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Criminal Law - Bordering on Unreasonableness: The Third Circuit again Expands the Border Search Exception in United States v. Hyde

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I. Introduction

Your client, a young professional, just returned from a well-deserved tropical vacation. Upon disembarking from his flight at Philadelphia International Airport, customs officers approach and, without any particular suspicion, begin questioning him. When he asks why he is being questioned, the officers respond that he simply fit their profile: a young, African-American male, travelling alone from the tropics. After answering some questions, the officers dismiss him. He proceeds to baggage claim. When his bags do not appear, he approaches an airline employee to report them missing. Here, the officials who had opened his luggage arrest him, after finding something he should not have possessed—maybe drugs, maybe money, maybe just an expensive gift for his wife. Your client wants to know if the court will exclude the evidence in his upcoming trial. Immediately, Fourth Amendment principles of reasonableness, privacy, search warrants and probable cause enter your mind. After your client departs, you begin researching and must confront the “border search exception.”

One of the fundamental protections concerning the framers of the United States Constitution involves the right of freedom from governmental searches and seizures.1 The Fourth Amendment to the United States

1. Harris J. Yale, Beyond the Border of Reasonableness: Exports, and the Border Search Exception, 11 Hofstra L. Rev. 733, 739-43 (1983). Yale details the passage of the Constitution and the Bill of Rights in the context of the concerns of the day. Id. He notes that the origin of the Fourth Amendment has been traced back through English history to the issuance of general warrants in the early fourteenth century and writs of assistance in the seventeenth century. Id. at 739 (footnotes omitted). As the attitude of the colonists changed, these warrants became a point of contention among the colonists and after the Declaration of Independence, seven states drafted constitutional provisions condemning general warrants and affirming the right of freedom from unreasonable searches and seizures. Id. at 740-41. Due to logistical problems, the drafters did not propose the Bill of Rights at the time of the Constitution. Id. Consequently, the absence of Fourth Amendment protections represented a large reason why the Constitution barely survived a vote. Id. Three drafters refused to sign it and two states would not ratify it. Id. at 741-42. Shortly thereafter, however, the drafters proposed amendments to the Constitution, including the current version of the Fourth Amendment. Id. at 742-43. For a more complete discussion of the history of the Fourth Amendment and the passage of the Constitution, see N.B. Lasson, The History and the Development of the Fourth Amendment to the United States Constitution 22 (1970 ed.); see also Note, Search and Seizure at the Border—The Border Search, 21 Rutgers L. Rev. 513, 514-15 (1967) (discussing general warrants and writs of assistance).
Constitution\(^2\) protects individuals against "unreasonable"\(^3\) searches and seizures.\(^4\) Whether a search fulfills the "reasonable" requirement depends on the specific facts of each case.\(^5\) Generally, courts require a warrant to meet the definition of "reasonable."\(^6\) Probable cause must support the

2. U.S. Const. amend. IV. The amendment provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

3. What courts call "reasonable" or "unreasonable" depends on the totality of the circumstances surrounding both search and seizure as well as the nature of the search and seizure. United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (citing New Jersey v. T.L.O., 469 U.S. 325, 337-42 (1985)).

4. Harris v. United States, 391 U.S. 145, 150 (1947); see also Jason J. Thompson, Note, Michigan Department of State Police v Sitz: Room for Sobriety Checkpoints Under the Fourth Amendment, 1991 Det. C.L. Rev. 859, 861 n.12-13 (discussing underlying purpose of Bill of Rights in general, and Fourth Amendment, in particular). "The stern protection of the Fourth Amendment sharply curtails the government's curiosity about us." Roger Rosenblatt, The Bill of Rights, LIFE, Fall 1991, Special Issue, at 9. Rosenblatt also discusses the dilemmas that future technology, never contemplated by the Framers of the Constitution and drafters of the Bill of Rights, pose for today's society. Id. "In coming years the Fourth Amendment will have a big role in the theater of the courtroom as the nation realizes just how precious — and vulnerable — is the promise of security from invasion by the state." Id.

5. Montoya de Hernandez, 473 U.S. at 537 ("What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself"); see also Yale, supra note 1, at 750 ([A] search that is unreasonable is one where probable cause is absent."). The term "reasonableness" under the border search exception lacks a "comprehensive definition or . . . mechanical application." United States v. Duncan, 693 F.2d 971, 977 (9th Cir. 1982), cert. denied, 461 U.S. 961 (1983) (quoting United States v. Guadalupe-Garza, 421 F.2d 876, 878 (9th Cir. 1970)). Rather, "[t]he scope of the intrusion, the manner of its conduct, and the justification for its initiation must all be considered in determining whether a search comports with reasonableness." Id.


The Supreme Court has, on countless occasions, claimed that the Fourth Amendment specifically contains a warrant requirement. Mincey, 437 U.S. at 390; see, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 445-55 (1971); Johnson v. United States, 333 U.S. 10, 14-15 (1948); see also Thompson, supra note 4, at 862-63 (noting that Court often points to "warrant clause" of Fourth Amendment as requiring warrant for reasonable search). But see Akhil R. Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 761 (1994) (arguing that words of Amendment itself do not require probable cause for all searches without warrants).

