CONSTITUTIONAL LAW—SEARCH AND SEIZURE—"REASONABLE SUSPICION" TEST PROVIDES CONSTITUTIONAL STANDARD FOR DETAINING SUSPECTED ALIMENTARY CANAL SMUGGLERS—*United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985).

The 1980's have witnessed a heightened awareness of the grave problems associated with drug smuggling and drug abuse.[1] In response, the Federal Government has developed new, more stringent methods of law enforcement in an effort to curtail the flow of illegal substances into this country.[2] Not surprisingly, drug smugglers have responded to this crackdown by developing novel, harder-to-detect methods for bringing their wares into the United States.[3] One new method of smuggling that has become increasingly popular with drug runners involves a smuggler's swallowing plastic bags or "balloons" filled with the illegal substances.[4] The smuggler then proceeds into this country with the undetected contraband concealed safely in his alimentary canal, to be retrieved later for distribution.[5] Sophisticated methods of drug smuggling, like this one, have tested the permissible limits of law enforcement methods as Government officials attempt to uncover new shipments of illegal substances.[6]

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1 *See generally Getting Straight*, NEWSWEEK, June 4, 1984, at 62, 62-69 (discussing the huge numbers of Americans struggling to overcome their drug and alcohol addictions); *Why U.S. Is Losing the War Against Drugs*, U.S. NEWS & WORLD REP., Feb. 6, 1984, at 49, 49-50 (outlining the country's problem in combating the drug trade) [hereinafter cited as *Losing the War Against Drugs*].

2 *See generally Losing the War Against Drugs*, *supra* note 1, at 49 ("33 federal agencies in nine departments" currently take part in the war against drugs). In addition, the President has enlisted the help of the military and the F.B.I. in his campaign against drugs. *Id.*

3 *See generally* United States v. Vega-Barvo, 729 F.2d 1341, 1349-50 (11th Cir.) (discussing traditional methods of smuggling as well as new methods such as alimentary canal smuggling), *cert. denied*, 105 S. Ct. 597 (1984).

4 United States v. Montoya de Hernandez, 105 S. Ct. 3304, 3309 & n.2 (1985).

5 *See* United States v. Montoya de Hernandez, 731 F.2d 1369, 1374 (9th Cir. 1984) (Jameson, J., dissenting), *rev'd*, 105 S. Ct. 3304 (1985). The alimentary canal is defined as "[t]he mucous-membrane-lined tube of the digestive system, extending from the mouth to the anus and including the pharynx, esophagus, stomach, and intestines." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 33 (new college ed. 1981). Alimentary canal smugglers initially prepare their bodies by taking laxatives to flush out their digestive tracts. *Hernandez*, 731 F.2d at 1374 (Jameson, J., dissenting). Next, the smuggler places the illegal substances in capsules or balloons and swallows them. *Id.* The smuggler then ingests certain drugs to slow digestion and curtail diarrhea during their short flight to this country. *Id.* Once they safely arrive in this country, they consume a second laxative to recover the narcotics. *Id.* (citation omitted).

6 *See* United States v. Montoya de Hernandez, 731 F.2d 1369, 1374 (9th Cir. 1984) (Jameson, J., dissenting), *rev'd*, 105 S. Ct. 3304 (1985). The *Hernandez* court

In *United States v. Montoya de Hernandez*,[7] the United States Supreme Court examined the legality of customs officials' searches of persons suspected of smuggling drugs into this country.[8] More specifically, the Court considered the constitutionality of a twenty-four-hour detention of a person suspected by experienced customs officials of "alimentary canal smuggling."[9]

The defendant in *Hernandez*, Rosa Elvira Montoya de Hernandez, was initially detained by customs officials after she arrived in Los Angeles on Avianca flight 80 from Bogota, Colombia.[10] Upon arrival, she passed through immigration without incident and continued to the customs desk where she encountered a customs inspector who reviewed her papers.[11] The customs inspector noticed from the defendant's documents that she had traveled to Miami or Los Angeles at least eight times in the past several months.[12] Considering this pattern of air travel suspicious, the inspector instructed her to prepare for further questioning at a secondary customs desk.[13]

At the second desk, the defendant was asked general questions about herself and the reason for her trip to Los Angeles.[14] During the course of the questioning, the defendant revealed, in Spanish, that she did not speak English and had no friends or relations in the United States.[15] She further stated that she had come to the United States with $5000 in cash[16] to purchase items for her husband's business in Bogota.[17] She intended to accomplish her purpose by riding around Los Angeles in taxicabs and visiting retail stores.[18] As the questioning progressed, the customs inspectors learned from the defendant that she did not have

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stated: "It is clear that narcotics smugglers have become increasingly adept at concealing contraband. Consequently, the indicia used by customs officials to identify smugglers have in some cases become more general and circumstantial." *Id.*

7 105 S. Ct. 3304 (1985).

8 *See id.* at 3306.

9 *See id.*

10 *Id.*

11 *Id.* at 3306-07.

12 *Id.* at 3307.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* This money was comprised mostly of $50 bills. *Id.* While this $5000 represented a substantial sum of money, the defendant did not possess a billfold. *Id.*

17 *Id.* The customs officials' suspicions were substantially elevated by the defendant's reference to Bogota because Bogota is a well-known center for narcotics traffic. *Id.*

18 *Id.* The defendant revealed, however, that she had no scheduled meetings with any merchandise vendor. *Id.*

hotel reservations for her stay in America.[19] Furthermore, Hernandez told the inspectors that she could not remember how her ticket to Los Angeles was purchased.[20] When the inspectors proceeded to open the defendant's luggage, they found only "four changes of 'cold weather' clothing" and noticed that the defendant had no shoes except for the single pair of high-heeled shoes she was wearing.[21]

At this point, the customs officials fully suspected that the defendant was smuggling drugs into the country.[22] This suspicion was based upon the defendant's past travel practices, the limited travel provisions contained in her luggage, and her scant knowledge concerning the particulars of the trip.[23] One inspector in particular, who had apprehended dozens of alimentary canal smugglers on previous Avianca flights,[24] suspected the defendant of being a "balloon smuggler."[25] Acting upon this suspicion, the inspector requested a female customs agent to conduct in private a pat down and strip search of the defendant.[26] During the course of this search, "the female inspector felt [the defendant's] abdomen area and noticed a firm fullness, as if [the defendant] was wearing a girdle."[27] Although the initial search revealed no illegal substances, the inspector observed that the defendant had on two pairs of elastic undergarments lined with paper towels in the crotch area.[28]

The female inspector reported her findings to the inspector in charge, who then informed the defendant that he suspected her of being a "balloon swallower."[29] When asked, the defendant agreed to be X-rayed at a hospital to confirm or rebut these suspicions.[30] Although the defendant informed the inspector that

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19 *Id.*

20 *Id.* It is frequently the case that internal drug smugglers, or "mules," as they are referred to, often do not buy their own ticket. *See* United States v. Renao-Castano, 729 F.2d 1364, 1365 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 3552 (1985).

