsey, *supra*, at 618–619, citing *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363, 376 (1971).

Consistently, therefore, with Congress' power to protect the nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior. Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant,[1] and first-class mail may be opened without a warrant on less than probable cause, *Ramsey*, *supra*. Automotive travellers may be stopped at fixed check points near the border without individualized suspicion even if the stop is based largely on ethnicity, *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 562–563 (1973), and boats on inland waters with ready access

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[1] See *Ramsey*, *supra*, at 616–619; *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 272–273 (1973); *id.*, at 288 (WHITE, J., dissenting). As the Court stated in *Carroll* v. *United States*, 267 U. S. 132, 154 (1925):

"Travellers 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 and effects which may be lawfully brought in."

to the sea may be hailed and boarded with no suspicion whatever. *United States* v. *Villamonte-Marquez*, 103 Sup. Ct. 2573 (1983).

These cases reflect long-standing concern for the protection of the integrity of the border. This concern is, if anything, heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics, see *United States* v. *Mendenhall*, 446 U. S. 544, 561 (1980) (POWELL, J., concurring), and in particular by the increasing utilization of alimentary canal smuggling. This desperate practice appears to be a relatively recent addition to the smugglers' repertoire of deceptive practices, and it also appears to be exceedingly difficult to detect.[2] Congress had recognized these difficulties. 19 U. S. C. § 1582 provides that "all persons coming into the United States from foreign countries shall be liable to detention and search authorized by [customs regulations]." Customs agents may "stop, search and examine" any "vehicle, beast or person" upon which an officer sus-

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[2] See *United States* v. *DeMontoya*, 729 F. 2d 1369 (CA11 1984) (required surgery; swallowed 100 cocaine-filled condoms); *United States* v. *Pino*, 729 F. 2d 1357 (CA11 1984) (required surgery; 120 cocaine-filled pellets); *United States* v. *Mejia*, 720 F. 2d 1378 (CA5 1983) (75 balloons); *United States* v. *Couch*, 688 F. 2d 599, 605 (CA9 1982) (36 capsules); *United States* v. *Quintero-Castro*, 705 F. 2d 1099 (CA9 1983) (120 balloons); *United States* v. *Saldarrianga-Marin*, 734 F. 2d 1425 (CA11 1984); *United States* v. *Vega-Barvo*, 729 F. 2d 1341 (CA11 1984) (135 condoms); *United States* v. *Mendez-Jimenez*, 709 F. 2d 1301 (CA9 1983) (102 balloons); *United States* v. *Mosquera-Ramirez*, 729 F. 2d 1352 (CA11 1984) (95 condoms); *United States* v. *Castrillon*, 716 F. 2d 1279 (CA9 1983) (83 balloons); *United States* v. *Castaneda-Castaneda*, 729 F. 2d 1360 (CA11 1984) (2 smugglers; 201 balloons); *United States* v. *Caicedo-Guarnizo*, 723 F. 2d 1420 (CA9 1984) (85 balloons); *United States* v. *Henao-Castano*, 729 F. 2d 1364 (CA11 1984) (85 condoms); *United States* v. *Ek*, 676 F. 2d 379 (CA9 1982) (30 capsules); *United States* v. *Padilla*, 729 F. 2d 1367 (CA11 1984) (115 condoms); *United States* v. *Gomez-Diaz*, 712 F. 2d 949 (CA5 1983) (69 balloons); *United States* v. *D'Allerman*, 712 F. 2d 100 (CA5 1983) (80 balloons); *United States* v. *Contento-Pachon*, 723 F. 2d 691 (CA9 1984) (129 balloons).

pects there is contraband or "merchandise subject to duty." *Id.*, § 482; see also *id.*, §§ 1467; 1481; 19 CFR §§ 162.6, 162.7.

Balanced against the sovereign's interests at the border are the Fourth Amendment rights of respondent. Having presented herself at the border for admission, and having subjected herself to the criminal enforcement powers of the federal government, 19 U. S. C. § 482, respondent was entitled to be free from unreasonable search and seizure. But not only is the expectation of privacy less at the border than in the interior, see, *e. g.*, *Carroll* v. *United States*, 267 U. S., at 154; *cf. Florida* v. *Royer*, 460 U. S. 491, 515 (1983) (BLACKMUN, J., dissenting), but the Fourth Amendment balance between the interests of the government and the privacy right of the individual is struck much more favorably to the government at the border. *Ante*, ~~9–11~~.