In attempting to analyze unreasonableness under the Fourth Amendment and what circumstances may justify departing from the warrant requirement, Justice Frankfurter stated that the words of the Fourth Amendment:

are not just a literary composition. They are not to be read as they might be read by a man who knows English but has no knowledge of the history
issuance of such warrant.\(^7\) Over the years, however, the United States Supreme Court has engrafted certain exceptions upon the probable cause requirement.\(^8\) In these limited situations, the governmental interest in that gave rise to the words. The clue to the meaning and scope of the Fourth Amendment is John Adams' characterization of Oui's argument against search by the police that "American independence was then and there born." One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable." Words must be read with the gloss of the experience of those who framed them. Because the experience of the framers of the Bill of Rights was so vivid, they assumed that it would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed — a significance not to be found in the dictionary. When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.


7. Yale, \textit{supra} note 1, at 734. For the text of the Fourth Amendment, see \textit{supra} note 2.

conducting a warrantless search of a person outweighs that individual's right to privacy under the Fourth Amendment.\(^9\)

One of the major exceptions to the probable cause requirement involves the so-called border search exception. This exception holds customs officials exempt from the probable cause requirement when searching persons entering the United States.\(^10\) The Supreme Court has upheld the reasonableness of border searches simply because it occurs at the border.\(^11\) Due to this virtually unlimited right to search, the only limitation ordinarily focuses on the reasonableness of the search.\(^12\)

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9. Hyde, 37 F.3d at 118 (citing Montoya de Hernandez, 473 U.S. at 537) ("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.'").


Since the first border search statute was enacted in 1789, customs officials have been authorized to stop and examine any vehicle, person, or baggage arriving in the United States on suspicion that merchandise is concealed which is subject to duty or which cannot legally be imported into the United States.

Id. (emphasis in original); see also Daniel L. Cullum, The Fourth Amendment and Maritime Drug Searches: Is There a "Legitimate Expectation of Privacy" on Vessels at Sea?, 1994 U. Chi. Legal F. 967 (1994) ("Border searches are authorized by Title 19, Section 482 of the United States Code . . . which grants Customs officers plenary power to inspect individuals and their belongings at the border."

The courts have also expanded the border search exception through the development of the "extended" border search doctrine, which permits searches to occur well after the border crossing occurs. United States v. Caicedo-Guarnizo, 723 F.2d 1420, 1422 (9th Cir. 1984); United States v. Espericueta-Reyes, 631 F.2d 616, 619 (9th Cir. 1980). Because an extended border search involves a greater spatial and temporal distance from the border than a search at the functional equivalent of the border, it must be justified by at least a "reasonable suspicion" of criminal activity. United States v. Delgado, 810 F.2d 480, 483 (5th Cir. 1987) (citing United States v. Alfonso, 759 F.2d 728, 734 (9th Cir. 1985)); United States v. Barbin, 743 F.2d 256, 261 (5th Cir. 1984); United States v. Richards, 638 F.2d 765, 772 (5th Cir.), cert. denied, 454 U.S. 1097 (1981).

11. United States v. Ramsey, 431 U.S. 606, 616 (1977) ("That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."); see also United States v. Scheer, 600 F.2d 5 (3d Cir. 1979) (holding border search of luggage as "routine" and needing no degree of suspicion).

12. Note, Search and Seizure at the Border—The Border Search, supra note 1, at 516-17. But see United States v. St. Prix, 672 F.2d 1077, 1083 n.10 (2d Cir.) ("The 'border search' exception does not justify searches of homes or business establishments." (citation omitted)), cert. denied, 456 U.S. 992 (1982).
The concept of the border search now includes searches at “functional equivalents” of the United States border. Furthermore, the


Airports, almost universally considered “functional equivalents,” have also been characterized as “critical zones” based on the nature of their function, namely to transport travelers. Sanford L. Dow, Airport Security, Terrorism, and the Fourth Amendment: A Look Back and a Step Forward, 58 J. AIR L. & COM. 1149, 1183-84 (1993). Thus, many courts treat airports like national borders. Id.; see also Jonathan L. Miller, Search and Seizure of Air Passengers and Pilots: The Fourth Amendment Takes Flight, 22 TRANSP. L.J. 199, 211 (1994) (noting uniqueness of aviation because air provides only means of travel for international gateways at landlocked, inner continental locations). Dow further analyzes, in some detail, how courts apply the border search exception to airports. Dow, supra, at 1184. Even among airport searches, courts differentiate between searches in secured boarding areas and those in general, undefined areas. Id. at 1186. Frequently, the searches in designated boarding areas only require mere suspicion, while those in the general area demand reasonable suspicion. Id.

14. United States v. Hyde, 37 F.3d 116, 120 n.2 (3d Cir. 1994) (“The Supreme Court has held that valid warrantless border searches may take place at the ‘functional equivalent’ of an international border or an ‘extension’ thereof.”); see also Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973) (stating that in certain situations courts permit border searches at functional equivalents of international border); see generally, Judith B. Ittig, The Rites of Passage: Border Searches and the Fourth Amendment, 40 TENN. L. REV. 329, 329 (1973) (noting that border searches “are not limited to searches at an international boundary though they must have a relation to it”).