21 *Hernandez*, 105 S. Ct. at 3307.

22 *See id.*

23 *See supra* notes 12-21 and accompanying text.

24 *See Hernandez*, 105 S. Ct. at 3307. As of July 10, 1982, this inspector had apprehended 25 persons who had arrived on Avianca flight 80 with drugs in their alimentary canals. United States v. Mendez-Jimenez, 709 F.2d 1300, 1301 (9th Cir. 1983).

25 *Hernandez*, 105 S. Ct. at 3307. A balloon smuggler is "one who attempts to smuggle narcotics into this country hidden in [his] alimentary canal." *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*; *see also supra* note 25 (balloon swallower same as balloon smuggler).

30 *Hernandez*, 105 S. Ct. at 3307.

she was pregnant, she agreed to take a pregnancy test for verification before submitting to the X ray.[31] The defendant withdrew her consent to be X-rayed, however, when she was informed that she would be handcuffed on the way to the hospital.[32] When the defendant withdrew this consent, she was given her choice of three options: returning to Bogota on the next flight available, submitting to an X ray, or remaining in custody until she produced a bowel movement for examination.[33] The defendant initially chose to return to Colombia; however, she was unable to do so because the next flight to Colombia had a layover in Mexico and she lacked the necessary visa.[34] The defendant was then advised that she would have to remain in custody until she consented to an X ray or had a monitored bowel movement.[35]

The defendant persisted in her refusal to be X-rayed, and she refused to consume any food or drink.[36] She also declined to use the toilet facilities during her period of confinement.[37] Instead, the defendant spent most of the following sixteen hours curled up in a small seat.[38] At that time, customs agents applied for a magistrate's order permitting a pregnancy test, a rectal examination, and an X ray.[39] This court order was granted approximately eight hours later, making Hernandez's period of confinement a full twenty-four hours in duration.[40] Customs officials then transported the defendant to the hospital where a pregnancy test was administered; this test later proved to be negative.[41] Before these test results were known, however, a doctor performed a rectal examination of the defendant and extracted a balloon containing eighty-percent-pure cocaine.[42] The defendant

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31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.* Because the flight from Los Angeles to Bogota would land first in Mexico City, the Mexican airline refused to place the defendant on the flight without a Mexican visa. *See id.*

35 *Id.* at 3307-08.

36 *Id.* at 3308.

37 *See id.*

38 *Id.* The Supreme Court stated "that [the defendant] exhibited symptoms of discomfort consistent with 'heroic efforts to resist the usual calls of nature.' " *Id.* (quoting United States v. Montoya de Hernandez, 731 F.2d 1369, 1371 (9th Cir. 1984), *rev'd*, 105 S. Ct. 3304 (1985)).

39 *Id.* The order of the Federal magistrate authorizing the rectal examination and involuntary X ray was conditioned on the physician in charge of the hospital or emergency room considering the defendant's claim of pregnancy. *Id.*

40 *See id.*

41 *Id.*

42 *See id.* Within four hours of the initial examination, the defendant passed six

was then given *Miranda* warnings[43] and formally placed under arrest.[44]

At the defendant's trial, the district court, after a suppression hearing, decided to admit the cocaine into evidence.[45] As a result, the defendant "was convicted of possession of cocaine with intent to distribute"[46] and "unlawful importation of cocaine."[47] On appeal, however, a divided panel of the Ninth Circuit Court of Appeals reversed the defendant's conviction.[48] Although the circuit court recognized that the customs officials had "a justifiably high level of official skepticism about the" defendant's stated intentions,[49] it held that this skepticism failed to justify the lengthy detention of the defendant.[50] The court believed that the inspectors' choice "to let nature take its course" was no substitute for the immediate procurement of a magistrate's warrant for an X ray.[51] The Ninth Circuit noted that under its prior decisions, a magistrate's warrant would issue upon a "clear indication" or "plain suggestion" that the suspect was smuggling drugs in her alimentary canal.[52] Finding that the inspectors' questioning of Hernandez provided no clear indication of wrongdoing, the court reasoned that "the evidence available to the customs officers when they decided to hold [the defendant] for continued observation was insufficient to support the 16-hour detention."[53] It was against this background of conflicting district court and Ninth Circuit decisions that the Supreme Court agreed to resolve the *Hernandez* controversy.[54]

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similar balloons filled with cocaine. *See id.* Altogether, the defendant "passed 88 balloons containing a total of 528 grams of 80% pure cocaine hydrochloride." *Id.*

43 *See* United States v. Montoya de Hernandez, 731 F.2d 1369, 1371 (9th Cir. 1984), *rev'd*, 105 S. Ct. 3304 (1985).

44 *Hernandez*, 105 S. Ct. at 3308.

45 *Id.*

46 *Id.* (violation of 21 U.S.C. § 841(a)(1) (1982)).

47 *Id.* (violation of 21 U.S.C. §§ 952(a), 960(a) (1982)).

48 United States v. Montoya de Hernandez, 731 F.2d 1369, 1373 (9th Cir. 1984), *rev'd*, 105 S. Ct. 3304 (1985).

49 *Id.* at 1372.

50 *Id.* at 1373.

51 *See Hernandez*, 105 S. Ct. at 3308 (citing United States v. Montoya de Hernandez, 731 F.2d 1369, 1371 (9th Cir. 1984), *rev'd*, 105 S. Ct. 3304 (1985)).

52 *See* United States v. Montoya de Hernandez, 731 F.2d 1369, 1371 (9th Cir. 1984) (citations omitted), *rev'd*, 105 S. Ct. 3304 (1985).

53 *Id.* at 1373.