We have not previously decided what level of suspicion would justify a seizure of an incoming traveller for purposes other than a routine border search. Cf. *Ramsey*, *supra*, at 618, n. 13. The Court of Appeals held that the initial detention of respondent was permissible only if the inspectors possessed a "clear indication" of alimentary canal smuggling. 731 F. 2d 1302, citing *Quintero-Castro*, *supra*; *cf. Mendez-Jimenez*, *supra*. This "clear indication" language comes from our opinion in *Schmerber* v. *California*, 384 U. S. 757 (1966), but we think that the Court of Appeals misapprehended the significance of that phrase in the context in which it was used in *Schmerber*.[3] The Court of Appeals for the Ninth Circuit viewed "clear indication" as an intermediate standard be-

[3] In that case we stated:

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

384 U. S., at 769.

tween "reasonable suspicion" and "probable cause." See *Mendez-Jimenez*, *supra*, 709 F. 2d, at 1082. But we think that the words in *Schmerber* were used to indicate the necessity for particularized suspicion that the evidence sought might be found within the body of the individual, rather than as enunciating still a third Fourth Amendment threshold between "reasonable suspicion" and "probable cause."

No other court, including this one, has ever adopted *Schmerber*'s "clear indication" language as a Fourth Amendment standard. See, *e. g.*, *Winston* v. *Lee*, Slip Op., at 6–7, —— U. S. —— (1985) (surgical removal of bullet for evidence). Indeed, another Circuit Court of Appeals, faced with facts almost identical to this case, has adopted a less strict standard based upon reasonable suspicion. See *United States* v. *Mosquera-Ramirez*, 729 F. 2d 1352, 1355 (CA11 1984). We do not think that the Fourth Amendment's emphasis upon reasonableness is consistent with the creation of a third verbal standard in addition to "reasonable suspicion" and "probable cause"; we are dealing with a constitutional requirement of reasonableness, not *mens rea*, see *United States* v. *Bailey*, 444 U. S. 394, 403–406 (1980), and subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question.

We hold that the detention of a traveller 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 traveller and her trip, reasonably suspect that the traveller is smuggling contraband in her alimentary canal.[4]

reasonable suspicion

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[4] It is also important to note what we do *not* hold. Because the issues are not presented today we suggest no view on what level of suspicion, if any, is required for non-routine border searches such as strip, body cavity, or involuntary x-ray searches. Both parties would have us decide the issue of whether aliens possess lesser Fourth Amendment rights at the border; that question was not raised in either court below and we do not consider it today.

The "reasonable suspicion" standard has been applied in a number of contexts and effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause. It thus fits well into the situations involving alimentary canal smuggling at the border: this type of smuggling gives no external signs and inspectors will rarely possess probable cause to arrest or search, yet governmental interests in stopping smuggling at the border are high indeed. Under this standard officials at the border must have a "particularized and objective basis for suspecting the particular person" of alimentary canal smuggling. *United States* v. *Cortez*, 449 U. S. 411, 418 (1981), citing *Terry* v. *Ohio*, *supra*, at 21, n. 18.

The facts, and their rational inferences, known to Customs inspectors in this case clearly supported a reasonable suspicion that respondent was an alimentary canal smuggler. We need not belabor the facts, including respondent's implausible story, that supported this suspicion, see *supra* text at 2–4. The trained Customs inspectors had encountered many alimentary canal smugglers and certainly had more than an "inchoate and unparticularized suspicion or hunch," *Terry*, 392 U. S., at 27, that respondent was smuggling narcotics in her alimentary canal. The inspectors' suspicion was a "'commonsense conclusio[n] about human behavior' upon which 'practical people,' including government officials, are entitled to rely." *T. L. O.*, *supra*, slip op., at 19, —— U. S. ——, citing *United States* v. *Cortez*, 449 U. S. 411, 418 (1981).

The final issue in this case is whether the detention of respondent was reasonably related in scope to the circumstances which justified it initially. In this regard we have cautioned that courts should not indulge in "unrealistic second guessing," *Sharpe*, *supra*, at 9, and we have noted that "creative judges, engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished," *Id.* But "the fact that the protection of the public

might, in the abstract, have been accomplished by 'less inclusive' means does not, in itself, render the search unreasonable." *Id.*, citing *Cady* v. *Dombrowski*, 413 U. S. 433, 447 (1983). Authorities must be allowed "to graduate their response to the demands of any particular situation." *Place*, 462 U. S., at 709, n. 10. Here, respondent was detained *incommunicado* for almost 16 hours before inspectors sought a warrant; the warrant then took a number of hours to procure, through no apparent fault of the inspectors. This length of time undoubtedly exceeds any other detention we have approved under reasonable suspicion. But we have also consistently rejected hard-and-fast time limits, *Sharpe; Place*, *supra*, at 709, n. 10. Instead, "common sense and ordinary human experience must govern over rigid criteria." *Sharpe*, *supra*, at 9.