Courts have not always defined the border in this manner. “Originally, the border was thought to extend only from an arriving ship to the streets of the port city in which it docked . . . .” Sims, supra note 13, at 1647. In the early 1970s, courts began employing the “elastic border” concept, “recognizing that in some instances it is impossible to search exactly at the border.” Id. (citing United States v. Martinez, 481 F.2d 214, 217 (5th Cir. 1973), cert. denied, 415 U.S. 931 (1974); United States v. Glaziou, 402 F.2d 8, 12 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969); Marsh v. United States, 344 F.2d 317, 324 (5th Cir. 1965)). The Almeida Court significantly restricted the “elastic border” concept with its creation of the “functional equivalent” standard. Almeida, 413 U.S. at 272-73; cf. Gregory L. Waples, From Bags to Body Cavities: The Law of Border Search, 74 COLUM. L. REV. 59, 56-57 (1974) (recognizing Almeida decision but continuing to define border “by dynamic parameters dependent upon the facts of each case, instead of by a static, linear front”). The Eleventh Circuit has summarized the essence of the functional equivalent:

A search within the border may also be justified as a border search requiring no warrant nor any suspicion if there is reasonable certainty that the object or person searched has just crossed the border, there has been no time or opportunity for the object to have changed materially since the time of crossing, and the search is conducted at the earliest practicable point after the border was crossed. . . . This type of search is justified
United States Circuit Courts of Appeals, including the Third Circuit, have expanded the border search to include searches of outgoing travelers.\textsuperscript{15} Recently, the Third Circuit held that “routine customs searches of persons and their belongings without probable cause as they leave the Virgin Islands for the continental United States are not unreasonable under the Fourth Amendment.”\textsuperscript{16}

Presently, one can differentiate among several distinct types of searches.\textsuperscript{17} For purposes of this Casebrief, the only important distinction to note involves that between “routine” and “non-routine” searches.\textsuperscript{18} This distinction entails a close scrutiny of the duration, extent and scope under the border-search doctrine because it is in essence no different than a search conducted at the border; the reason for allowing such a search to take place other than at the actual physical border is the practical impossibility of requiring the subject searched to stop at the physical border.

United States v. Niver, 689 F.2d 520, 526 (5th Cir. 1982) (citing Almeida, 413 U.S. at 272; United States v. Garcia, 672 F.2d 1349, 1363-64 (11th Cir. 1982)).


16. Hyde, 37 F.3d at 117. For a detailed discussion of this decision, see \textit{infra} notes 127-39 and accompanying text.

17. Note, \textit{Border Searches and the Fourth Amendment}, supra note 10, at 1012-18. Some of these differences arise in the manner of the search others stem from the length of the search and still other differences occur in the object or area of the person searched. \textit{Id}. One can identify at least four types of searches: examinations of identification papers; searches of baggage, vehicle and/or clothing; intrusive personal searches; and extended border searches. \textit{Id}. at 1014-18. The type of search conducted necessarily affects the court’s analysis of its reasonableness. \textit{Id}. at 1013.

18. \textit{Id}. Examples of “routine” searches include a brief roadside stop to check identification and a pat-down or frisk search for weapons, drugs or both. \textit{Id}. “Non-routine” searches commonly pertain to detentions of extended duration, body cavity searches or both. \textit{Id}. Disagreement exists among courts over these broad generalizations. For example, in People v. Luna, 535 N.E.2d 1305 (N.Y. 1989), the court held that, under New York law, a pat-down search of a person crossing an international border required “some” level of suspicion, but a luggage search requires no suspicion. \textit{Luna}, 535 N.E.2d at 1306-09. \textit{But see} United States v. Sanders, 35 F.3d 557 (4th Cir. 1994) (noting that only strip searches and body cavity searches constitute non-routine searches). The court, in reaching this decision, noted some varying interpretations of the level of intrusiveness of particular searches and how different courts view them. \textit{Luna} at 1306-08; \textit{see also} United States v. Forde, 30 F.3d 127 (1st Cir. 1994) (holding that search consisting of ripping off soles of shoes after detecting thick soles and glue constitutes routine search), \textit{cert. denied}, 115 S. Ct. 526 (1994); United States v. Grotke, 702 F.2d 49, 52 (2d Cir. 1983) (holding that search of cowboy boots only results in minimal intrusion and thus, requires no reasonable suspicion).
of the particular search. The significance of this distinction in relation to the border search exception and what it means to a practitioner is discussed in detail below.

This Casebrief discusses the development of the border search exception in both United States jurisprudence generally and within the Third Circuit specifically. Part II summarizes the development of the border search exception by the Supreme Court. Part III begins with a brief analysis of how other circuit courts have applied and interpreted the border search exception. Part III also outlines the Third Circuit's historical treatment of the border search exception, focusing on recent decisions applying the exception and on customs searches involving the Virgin Islands. Part IV then critically analyzes the Third Circuit's most recent

A recent decision in the United States District Court for the Northern District of New York notes that "[a] strip search, regardless of how professionally and courteously conducted, is an embarrassing and humiliating experience." Johnson v. Harron, No. 91-CV-1460, 1995 WL 319943, at *9 (N.D.N.Y. May 23, 1995) (quoting Daugherty v. Campbell, 39 F.3d 554, 556 (6th Cir. 1994)). In the context of a border search, the Harron court stated that "[b]efore a border official may insist upon [a strip search], he [or she] should have a suspicion of illegal concealment that is based upon something more than the border crossing, and the suspicion should be substantial enough to make the search a reasonable exercise of authority." Id.


Although the Supreme Court has not explicitly enumerated the factors that render a border search routine, the courts of appeals examine the degree of intrusiveness involved in a particular search when distinguishing between a routine and nonroutine search. For example, nonintrusive searches of persons and searches of luggage, personal effects, and vehicles qualify as routine border searches. Additionally, although the Court has declined to decide what standard, if any, would govern nonroutine border searches such as strip searches, body cavity searches, or X-ray examinations, the courts generally agree that reasonable suspicion will justify strip searches and X-ray examinations, but that a higher level of suspicion is needed to justify body cavity searches.