54 *See Hernandez*, 105 S. Ct. at 3306. The *Hernandez* Court noted that "another Circuit Court of Appeals, faced with facts almost identical to this case, has adopted a less strict standard [than the Ninth Circuit] based upon reasonable suspicion." *Id.* at 3310-11 (citing United States v. Mosquera-Ramirez, 729 F.2d 1352, 1355 (11th

The fourth amendment to the United States Constitution protects the people "in their persons, houses, papers, and effects, against unreasonable searches and seizures."[55] Generally, for a search to be deemed reasonable, it must be authorized by a warrant approved by a magistrate based on a showing of probable cause.[56] Courts have long cautioned, however, that the fourth amendment does not condemn all searches, but only those that are found to be unreasonable.[57] As a result, probable cause is not considered a sine qua non for a reasonable search.[58] Instead, the reasonableness of a particular search will depend upon the prior justification presented to law enforcement officials and the apparent urgency of the need to conduct the search.[59]

An important Supreme Court case dealing with the reasonableness of government searches of individuals is *Terry v. Ohio*.[60] In *Terry*, the Court faced a situation in which a police officer, though lacking the traditional probable cause to search, nevertheless had detained and frisked suspects based merely upon a reasonable suspicion of wrongdoing.[61] The *Terry* Court recognized that such brief detentions are governed by the fourth amendment, but the majority stopped short of holding that all stops lacking probable cause are per se unconstitutional.[62] The Court declared that the determination of whether such searches

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Cir. 1984)). The Supreme Court granted certiorari in the *Hernandez* case to settle this apparent conflict between the circuits. *Id.* at 3306.

55 U.S. CONST. amend. IV.

56 *See* Terry v. Ohio, 392 U.S. 1, 35-36 (1968) (Douglas, J., dissenting).

57 *See id.* at 9; Carroll v. United States, 267 U.S. 132, 147 (1925).

58 *See* Terry v. Ohio, 392 U.S. 1, 15-16, 30 (1968) (Court concluding that search lacking probable cause was nevertheless reasonable and permissible under fourth amendment).

59 *See id.* at 20. Outlining the general justification required to conduct a search, the *Terry* Court stated:

> We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances. . . . But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

Id. (citations & footnote omitted).

60 392 U.S. 1 (1968).

61 *See id.* at 5-8.

62 *See id.* at 20.

are reasonable requires a two-step analysis: first, a tribunal must determine if the action taken by the officer was permissible at its inception, and second, the court must decide whether the search was "reasonably related in scope to the circumstances which justified the interference in the first place."[63]

Writing for the majority, Chief Justice Warren determined that in order to assess the reasonableness of a search, a court must balance the officer's need to conduct the search against the accompanying intrusion on the suspect's liberty.[64] Chief Justice Warren further stated that to prove a legitimate need to search, the officer involved "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[65] Hence, the *Terry* Court recognized the validity of searches based upon observations that would " 'warrant a man of reasonable caution in the belief, that the action taken was appropriate."[66]

Furthermore, searches at the nation's border have long been subject to different constitutional standards than searches conducted in the nation's interior.[67] The Supreme Court and Congress have consistently recognized that searches conducted at the national border are presumed to be reasonable because of the long-standing right of a sovereign to protect its boundaries.[68] In the 1925 case of *Carroll v. United States*,[69] the Supreme Court expressly approved the Government's practice of searching every vehicle entering the United States, regardless of whether probable cause to conduct a search existed.[70] The *Carroll* Court noted that while such a practice would be unreasonable if conducted in the nation's interior, the nation's interest in self-protection justified a search of every vehicle at the border.[71] Hence, the Court recognized the broad powers to search that border officials have

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63 *Id.* at 19-20.

64 *Id.* at 20-21.

65 *Id.* at 21 (footnote omitted).

66 *Id.* at 22 (citations omitted).

67 *See* United States v. Ramsey, 431 U.S. 606, 616-19 (1977); Carroll v. United States, 267 U.S. 132, 153-54 (1925).

68 *See* Carroll v. United States, 267 U.S. 132, 154 (1925). The *Carroll* Court stated that "[t]ravellers may be . . . stopped [without probable cause] in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Id.*; *see also infra* notes 89-102 and accompanying text (discussing recent border search cases).

69 267 U.S. 132 (1925).

70 *See id.* at 154.

71 *See id.*

enjoyed ever since the *Carroll* decision.[72]

Fourth amendment jurisprudence was taken a step further in the 1950's and 1960's in a series of cases examining the government's right to procure evidence contained within a suspect's body. In its 1952 decision in *Rochin v. California*,[73] the Supreme Court found unreasonable a stomach pump search of a defendant who had swallowed two capsules during a drug raid.[74] The *Rochin* majority reasoned that the police conduct in this instance was so egregious that it "shock[ed] the conscience" of the Court.[75] Therefore, the Court invalidated the search as an unreasonable violation of the defendant's due process rights.[76]

Fourteen years after its decision in *Rochin*, however, the Supreme Court expressly approved the taking of a blood sample from a defendant suspected of drunken driving.[77] In *Schmerber v. California*,[78] the Court held not only that the procurement of a blood sample is a reasonable search under the fourth amendment, but also that it does not violate the suspect's fifth amendment privilege against self-incrimination.[79] The Court reasoned that when considered as a search, this taking of blood from the suspect was reasonable because the procedure was performed by a doctor and because there was a danger that the evidence—a high blood-alcohol concentration—would be destroyed if immediate action were not taken.[80] Unlike the situation in *Rochin*, the police officers in *Schmerber* used no abusive, "conscience-shock-

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72 *See id.*; *see also* U.S. CONST. art. 1, § 8, cl. 3 (granting Congress broad powers to regulate commerce with foreign nations).

73 342 U.S. 165 (1952).

74 *Id.* at 166, 174.

75 *Id.* at 172. The *Rochin* Court stated:

> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id.

76 *Id.* at 174.

77 *See* Schmerber v. California, 384 U.S. 757 (1966).

78 384 U.S. 757 (1966).

79 *See id.* at 760, 761, 772.