The rudimentary knowledge of the human body which judges possess in common with the rest of humankind tells us that alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief *Terry*-type stops. It presents few, if any external signs; a quick frisk will not do, nor will even a strip search. In the case of respondent the inspectors had available, as an alternative to simply awaiting her bowel movement, an x-ray. They offered her the alternative of submitting herself to that procedure. But when she refused that alternative, the Customs inspectors were left with only two practical alternatives: detain her for such time as necessary to confirm their suspicions, a detention which would last much longer than the typical "*Terry*" stop, or turn her loose into the interior ~~with~~ reasonably suspected contraband drugs ~~on her person.~~ carrying the

The inspectors in this case followed this former procedure. They no doubt expected that respondent, having recently disembarked from a 10-hour direct flight with a full and stiff abdomen, would produce a bowel movement without extended delay. But her visible efforts to resist the call of nature,

which the court below labeled "heroic," disappointed this expectation and in turn caused her humiliation and discomfort. Our prior cases have refused to charge police with delays in investigatory detention attributable to the suspect's evasive actions, see *Sharpe*, *supra*, at 11–12; *id.*, at 9 (MARSHALL, J., concurring in judgment), and that principle applies here as well. Respondent alone was responsible for much of the duration and discomfort of the seizure.

Under these circumstances, we conclude that the detention in this case was not unreasonably long. It occurred at the international border, where the Fourth Amendment balance of interests leans heavily to the government. 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. See 8 U. S. C. §§ 1182(a)(23); 1182(a)(6); 1222; 19 CFR §§ 162.4–162.7. See also 19 U. S. C. § 482; 8 U. S. C. § 1103(a). In this regard the detention of a suspected alimentary canal smuggler at the border is analogous to the detention of a suspected tuberculosis carrier at the border: both are detained until their bodily processes dispel the suspicion that they will introduce a harmful agent into this country. Cf. 8 U. S. C. § 1222; 42 CFR pt. 34; 19 U. S. C. §§ 482, 1582.

Respondent's detention was long, uncomfortable, indeed, humiliating; but both its length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country. In *Adams* v. *Williams*, 407 U. S. 143 (1972), another *Terry*-stop case, we said that "the Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." 407 U. S., at 145. Here, by analogy, in the presence of articulable suspicion of smuggling in her alimentary canal, the Customs officers were not required

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 14, 1985

No. 84-755 United States v. de Hernandez

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

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Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 15, 1985

84-755 - United States v. de Hernandez

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Byron

Justice Rehnquist

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Washington, D. C. 20543

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JUSTICE BYRON R. WHITE

May 15, 1985

84-755 - United States v. de Hernandez

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Sincerely,

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JUSTICE WM. J. BRENNAN, JR.

May 15, 1985

No. 84-755

United States v. De Hernandez

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I'll be circulating a dissent in the above "in due course."

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Bill

Justice Rehnquist

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JUSTICE HARRY A. BLACKMUN

May 15, 1985

Re: No. 84-755, United States v. DeHernandez

Dear Bill:

Please join me.

Sincerely,

H.A.B.

Justice Rehnquist

cc: The Conference

May 15, 1985

84-755 United States v. De Hernandez

Dear Bill:

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Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 17, 1985

Re: No. 84-755 - United States v. De Hernandez

Dear Bill:

I join.

Regards,

WEB

Justice Rehnquist

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CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 26, 1985

Re: No. 84-755-U.S. v. De Hernandez

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

84-755 United States v. De Hernandez (Lynda)

WHR for the Court 4/26/85
1st draft 5/14/85
2nd draft 5/16/85
Joined by SOC 5/14/85
LFP 5/15/85
BRW 5/15/85
CJ 5/17/85

JPS concurring in the judgment
1st draft 6/2/85

WJB dissenting
Typed draft 6/25/85
1st printed draft 6/27/85
Joined by tM 6/26/85

WJB will dissent 5/15/85
TM await dissent 5/15/85