20. For a discussion of the significance of non-routine and routine searches as it relates to the border search exception and what it means to the practitioner, see infra notes 59, 76-82, 124-33 & 153-59 and accompanying text.

21. For a discussion of the development of the border search exception by the Supreme Court, see infra notes 28-86 and accompanying text.

22. For an analysis of other circuit courts' interpretation of the border search exception, see infra notes 87-108 and accompanying text.

23. For a complete discussion of the Third Circuit's treatment of the border search exception, see infra notes 109-42 and accompanying text.
statements regarding the border search exception and how such statements may affect individual freedoms in the future.\textsuperscript{24} This section also examines the history of the Virgin Islands and its relationship with the United States mainland.\textsuperscript{25} Part V opens by describing what a practitioner in the Third Circuit must do when facing the border search exception.\textsuperscript{26} Finally, part V concludes by considering the future of the border search exception and how far courts may expand it.\textsuperscript{27}

II. \textsc{the supreme court and the border search exception}

The border search exception is “as old as the Fourth Amendment itself.”\textsuperscript{28} The Supreme Court formally recognized this exception as early as 1886, in \textit{Boyd v. United States}.\textsuperscript{29} The circumstances facing the \textit{Boyd} Court involved the allegedly fraudulent importation of plate glass into the port of New York.\textsuperscript{30} In interpreting the applicable customs regulation,\textsuperscript{31} the Court noted that the government has authorized seizures of illegally im-

\begin{itemize}
\item\textsuperscript{24} For a critical analysis of the Third Circuit’s most recent statements regarding the border search exception and their effects on individual freedoms, see infra notes 143-79 and accompanying text.
\item\textsuperscript{25} For a complete discussion of the history of the Virgin Islands and its relationship with the United States mainland, see infra notes 182-90 and accompanying text.
\item\textsuperscript{26} For a discussion of what a practitioner must do when facing the border search exception in the Third Circuit, see infra notes 193-95 and accompanying text.
\item\textsuperscript{27} For a discussion of the future of the border search exception, see infra notes 196-97 and accompanying text.
\item\textsuperscript{28} United States v. Hyde, 37 F.3d 116, 118 (3rd. Cir. 1994) (quoting United States v. Ramsey, 431 U.S. 606, 619 (1977)).
\item\textsuperscript{29} 116 U.S. 616 (1886).
\item\textsuperscript{30} \textit{Id.} at 617-18; see also \textit{Yale}, supra note 1, at 743 (“The border search exception traces its judicial genesis directly to the Supreme Court’s decision in \textit{Boyd v. United States}.”). The district attorney filed an information against the owners of the glass, seizing said glass pursuant to the twelfth section of the “Act to amend the customs revenue laws” passed on June 22, 1874. \textit{Boyd}, 116 U.S. at 616. The court noted that the case involved “a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen . . . .” \textit{Id.} at 618.
\item\textsuperscript{31} The district attorney relied upon the twelfth section of the “Act to amend the customs revenue laws” passed on June 22, 1874. \textit{Id.} at 617. The twelfth section declared that:
\begin{quote}[A]ny owner, importer, consignee, etc., who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper or statement, or affected by such act or omission, shall for each offense be fined in any sum not exceeding $5000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited.
\end{quote}
\textit{Id.}
\end{itemize}
ported items "from the commencement of the government." The Boyd Court reasoned that because the customs statute of 1789 "was passed by the same Congress that proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment." The Court ultimately rejected the constitutionality of this customs statute because the Court reasoned that the statute's compulsory production of invoices violated the Fourth Amendment standard of reasonableness and the Fifth Amendment right of freedom from self-incrimination.

Since Boyd, however, courts have almost universally accepted this historical justification for border searches. More recent judicial justifica-

32. Id. at 623. The Court also noted that the act of July 31, 1789, (1 Stat. 29, 43), contained provisions to this effect. Id. 33. Id. at 623. Most commentators to address the issue agree with the Boyd historical justification. See, e.g., Jules D. Barnett, A Report On Search and Seizure at the Border (Customs Problems), 1 Am. CRiM. L.Q. 36, 39 (Aug. 1963) ("Thus we see the rare instance of a fact situation, the Constitutional interpretation of which was authoritatively announced by the draftsmen as a specific reason for the very organic law in issue."). At least one commentator, however, looks with disfavor at the historical justification, noting "if Justice Bradley [in Boyd] was correct that the Framers believed warrantless searches of incoming vessels were reasonable, this belief must have been based upon something more than the nature of the search." Yale, supra note 1, at 749 (citation omitted). In evaluating Boyd and its progeny, Yale argues that the Framers' belief must have rested "upon the circumstances of the search." Id. He then concludes that the first Congress implicitly adopted an "exigent circumstances" doctrine, which would excuse the Fourth Amendment warrant requirement, but not probable cause. Id. at 749-50 (emphasis added); see also O'Brien v. City of Grand Rapids, 23 F.3d 990, 997 (6th Cir. 1994) (noting border search exception constitutes exigent circumstances exception). "[B]y declaring the basis of the border search exception to be historical, and not exigent, in nature, the reasonableness of a border search in nearly all circumstances, whether exigent or not, and whether there is probable cause or not, is accepted as fact." Yale, supra note 1, at 750 (citation omitted).

34. Boyd, 116 U.S. at 631-35, 638. The Boyd Court stated that a cardinal rule of the courts "is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property." Id. at 631. Any compulsory discovery compelling an individual to produce the very evidence that leads to his conviction "is contrary to the principles of a free government." Id. at 631-32. In this context, the Boyd Court noted the "intimate relation" between the Fourth and Fifth Amendments. Id. at 633. The Court stated that the amendments:

throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. Id.