80 *See id.* at 770-72.

ing" means to obtain evidence.[81]

The *Schmerber* Court then took an interesting approach to the defendant's claim of a fifth amendment violation. Recognizing that the fifth amendment protects a suspect from being compelled in any criminal case to be a witness against himself,[82] the Court opined that this protection only extends to "evidence of a testimonial or communicative nature."[83] The Court noted that many state and Federal cases have held that the fifth amendment does not protect a criminal suspect from submitting to such techniques as fingerprinting, photographing, measurements, writing analysis, and voice identification.[84] The reason for this, the *Schmerber* Court stated, is that these items constitute noncommunicative evidence, which cannot be subverted by abusive law enforcement practices.[85] The taking of a blood sample was considered similar to these procedures because it fails to implicate the suspect's testimonial capacity.[86] The Court noted that the results of the test depended solely upon the chemical analysis of the evidence withdrawn and that the suspect, other than being the donor of the blood, had little to do with the procedure.[87] Hence, the Court admitted the evidence as consistent with the protections of the fifth amendment.[88]

Subsequently, in the 1970's, the Supreme Court re-examined the constitutionality of government searches at the United States border in a series of immigration control cases. Three decisions in particular—*Almeida-Sanchez v. United States*,[89] *United States v. Brignoni-Ponce*,[90] and *United States v. Martinez-Fuerte*[91] —established the constitutionally permissible procedures for detaining and searching vehicles at the border. In *Almeida-Sanchez*, the Court held that a warrantless police search of an automobile conducted only twenty miles from the Mexican border

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81 *See id.* at 760.

82 *Id.* at 761.

83 *Id.* The *Schmerber* Court recognized that "the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends." *Id.*

84 *Id.* at 764.

85 *See id.* at 764-65. The *Schmerber* Court noted that the "compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate [the privilege against self-incrimination.]" *Id.*

86 *Id.* at 765.

87 *See id.*

88 *Id.*

89 413 U.S. 266 (1973).

90 422 U.S. 873 (1975).

91 428 U.S. 543 (1976).

was a violation of the fourth amendment.[92] Although the Court recognized that the search was predicated on police efforts to detect illegal aliens, it reasoned that it could not condone arbitrary police stops of automobiles simply because the stops were conducted *near* the national border.[93] The Court stated that some prior justification to search must exist before it would approve warrantless vehicle stops in the nation's interior.[94] The Court did reaffirm, however, that *Carroll* and subsequent decisions had provided for broad governmental powers to conduct searches *at* the nation's border.[95]

In *Brignoni-Ponce*, decided two years after *Almeida-Sanchez*, the Supreme Court once again held a random stop of an automobile near the national border unconstitutional.[96] In that case, police officers had stopped a vehicle to search for illegal aliens merely because the occupants of the automobile appeared to be of Mexican ancestry.[97] The Court found that this observation by police, without something more, could not serve to justify a roving patrol search as reasonable under the fourth amendment.[98]

One year later, however, in *Martinez-Fuerte*, the Supreme Court expressly approved a police-conducted, illegal-alien checkpoint that was set up near the national border.[99] The *Martinez-Fuerte* Court reasoned that fixed checkpoints near the national border, at which all vehicles are stopped, present a lesser degree of objective intrusion than the random stops conducted in *Almeida-Sanchez* and *Brignoni-Ponce*.[100] The Court further opined that because these fixed checkpoints are monitored by higher-level government officials, they are not the product of the unbridled discretion of officers in the field.[101] Thus, the Court held that

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92 *Almeida-Sanchez*, 413 U.S. at 273. The officers who conducted this arbitrary stop were simply engaged in a roving border patrol as opposed to a fixed border checkpoint. *Id.*

93 *See id.*

94 *See id.* at 269-70.

95 *See id.* at 272.

96 *See Brignoni-Ponce*, 422 U.S. at 887.

97 *Id.* at 875.

98 *See id.* at 884. The *Brignoni-Ponce* Court stated that "[e]xcept at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Id.* (footnote omitted).

99 *See Martinez-Fuerte*, 428 U.S. at 566.

100 *See id.* at 559.

101 *See id.* The *Martinez-Fuerte* Court posited that because

> field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in

fixed-checkpoint stops are reasonable methods of law enforcement under the fourth amendment.[102]

These immigration control cases, along with the earlier cases dealing with border searches and interior body searches, have subsequently served as the legal authority for circuit courts presented with the issue of governmental searches of alimentary canal smugglers. Not surprisingly, the circuit courts have reached varied conclusions regarding the constitutionality of these searches.[103] While the Fifth Circuit and the Eleventh Circuit have appeared willing to condone the actions of customs officials,[104] the Ninth Circuit has experienced great difficulty in deciding how far customs inspectors may go when detaining and searching persons suspected of alimentary canal smuggling.[105] Borrowing language from the Supreme Court's holding in *Schmerber*, the Ninth Circuit has determined that customs officials need a "clear indication" of alimentary canal smuggling before they can constitutionally detain a suspect.[106] The Ninth Circuit therefore has adopted an intermediate standard for searching smuggling suspects, which falls somewhere between "reasonable suspicion" and "probable cause."[107]

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the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.

Id. (footnote omitted).

102 *Id.* at 566-67.

103 *See infra* notes 104-115 and accompanying text.

104 *See, e.g.*, United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir.), *cert. denied*, 105 S. Ct. 597 (1984); United States v. Mejia, 720 F.2d 1378 (5th Cir. 1983) (both upholding the constitutionality of customs officials' detentions of persons suspected of alimentary canal smuggling). The *Vega-Barvo* court adopted a "reasonable suspicion" standard for determining the constitutionality of searching people suspected of alimentary canal smuggling. *See Vega-Barvo*, 729 F.2d at 1349. The Eleventh Circuit stated that the standard was usually met in cases where the suspect was first approached because he fit into a drug courier profile that had been formulated by customs officials. *Id.* The court noted, however, that the factors which comprise the profile would be scrutinized in order to determine whether there was a "reasonable suspicion." *See id.*

In *Mejia*, the Fifth Circuit noted that while using a drug courier profile may by itself be insufficient to establish a reasonable suspicion to search, it may warrant the further examination of suspects. *See Mejia*, 720 F.2d at 1382. The court stated that the profile, coupled with the information procured during the examination, may be enough to meet the standard. *See id.*

105 *See infra* notes 106-115 and accompanying text.

106 *See* United States v. Mendez-Jimenez, 709 F.2d 1300, 1302 (9th Cir. 1983); United States v. Quintero-Castro, 705 F.2d 1099, 1100 (9th Cir. 1983). The Supreme Court recognized in the *Hernandez* decision that the "clear indication" language was first set forth in *Schmerber*. *See Hernandez*, 105 S. Ct. at 3310.

107 *See* United States v. Montoya de Hernandez, 731 F.2d 1369, 1371-72 (9th Cir.

Unfortunately, application of this standard has led to disparate results.[108] In two important 1983 decisions, *United States v. Quintero-Castro*[109] and *United States v. Mendez-Jimenez*,[110] the Ninth Circuit reached opposite conclusions regarding the constitutionality of the detention of a person suspected of alimentary canal smuggling.[111] The former case invalidated a warrant permitting an X-ray search of a suspect because customs officials failed to supply the issuing magistrate with a "clear indication" that the suspect might be smuggling contraband.[112] The latter case, although based on many similar facts, approved an X-ray search of a suspected smuggler for exactly the opposite reason.[113]

One year later, in *United States v. Montoya de Hernandez*,[114] the Ninth Circuit again invalidated a customs search because the ob-

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1984) (explaining the reasons for this intermediate standard applied by Ninth Circuit courts), *rev'd*, 105 S. Ct. 3304 (1985).

108 *See infra* notes 109-116 and accompanying text.

109 705 F.2d 1099 (9th Cir. 1983).

110 709 F.2d 1300 (9th Cir. 1983).

111 *Compare Quintero-Castro*, 705 F.2d at 1101 (holding facts did not support issuance of warrant to conduct X-ray search of alimentary canal smuggling suspect) *with Mendez-Jimenez*, 709 F.2d at 1304 (holding facts did support issuance of warrant to conduct X-ray search of suspected smuggler).

112 *See Quintero-Castro*, 705 F.2d at 1100-01. The *Quintero-Castro* court noted:

> The facts as recited in the affidavit showed that Quintero-Castro appeared nervous; he had paid cash for his airline ticket; he said that he was on a short pleasure trip without his family; and that although he had relatives in the area, he planned to stay at a hotel. Aguilar and Quintero-Castro gave conflicting answers on whether they knew each other even though they were traveling together. They were coming from a drug source country. Quintero-Castro had a large amount of cash and told conflicting stories about his occupation. These are suspicious circumstances and indicate some wrongdoing, but the issue here is whether these circumstances adequately focused suspicion on body cavity smuggling.

Id. (citation omitted). The court concluded that these factors failed to support a search of the suspect. *Id.* at 1101.

113 *See Mendez-Jimenez*, 709 F.2d at 1304. Although the defendant in *Quintero-Castro* was also carrying a large amount of cash, was very nervous, and was unable to explain accurately the purpose of his trip, the *Mendez-Jimenez* court distinguished this case from *Quintero-Castro* by noting that

> [i]n [*Quintero-Castro*], there were fewer factors to support a finding of clear indication. There was no anti-diarrhea pill or any other substance which would be associated with internal smuggling; there was no showing of non-consumption of food or beverages; the suspects had relatives in the United States; and there was no evidence of passport tampering. That case is therefore clearly distinguishable from this one.

Id. Hence, the Ninth Circuit made it clear that the question of whether a suspect could constitutionally be searched on a suspicion of alimentary canal smuggling was extremely fact sensitive. *See id.*

114 731 F.2d 1369 (9th Cir. 1984), *rev'd*, 105 S. Ct. 3304 (1985).

servations upon which officials based their search failed to provide a "clear indication" that the suspect was smuggling.[115] Finally, the Supreme Court, eager to eliminate the conflict among the circuits, granted certiorari in the *Hernandez* case in order to clarify the constitutional standards for detaining and searching someone suspected of alimentary canal smuggling.[116]

In *Hernandez*, the Supreme Court adopted the "reasonable suspicion" standard for evaluating the legality of a customs official's acts when detaining an international traveler for more than a routine customs inspection and search.[117] Under this standard, customs officials at the national border need "a 'particularized and objective basis for suspecting the particular person' of alimentary canal smuggling."[118] Justice Rehnquist, writing for the majority,[119] postulated that this standard allows for a balancing of the private and public interests involved in alimentary canal searches while recognizing the detection problems inherent in this type of smuggling.[120]

The *Hernandez* Court began its analysis by acknowledging the long-standing principle that border searches answer to different constitutional standards than searches that occur in the nation's interior.[121] The Court disagreed, however, with the Ninth Cir-

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115 *See id.* at 1373; *see also supra* notes 48-53 and accompanying text (discussing Ninth Circuit's reasoning).

116 *See Hernandez*, 105 S. Ct. at 3306.

117 *Id.* at 3311. This standard was first enunciated by the Court in *Terry v. Ohio*. *See supra* notes 60-66 and accompanying text (discussing *Terry*).

118 *Hernandez*, 105 S. Ct. at 3311 (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)) (additional citations omitted).

119 *Id.* at 3306. Justice Stevens filed a concurring opinion. *See id.* at 3313 (Stevens, J., concurring). Justice Brennan filed a dissenting opinion in which Justice Marshall joined. *See id.* at 3313-25 (Brennan, J., dissenting).

120 *Id.* at 3311. Justice Rehnquist noted that alimentary canal smuggling usually "gives no external signs" that it is occurring. *Id.* Thus, customs officials will rarely have probable cause to search or arrest despite the important governmental interest in preventing smuggling. *Id.*

121 *Id.* at 3309. Justice Rehnquist based this contention on the long line of cases holding that border searches involve different considerations and constitutional principles than searches occurring inside the country. *See id.* One of these special considerations is the important governmental interest in preventing contraband from entering the country. *See id.* Justice Rehnquist recognized that customs officials are empowered to prevent persons from bringing anything harmful—such as narcotics, explosives, or communicable diseases—into the country. *Id.* at 3312 (citations omitted). He analogized the detention of a suspected alimentary canal smuggler at the border to that of a suspected tuberculosis carrier; both should be detained until their bodies dispel the inspector's suspicion that they will bring something harmful into the country. *Id.* Justice Rehnquist also noted that the Court had previously approved the stopping of motorists at fixed border checkpoints without individualized suspicion of wrongdoing. *Id.* at 3309 (citing United

cuit's determination that a "clear indication" standard should govern the constitutionality of searches at the United States border.[122] Justice Rehnquist stated that the circuit court had misapplied the principles enunciated in *Schmerber* by applying the "clear indication" standard to the *Hernandez* case.[123] The Court noted that "[n]o other court, including this one, has ever adopted *Schmerber's* 'clear indication' language as a Fourth Amendment standard."[124] Justice Rehnquist opined that the *Schmerber* Court's "clear indication" language simply explained the level of particularized suspicion necessary to show that evidence sought might actually be within a person's body.[125] Justice Rehnquist stated that this language did not create a third fourth-amendment standard lying somewhere between "reasonable suspicion" and "probable cause."[126] Hence, the Court opted to apply the "reasonable suspicion" test in the *Hernandez* case because this standard had been applied in a number of other fourth amendment contexts.[127]