35. See, e.g., United States v. Ramsey, 431 U.S. 606 (1977) (reaffirming Boyd analysis); United States v. Hyde, 37 F.3d 116, 119 (3rd Cir. 1994) (citing Boyd); Yale, supra note 1, at 744 (remarking that Supreme Court noted juxtaposition of
tions for the border search have included: (1) the war on drugs, 36 (2) the less intrusive nature of border searches, 37 (3) the lack of stigma resulting from border searches, 38 and (4) mere practicality. 39 In addition to these judicial justifications, Congress provides at least one express statutory explanation for application of the border search exception. 40

passing import duty regulations in July, 1789 and Bill of Rights two months later "to be the Framers' imprimatur on the reasonableness of warrantless searches of ships and vessels by customs officials"); cf. Note, Border Searches and the Fourth Amendment, supra note 10, at 1011 (citing three reasons why historical justification does not work).

First, the legislators may have passed the customs statute of 1789 without considering fully the applicability to border searches of the moral position to which they were about to commit the community in drafting the fourth amendment. Second, the community's standards of reasonableness may have changed over time. And third, changes in the underlying facts may have made unreasonable a search which would have been reasonable by the same standards in 1789.

Id.; Galloway, supra note 8, at 760 (noting that in light of recent developments, border search exception appears to fit within special needs doctrine, with special need being to prevent importation of harmful items); Ittig, supra note 14, at 333 (arguing that "the historical argument based on continuity of legislative intent can fully apply only to the first customs law").

36. United States v. Ezeiruaku, 936 F.2d 136, 143 (3d Cir. 1991); see Note, Border Searches and the Fourth Amendment, supra note 10, at 1011 (noting vital national interest in preventing illegal entry and smuggling goods, particularly narcotics); see also Sims, supra note 13, at 1643 (listing "three drug-related justifications: the government's interest in protecting citizens from illegal drugs, the likelihood of smuggling attempts at the border and the difficulty of detecting drug violations"). In fact, as early as 1963, one commentator stated:

[With the present magnitude and scope of the smuggling problem (with emphasis on narcotics), any attack upon the validity of the presently construed rules and regulations pertaining to border search and seizure is a matter of great concern to the existence and very safe-being of the residents and government of the United States of America, and should be guarded against with eternal and continuous vigilance both on the factual, and legal and judicial levels.

Barnett, supra note 33, at 37.

37. Sims, supra note 13, at 1643.

38. Id.

39. Yale, supra note 1, at 752. Yale observes that courts have justified the border search exception from a practical standpoint. Id. The practicality surrounding the exception "enables customs officials to effectively carry out their duties of preventing contraband from entering the country and collecting duties where appropriate." Id. (citing United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), cert. denied, 399 U.S. 1121 (1969)). Yale further argues that public policy requires a constitutionally permissible technique allowing customs officials to achieve these goals. Id. Yale notes that the Glaziou court has "argued that no investigatory technique, other than that utilized by customs officials under the aegis of the border search exception, would achieve any, let alone acceptable, results." Id. (citing Glaziou, 402 F.2d 8).

40. 31 U.S.C. § 5317(b) (1982). Section 5317(b) deals with the smuggling of currency and reads, in pertinent part: "[F]or purposes of ensuring compliance with the requirements of [the currency smuggling statute], a customs officer may stop and search, at the border and without a search warrant, . . . any person entering or departing from the United States." Id.
In *United States v. Carroll*, a prohibition-era case, the Court examined the warrantless seizure of intoxicating liquors from the defendants' automobile as they travelled from Detroit to Grand Rapids. Although the Court determined that applicable statutes permitted warrantless searches for contraband goods, the court cautioned that it would be "intolerable and unreasonable" if all persons lawfully using the highways faced such searches. Chief Justice Taft, in dicta often cited by later courts, stated that warrantless searches of persons within the country must adhere to Fourth Amendment requirements.

The Court in *Boyd* and *Carroll* provided the basic foundations and limitations for the border search exception. *Boyd* applied the border search exception to incoming travellers and goods, while *Carroll* attempted to define the limits of the exception by stating it did not apply to interstate travellers. For years, courts have freely applied the exception to searches.

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41. 267 U.S. 132 (1925).

42. Id. at 134. In September of 1921, federal prohibition agents, acting undercover, set up a proposed sale of illegal liquors with three men. Id. at 135. On the night of the supposed delivery, the three men did not show up. Id. In October of the same year, while patrolling their normal route between Grand Rapids and Detroit, the agents saw the car of one of the principles in the attempted September smuggling operation travelling from Grand Rapids. Id. The agents attempted to follow the car, but lost its trail. Id. In December, they again saw the car travelling from Detroit to Grand Rapids. Id. This time, the government agents stopped and searched the automobile, finding 68 bottles of whiskey. Id. at 136.

43. Id. at 154. The *Carroll* Court found the distinction between legal and illegal warrantless searches involved probable cause to search. Id. at 156. The Court believed that this rule fulfilled the guaranty of the Fourth Amendment. Id.

In cases where the securing of a warrant is reasonably practicable, it must be used, and when properly supported by affidavit and issued after judicial approval protects the [search]. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.