Justice Rehnquist next posited that the "reasonable suspicion" standard is particularly well-suited for use in alimentary canal smuggling cases.[128] He based this determination on the fact that this specific type of smuggling rarely provides customs officials with any external signs of its existence.[129] Thus, customs officials generally will not have probable cause to arrest and search these smugglers, despite the enormous governmental interest in stopping international drug trafficking.[130] The Court stressed

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States v. Martinez-Fuerte, 428 U.S. 543, 562-63 (1976)). All of these considerations, Justice Rehnquist reasoned, supported the detention of Hernandez. *See id.* at 3312.

122 *Id.* at 3310.

123 *Id.* In *Schmerber*, the Court stated:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions [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.

Schmerber, 384 U.S. at 769 (emphasis added).

124 *Hernandez*, 105 S. Ct. at 3310 (citation omitted).

125 *Id.*

126 *Id.* Justice Rehnquist noted that "subtle verbal graduations" of the required suspicion under the fourth amendment may obscure rather than clarify the amendment's meaning. *Id.* at 3311.

127 *See id.*

128 *Id.*

129 *Id.*

130 *Id.*

that the customs inspectors in *Hernandez* were trained officers who had encountered numerous alimentary canal smugglers in the course of their employment; therefore, they clearly had more than an " 'inchoate and unparticularized suspicion or 'hunch' " that this defendant was an alimentary canal smuggler.[131] Rather, Justice Rehnquist opined that the customs officials' "suspicions [were] a 'common sense conclusio[n] about human behavior' upon which 'practical people,' including government officials, are entitled to rely."[132]

After adopting the "reasonable suspicion" standard as the requisite basis for the detention of Hernandez, the Court addressed the issue of whether this particular detention was reasonable in scope.[133] The Court first pointed to the recently decided case of *United States v. Sharpe*,[134] in which the Supreme Court held that courts should not engage in " 'unrealistic second guessing' " when evaluating the reasonableness of a search.[135] Justice Rehnquist noted that an after-the-fact evaluation of police conduct can almost always result in a judge's formulation of some less intrusive, alternative procedure for accomplishing police objectives.[136] The Court stated that an abstract finding that the public might have been afforded greater protection if the police had used less intrusive means does not immediately render the search unreasonable.[137] Rather, the Court believed that law enforcement officials should "be allowed 'to graduate their response to the demands of any particular situation.' "[138]

The Court also considered whether the length of time that the customs officials had detained the defendant rendered this particular stop constitutionally unreasonable.[139] The Court first recognized that this detention exceeded the time limit that the Supreme Court had approved in other reasonable suspicion cases.[140] Justice Rehnquist cautioned, however, that the Court had consistently rejected "hard-and-fast time limits" in favor of a common-sense approach based on ordinary human experi-

131 *Id.* (quoting *Terry*, 392 U.S. at 27).
132 *Id.* (citations omitted).
133 *Id.*
134 105 S. Ct. 1568 (1985).
135 *Hernandez*, 105 S. Ct. at 3311 (quoting *Sharpe*, 105 S. Ct. at 1576).
136 *Id.*
137 *Id.* (citing *Sharpe*, 105 S. Ct. at 1576).
138 *Id.* (quoting United States v. Place, 462 U.S. 696, 709 n.10 (1983)).
139 *Id.* at 3312.
140 *Id.*

ence.[141] Furthermore, the Court noted that in this situation, the defendant precipitated much of the discomfort and duration of her confinement because of the method she selected for smuggling drugs into the country.[142] Justice Rehnquist also pointed out that the Court has refused to censure police delays in investigative detentions when such a delay is attributable to the evasive actions of the suspect.[143]

Continuing his analysis, Justice Rehnquist noted the unique difficulty faced by customs officials when someone reasonably suspected of alimentary canal smuggling refuses to submit to an X ray in order to rebut this suspicion.[144] The Court stated that customs officials faced with this situation would have only two alternatives.[145] They could either detain the suspect for such time as is necessary to confirm or dispel their suspicions—a time period almost certain, because of the intricacies of human biology, to be longer than a traditional *Terry* search—or they could turn the suspect loose to carry the suspected contraband into the country.[146] The Court pointed out, however, that releasing the suspect was not constitutionally mandated.[147] Justice Rehnquist observed that the fourth amendment has never required a law enforcement officer who has a reasonable suspicion of wrongdoing, but who lacks probable cause, " 'to simply shrug his shoulders and allow a crime to occur or a criminal to escape.' "[148] Rather, the Court reasoned that the officers are entitled to take reasonable steps to confirm or deny their suspicions.[149]

The Court therefore concluded that the customs officials, based upon their reasonable, articulable suspicions that Hernandez was guilty of alimentary canal smuggling, were not required to allow the defendant to carry her cache of cocaine into

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141 *Id.* (citations omitted).

142 *Id.*

143 *Id.*

144 *See id.* The Court stated that the

> rudimentary knowledge of the human body [that we all possess] 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.

Id.

145 *Id.*

146 *Id.*

147 *See id.* at 3312-13.

148 *Id.* at 3312 (quoting Adams v. Williams, 407 U.S. 143, 145 (1972)).

149 *See id.* at 3313.

the country.[150] Instead, the Court held that it was reasonable for customs officials to detain the defendant for a time period sufficient either to verify or to dispel the reasonable suspicions they had already formulated.[151]

Justice Stevens concurred with the majority's holding.[152] He did not agree, however, that the long and degrading detention of the defendant was justified by the defendant's choice of smuggling methods.[153] Rather, Justice Stevens believed that the detention was warranted because the defendant withdrew her consent to have an X ray taken.[154] Justice Stevens reasoned that an X ray of the defendant would have determined whether the suspicion that she was carrying drugs was reasonable.[155] Thus, Justice Stevens took the majority's opinion one step further and stated that he would allow customs officials to require a nonpregnant person reasonably suspected of being an alimentary canal smuggler to submit to an X-ray examination as part of a border search.[156]

Justice Brennan, joined by Justice Marshall, dissented.[157] Justice Brennan agreed with the majority that the fourth amendment permits law enforcement officials to subject travelers at the United States border to routine questioning, preliminary frisks, and thorough examinations of their belongings.[158] These procedures are all permissible, Justice Brennan opined, because of the nation's need to protect itself.[159] Justice Brennan stated, however, that Federal officials could confine someone at the border for a criminal investigation only under those circumstances that would allow a similar confinement in the nation's interior.[160] Therefore, Justice Brennan believed that when border investigations extend beyond these preliminary searches, they are presumed reasonable only if they are authorized by a magistrate upon a demonstration of probable cause.[161] Justice Brennan

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150 *Id.* at 3312-13.
151 *Id.* at 3313.
152 *Id.* (Stevens, J., concurring).
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.* (Brennan, J., dissenting).
158 *Id.* at 3316 (Brennan, J., dissenting).
159 *Id.* (citing *Carroll*, 267 U.S. at 154).
160 *See id.*
161 *See id.* The fourth amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

stated that the confinement of Hernandez for twenty-four hours based solely on the suspicions of customs officials was not only constitutionally unreasonable, but was also an affront to the defendant's human dignity and an abuse of power by the Government officials.[162] Hence, he declared that the detention of Hernandez violated the fourth amendment.[163]

Justice Brennan added that he did not believe these unconstitutional tactics are the only methods available to customs inspectors for detecting alimentary canal smugglers.[164] Concluding his dissent, he suggested that the Government could have maintained its interest in acting expediently, while still preserving the suspect's fourth amendment rights, "by obtaining a telephonic search warrant—a procedure 'ideally suited to the peculiar needs of the customs authorities.' "[165]

The majority's decision in *Hernandez* reflects, more than anything else, the increasing concern that drug trafficking is a growing and virtually irreversible trend in our society.[166] Every day, drug abuse destroys the life of another American and forces

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place to be searched, and the person or things to be seized." U.S. CONST. amend. IV. With regard to this language, Justice Brennan stated:

> [T]he Court repeatedly has emphasized that the Fourth Amendment's Warrant Clause is not mere "dead language" or a bothersome "inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement."

Hernandez, 105 S. Ct. at 3317 (Brennan, J., dissenting) (quoting United States v. United States Dist. Court, 407 U.S. 297, 315-16 (1972)). Justice Brennan reasoned that the "Warrant Clause" is so fundamental that it requires a magistrate's authorization before government officials may perform such "administrative searches" as "fire, health, and housing-code inspections." *Id.* at 3318 (Brennan, J., dissenting). Justice Brennan believed that "[s]omething has gone fundamentally awry in our constitutional jurisprudence when a" warrant is necessary to conduct an "administrative search," but not to hold a person "in indefinite involuntary isolation at the nation's border to investigate whether he might be engaged in criminal wrongdoing." *Id.* at 3318-19 (Brennan, J., dissenting). Justice Brennan stated that the determination to search should not be made ex parte by customs officials because their unbridled " 'discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy.' " *Id.* at 3319 (Brennan, J., dissenting) (quoting United States v. United States Dist. Court, 407 U.S. 297, 317 (1972)).

162 *See Hernandez*, 105 S. Ct. at 3319 (Brennan, J., dissenting).

163 *Id.* at 3324 (Brennan, J., dissenting).

164 *See id.* at 3319-20 (Brennan, J., dissenting).

165 *Id.* (footnote omitted). Procurement of a warrant by telephone was finally effected by customs officials 24 hours after the defendant's initial detention. *Id.* at 3320 (Brennan, J., dissenting).

166 *See id.* at 3309. Justice Rehnquist recognized that cases such as *Hernandez* evi-

countless others to turn to crime to support their habits.[167] In a society that prides itself on being one of the most advanced and productive in the world, the social costs of drug abuse are disturbing.[168] Desperate for a solution to the problem, the President of the United States and the United States Government have enlisted the military to combat drug trafficking with sophisticated tracking equipment used to detect smuggling in progress.[169] While these efforts have enjoyed some success, the problem of substance abuse is still devastating.[170] Clearly, the *Hernandez* Court was correct in determining that the Federal Government's interest in stemming the international drug trade is overwhelming.[171]

Nevertheless, even an important governmental interest in stemming crime must be balanced against an individual's fourth amendment right to be free from unreasonable searches and seizures.[172] If the fourth amendment is to have any significance in modern constitutional jurisprudence, then law enforcement officers should not be allowed to detain and search people based upon abstract suspicions or "hunches."[173] Although it is tempting to justify a search by what it uncovers, this reasoning cannot be accepted because it gives absolutely no effect to the constitutional guarantees of the fourth amendment.[174] As Justice Frankfurter pointed out in *United States v. Rabinowitz*,[175] "the safeguards of liberty have frequently been forged in controversies involving

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dence a "veritable national crisis in law enforcement caused by smuggling of illicit narcotics." *Id.* (citation omitted).

167 *See Narcotics "Our No. 1 Crime Problem,"* U.S. NEWS & WORLD REP., Feb. 6, 1984, at 51, 51-52. In an interview, former Attorney General William French Smith stated: "It's true that drugs are still in abundance. In fact, together with organized crime, they are our No. 1 crime problem." *Id.* at 51; *see also More Bad News in War Against Drugs*, U.S. NEWS & WORLD REP., July 16, 1984, at 11 (outlining the increasing abuse and the negative effects of drugs in our society).

168 *See Getting Straight*, *supra* note 1, at 62-69 (discussing the many social costs of drug and alcohol abuse and the difficulties of rehabilitation).

169 *See Losing the War Against Drugs*, *supra* note 1, at 49. This article stated that "[t]he antidrug drive that is just now getting into full swing began soon after President Reagan assumed office in 1981. Among steps taken: Using military hardware against smugglers, giving the Federal Bureau of Investigation jurisdiction in drug cases and pressuring exporting nations to curtail drug production." *Id.*

170 *See id.* (noting that "[d]espite an intensifying counterattack by federal agents, military forces, local police and diplomats, the odds keep mounting in favor of drug dealers").