44. Id. at 154. The specific language states that:

[I]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of [a warrantless] search. 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 as effects which may be lawfully brought in. But those lawfully within the country . . . have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Id. at 153-54 (emphasis added). "One commentator has noted that this dicta became a self-fulfilling prophecy." Yale, supra note 1, at 745 (citing J.W. HALL, JR., SEARCH AND SEIZURE § 15.3 n.9 (1982)).

45. Note, Search and Seizure at the Border — The Border Search, supra note 1, at 515.

46. United States v. Hyde, 37 F.3d 116, 118-20 (3d Cir. 1994) (noting *Boyd* held border search exception constitutional and *Carroll* established balancing test used in applying exception).
occurring at the border, but have cautiously applied it to more attenuated border searches.\textsuperscript{47}

The Supreme Court revisited the justifications for the border search exception in a series of cases during the 1970s.\textsuperscript{48} Relying largely on the rationale of \textit{Boyd}, the Court attempted to clarify what constitutes a "border."\textsuperscript{49} In another case, the Court stated that border searches are reasonable simply because they take place at the border.\textsuperscript{50} In fact, faced with a challenge to the seizure of pornographic films imported into the United States for personal use, the Court went so far as to say that Congress has plenary powers in the area of restrictions on imports.\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{47} Almeida-Sanchez v. United States, 413 U.S. 266 (1973). The \textit{Almeida} Court held that a search of a defendant's car by a roving patrol on a California highway which, at its closest point lies 20 miles from the Mexican border, would not fall under the border search exception. \textit{Id.} at 273.
\item \textsuperscript{48} United States v. Ramsey, 431 U.S. 606 (1977); United States v. Thirty-Seven Photographs, 413 U.S. 206 (1973); United States v. 12 200-Ft. Reels of Super 8 MM Film, 413 U.S. 125 (1973); \textit{Almeida-Sanchez}, 413 U.S. at 266.
\item \textsuperscript{49} See \textit{Almeida}, 413 U.S. at 272 (permitting searches at border and its functional equivalent).
\item \textsuperscript{50} \textit{Ramsey}, 431 U.S. at 616.
\item \textsuperscript{51} \textit{12 200-Ft. Reels}, 413 U.S. at 125. Congress' plenary power derives from Article I, Section 8, clause 5, giving Congress broad, comprehensive power to regulate commerce with foreign nations. \textit{Id.} The specific issue the Court addressed involved the constitutionality of a federal statute prohibiting the importation of obscene material, which the importer used solely for private, personal use and possession. \textit{Id.} The statute at issue read, in pertinent part:

\begin{quote}
All persons are prohibited from importing into the United States from any foreign country \ldots any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral \ldots. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture \ldots. Provided further, that the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.
\end{quote}

19 U.S.C. § 1305(a) (1913). The Court stated that "[i]mport restrictions and searches of persons or packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations." \textit{12 200-Ft. Reels}, 413 U.S. at 125. In noting Congress' plenary power in this area, the Court stated that Congress needs such power to prevent smuggling and prohibited articles from entry. \textit{Id.} at 125-26; see also Weber v. Freed, 239 U.S. 325 (1915) (remarketing on need for congressional authority); Brolan v. United States, 236 U.S. 216 (1915) (noting Congress' plenary power); Buttfield v. Stranahan, 192 U.S. 470, 492 (1904) (citing Congress' need for such power).
\end{itemize}
In Almeida-Sanchez v. United States, the Supreme Court redefined "border" for purposes of the border search exception, extending it beyond the actual border of the United States to a "functional equivalent of the border." The Almeida Court interpreted the search of an individual stopped by a roving Border Patrol on a California highway, twenty-five air miles north of the Mexican border. The Court held that a routine border search may occur at the border's "functional equivalent." The facts in Almeida did not, in the Court's opinion, meet the "functional equivalent" test. Therefore, the border search exception did not apply. Some commentators viewed this "functional equivalent" test as constraining the border search exception, which was moving towards an "elastic border" in some circuit court decisions.

52. 413 U.S. 266 (1973).
53. Id. at 272-73.
54. Id. at 267-68. The Border Patrol, without a warrant or probable cause, stopped the petitioner and thoroughly searched his car on State Highway 78 in California. Id. Indeed, the Court noted that the Border Patrol did not even have the "reasonable suspicion" required by Terry v. Ohio, 392 U.S. 1 (1968). Id. at 268. The only possible justification the government had for the search entailed § 287(a)(3) of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. § 1357(a)(3) (1952), which simply provides for warrantless searches of automobiles and other conveyances 'within a reasonable distance from any external boundary of the United States' . . . ." Id.
55. Id. at 272-73.
56. Id.; see also Paul S. Rosenzweig, Functional Equivalents of the Border, Sovereignty, and the Fourth Amendment, 52 U. Chi. L. Rev. 1119 (1985) (noting that Supreme Court "has never defined a functional border equivalent or set forth the scope of searches it would permit at such a location"). While not defining a precise test, the Almeida Court made reference to "a point marking the confluence of two or more roads that extend from the border." Almeida, 413 U.S. at 278. The Court also noted that "a St. Louis airport after a nonstop flight from Mexico City" would constitute a "functional equivalent." Id.
57. Almeida, 413 U.S. at 273.
58. Waples, supra note 14, at 56-58. Waples notes that once a traveller passes a port of entry and enters the country, full Fourth Amendment protections apply. Id. Courts have wrestled with both law and logic to determine when a traveller reaches this point. Id. at 56. Early on, courts treated the border as an actual "barrier" and as soon as an individual passed it, they entered the country. Id. at 56-57. The courts ultimately rejected this rationale as unworkable for customs purposes and replaced it with the concept of the "elastic border." Id. at 57. The "elastic border" treated the border as an area rather than a line. Id. Therefore, the "elastic border" represents a dynamic concept that changes with the particular facts of each case. Id.

The Fifth Circuit extended the concept of the border search exception. As one commentator notes:

"Functional equivalency was determined by applying a three part test focusing on the ratio between international and domestic traffic passing through the checkpoint, the permanence of the checkpoint, and the effect of the checkpoint on international traffic. The test was weighted in favor of functional equivalency by defining "international traffic" as including vehicles that had never crossed the border but originated in the "immediate border area."
held that this case did not involve a "routine" search and, therefore, re-
quired either probable cause or consent.\textsuperscript{59}

Six years later, in \textit{United States v. Ramsey},\textsuperscript{60} the Court reinforced the
"border search exception."\textsuperscript{61} In \textit{Ramsey}, the Court extended the border
search exception to first-class mail entering the United States.\textsuperscript{62} Defendants operated a heroin-by-mail enterprise, which consisted of mailing her-
oin from Bangkok, Thailand, to various locations in the United States.\textsuperscript{63} At New York's Kennedy Airport, deemed a "border" for search purposes, a
customs inspector identified eight suspicious, bulky envelopes in the
mail.\textsuperscript{64} Upon inspection, he found that the envelopes contained her-
oin.\textsuperscript{65} The Ramsey Court noted that postal regulations, alone, authorized
the search.\textsuperscript{66} Therefore, the only remaining question involved the consti-
tutionality of the search.\textsuperscript{67}

Based on \textit{Boyd}, decided nearly a century earlier, the Ramsey Court
held that border searches "are reasonable simply by virtue of the fact that
they occur at the border."\textsuperscript{68} The Court did note, in deference to the Car-
roll decision, the qualitative differences between searches within the coun-
try, which require probable cause, and those which occur at the borders of
the country.\textsuperscript{69} The Court also reasoned that, because a port of entry does

\textsuperscript{59} Almeida, 413 U.S. at 274-75 ("[T]hose lawfully within the country, entitled
to use the public highways, have a right to free passage without interruption or
search unless there is known to a competent official authorized to search, probable
cause for believing that their vehicles are carrying contraband or illegal
merchandise.").

\textsuperscript{60} 431 U.S. 606 (1977).

\textsuperscript{61} Id. at 616. The Court cited the rationale of the Boyd Court in making this
statement. Id.

\textsuperscript{62} Id. at 624-25. For a more complete discussion of the inspection of inter-
national letter mail under the border search exception, see Annotati-

\textsuperscript{63} Ramsey, 431 U.S. at 608. The defendants ultimately distributed the heroin
in the District of Columbia. Id.

\textsuperscript{64} Id. at 609 n.2.

\textsuperscript{65} Id. at 609-10.

\textsuperscript{66} Id. at 615. The specific regulation at issue read, in pertinent part, "[a]ny
of the officers or persons authorized to board or search vessels may ... search any
trunk or envelope, wherever found, in which he may have a reasonable cause to
suspect there is merchandise which was imported contrary to law." Id. at 611 (citi-
ing 19 U.S.C. § 482). The Ramsey Court stated that this "reasonable cause to sus-
pect" standard is significantly less stringent than the probable cause requirement
imposed by the Fourth Amendment. Id. at 612-13. Therefore, as long as "reason-
able cause to suspect" exists, the Fourth Amendment does not come into play. Id.

\textsuperscript{67} Id.

\textsuperscript{68} Id. at 616.

\textsuperscript{69} Id. at 617-18 (citing Carroll v. United States, 267 U.S. 132, 153-54 (1925)).
not constitute a traveller's home, a diminished expectation of privacy exists for that individual.70

The most recent Supreme Court ruling regarding the border search appears in United States v. Montoya de Hernandez.71 Montoya dealt with the detention of a suspected alimentary canal drug smuggler who was detained for over sixteen hours as customs inspectors waited for her to have a bowel movement.72 Due to the type and length of this detention, the Court classified the search as not "routine" and, therefore, applied the Fourth Amendment balancing test of weighing individual privacy against the governmental interest.73 However, because the majority opinion found that the facts supported at least a reasonable suspicion, the Court upheld this search.74 The Court did, however, discuss the border search exception.75

Stating that searches occurring at the border rest on different considerations and rules of constitutional law than domestic regulations, the Montoya Court declared that "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior."76 The Court also reinforced the notion that routine border

70. Id. at 618 (citing United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971)). The Court upheld the search and concluded that including letters within the border search exception does not extend the exception. Id. at 619. As a result, the Court eliminated the requirement of probable cause because the search occurred at the border. Id. at 619-20.


72. Id. at 532-36. Customs officials detained Rosa Elvira Mcntoya de Hernandez upon her arrival at Los Angeles International Airport from Bogota, Columbia. Id. at 533-34. After some brief questioning, the customs agents classified Ms. Hernandez as an alimentary canal smuggler or "balloon swallower." Id. at 534. A female inspector then performed a pat-down and strip search, during which she noticed Ms. Hernandez's very firm abdomen. Id. Inspectors kept Ms. Hernandez under surveillance for over 16 hours, until a court-ordered rectal examination verified the presence of balloons. Id. at 535-36. In all, Ms. Hernandez passed 88 balloons filled with a total of 528 grams of 80% pure cocaine. Id. This passing led to her arrest. Id.