171 *See Hernandez*, 105 S. Ct. at 3311.

172 *See id.* at 3308-09 (citations omitted).

173 *See Terry*, 392 U.S. at 27.

174 *See Hernandez*, 105 S. Ct. at 3321 (Brennan, J., dissenting) (citations omitted).

175 339 U.S. 56 (1950).

not very nice people."[176] Therefore, in performing any fourth amendment analysis, a court must remember that the search has to have some reasonable, prior justification before it may be deemed constitutionally permissible.[177] What is in fact reasonable will depend on the circumstances of the particular search.[178]

It is not surprising that in the wake of recent governmental attempts to stem international smuggling, drug smugglers have developed new and ingenious methods to escape detection by alert customs inspectors.[179] Many new types of drug smuggling, foremost among them being alimentary canal smuggling, do not present customs officials with the traditional indicia of smuggling, such as baggy clothing and false-bottomed suitcases.[180] In addition, alimentary canal smuggling is uniquely immune from detection through a strip search, whereas the more conventional practices of rectal and vaginal smuggling are easily uncovered by this law enforcement procedure.[181] Furthermore, the clues that rectal and vaginal smuggling afford customs inspectors—"an unnaturally stiff and erect gait, restricted body movement, and possession of lubricants"—are absent from the alimentary canal smuggling situation.[182] Understandably, the detection of alimentary canal smuggling has become an increasingly confounding problem for law enforcement officers and Government officials.[183]

The fact remains, however, that alimentary canal smugglers continue to bring their forbidden cargo into the United States at an increasing rate.[184] The reality that these smugglers are so difficult to detect has left the Government two practical alternatives: either to ease the criteria upon which officials may search a suspected smuggler or to allow the smuggler to proceed into the country unmolested.[185] Although the indicia of alimentary canal

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176 *Id.* at 69 (Frankfurter, J., dissenting).

177 *See Hernandez*, 105 S. Ct. at 3311 (citations omitted).

178 *Id.* at 3308 (citation omitted).

179 *See id.* at 3309. Justice Rehnquist stated that the "desperate practice [of alimentary canal smuggling] appears to be a relatively recent addition to the smugglers' repertoire of deceptive practices." *Id.*

180 *See* United States v. Vega-Barvo, 729 F.2d 1341, 1349-50 (11th Cir.), *cert. denied*, 105 S. Ct. 597 (1984).

181 *See* United States v. Mendez-Jimenez, 709 F.2d 1300, 1303 (9th Cir. 1983).

182 *See* United States v. Montoya de Hernandez, 731 F.2d 1369, 1374 (9th Cir. 1984) (Jameson, J., dissenting), *rev'd*, 105 S. Ct. 3304 (1985).

183 *See Hernandez*, 105 S. Ct. at 3312.

184 *See Losing the War Against Drugs*, *supra* note 1, at 49.

185 *See Hernandez*, 105 S. Ct. at 3312 (discussing the alternatives available to customs inspectors trying to uncover alimentary canal smugglers).

smuggling may seem innocent to the untrained eye, it is altogether reasonable that these factors might justify a search if perceived by a trained customs inspector.[186] In fact, in *United States v. Cortez*,[187] the Supreme Court explicitly recognized that a trained law enforcement official will often perceive criminal behavior in situations where a civilian would not.[188] Furthermore, the *Cortez* Court held that the standard for review where a trained expert is involved is whether under the "totality of the circumstances" an experienced law enforcement officer would reasonably believe that a search of the suspect is warranted.[189]

In *Hernandez*, the Supreme Court properly chose "reasonable suspicion" as the standard under which *trained* customs officials may search someone suspected of alimentary canal smuggling.[190] While the Court has tipped the fourth amendment balance slightly in favor of law enforcement officials, it has not, however, approved unbridled searches by border officials absent some prior justification.[191] The Court has merely clarified the prior justification needed to search someone suspected of alimentary canal smuggling.[192] Common sense dictates that judicial review of the reasonableness of a border search must be governed by the practical knowledge of the extreme steps smugglers will take to accomplish their illicit goals. The growing phenomenon of alimentary canal smuggling and the difficulties related to its detection have necessitated this modification of basic fourth amendment principles. The only surprising thing about the *Hernandez* majority's decision is that it ignored Justice Stevens's advice to require nonpregnant persons suspected of alimentary canal smuggling to submit to an X-ray examination.[193] This procedure would provide an expedient and somewhat dignified method for detecting smuggling in progress. Nevertheless, the debate on this issue will probably persist until the actual health

186 *See* United States v. Vega-Barvo, 729 F.2d 1341, 1350 (11th Cir.) (citing United States v. Cortez, 449 U.S. 411, 419 (1981)), *cert. denied*, 105 S. Ct. 597 (1984).

187 449 U.S. 411 (1981).

188 *Id.* at 419.

189 *See id.* at 417-18.

190 *See Hernandez*, 105 S. Ct. at 3311.

191 *See id.*

192 *See id.* at 3310-11 (rejecting other proposed constitutional standards in favor of "reasonable suspicion" standard).

193 *See id.* at 3313 (Stevens, J., concurring).

effects of X-ray exposure are known.[194]

It is beyond debate that drug abuse is a serious problem in modern-day America. Although many solutions to the problem have been proposed, the key to eliminating drug abuse ultimately lies with the detection and incarceration of those responsible for smuggling drugs into this country. Clearly, the self-degrading practice of alimentary canal smuggling proves that these smugglers will stop at nothing to forward their illegal activities. The Government thus has been forced to take extreme measures to combat them. Recognizing this, the *Hernandez* Court properly deemed the search of Rosa Montoya de Hernandez reasonable under the fourth amendment.[195] By doing so, the Court effectively refused to permit alimentary canal smugglers to escape Government scrutiny simply because they exhibit fewer outward signs of smuggling than traditional drug runners.[196] The *Hernandez* Court thereby struck the only logical, workable balance between the Government's interest in detecting alimentary canal smugglers and the privacy interests of individuals at our Nation's border.

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194 *See id.* at 3321-22 (Brennan, J., dissenting) (discussing potentially harmful effects of X rays).

195 *See id.* at 3313.

196 *See id.* at 3311.