The Court has noted a great increase in this method of smuggling. Id. at 538. "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." Id. at 538-39. The Court cited 18 cases in 1983 and 1994, alone, dealing with such practices. Id. at 539 n.2.

73. Id. at 537; see also Nancy L. Dzwonczyk, Criminal Procedure—Application of the "Border Search" Exception to Exiting Individuals—United States v. Ezeiruaku, 65 Temp. L. Rev. 309, 313 (1992) (noting that because Court did not classify search as "routine," Court balanced intrusion of search on individual's privacy as compared to governmental interest in regulating what enters country).

74. Montoya, 473 U.S. at 542.

75. Id. at 537-41.

76. Id. at 537-38. The Court stated that "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant, and first-class mail may be opened without a warrant on less than probable cause." Id. at 538 (citing United States v. Ramsey, 431 U.S. 606 (1977)).
searches, including the opening of first-class mail, need not meet any requirement of reasonable suspicion, probable cause or warrant.\textsuperscript{77} The Court also affirmed cases holding that government agents may board boats on inland waters, with ready access to the sea, without any suspicion.\textsuperscript{78} In justifying these exceptions, the Court stated that the permissibility of the search must "be judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"\textsuperscript{79}

Applying this test to the border search, where lower expectations of privacy and stronger governmental interests exist, courts will always find routine border searches permissible.\textsuperscript{80} Citing \textit{Boyd}, the Court stated that it has long recognized Congress' power to police entrants at international borders.\textsuperscript{81} Noting a longstanding concern for the protection of the international border, the Court stated that "[t]his concern is, if anything, heightened by the veritable national crisis in law enforcement caused by the smuggling of illicit narcotics."\textsuperscript{82}

After the \textit{Carroll} decision in 1925, the Court has repeatedly stressed that the rationale supporting the border search exception does not extend to searches occurring once a person has entered the United States.\textsuperscript{83} Once in the country, the Fourth Amendment guarantees that an individual may move and travel, without limitation, while remaining free from unreasonable searches and seizures.\textsuperscript{84} In this context, the reasonableness standard that is so lax at the border is at its strongest.\textsuperscript{85} Likewise, the individual's right of freedom from searches and seizures extends to its

\textsuperscript{77} \textit{Id.; see, e.g., Ramsey, 431 U.S. at 606 (applying border search exception to first-class mail).}

\textsuperscript{78} \textit{Montoya, 473 U.S. at 538 (citing United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983)). The Court also confirmed recent cases holding that agents may stop automobile travellers at fixed checkpoints near the border, in the absence of suspicion. See, e.g., United States v. Martinez-Fuerte, 428 U.S. 543, 562-63 (1976) (applying border search exception to automobile search undertaken based on driver's ethnic background). The agents may even predicate these stops on ethnicity. \textit{Id.}}

\textsuperscript{79} \textit{Montoya, 473 U.S. at 537 (citing \textit{Villamonte-Marquez, 462 U.S. at 588; Delaware v. Prouse, 440 U.S. 648, 654 (1979); Camara v. Municipal Court, 387 U.S. 523 (1967)).}}

\textsuperscript{80} \textit{Id. at 539-40 (citing Florida v. Royer, 460 U.S. 591, 615 (1983) (Blackmun, J., dissenting); Carroll v. United States, 267 U.S. 132, 154 (1925)).}

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id. at 538 (citing United States v. Mendenhall, 446 U.S. 554, 561 (1980) (Powell, J., concurring)). One should remember this statement, because it likely drives much of the recent expansion of the border search exception.}

\textsuperscript{83} \textit{See United States v. Ramsey, 431 U.S. 606, 618 (1973) (quoting \textit{Almeida-Sanchez v. United States, 413 U.S. 266, 273-74 (1973); U.S. v. 12 200-Ft. Reels of Super 8MM Film, 413 U.S. 123, 125 (1973); Carroll, 267 U.S. at 132).}

\textsuperscript{84} \textit{Almeida, 413 U.S. at 273-75.}

\textsuperscript{85} \textit{Montoya, 473 U.S. at 541 (emphasizing that because search occurred at border, less expectation of privacy existed).}
highest point. However, after evaluating the expansion of the border search among both the circuit courts and, to a lesser extent, the Supreme Court, this proposition seems unclear.

III. EVALUATING THE CIRCUITS

A. Other Circuits and the Border Search Exception

This Casebrief focuses on the border search exception in the Third Circuit. A review of the other Circuit Courts of Appeals uncovered an expanding border search. This expansion must include a heightened scrutiny of the expansion and its application. The importance of this scrutiny heightens when judging enforcement measures, because human nature dictates that any exception will ultimately reach, and possibly exceed, its limits.

The border search, as originally contemplated by the Boyd court, slowly expanded in the circuit courts through the development of the "elastic border." Then, in Almeida, the Supreme Court redefined the scope of the exception and attempted to limit its application by introducing the "functional equivalent" of the border.

86. Carroll, 267 U.S. at 154.

87. The Supreme Court decisions discussed above have settled the parameters of the border search exception. Due to the Third Circuit's reliance upon the other circuits and the Supreme Court for guidance regarding application of the border search exception, however, the Casebrief quickly reviews these decisions.

88. See, e.g., United States v. Oriakhi, 57 F.3d 1290, 1296 (4th Cir. 1995) (joining Second, Third, Fifth, Eighth, Ninth and Eleventh Circuit Courts of Appeals in applying border search exception to outgoing travellers).

89. See Ittig, supra note 14 at 330-35 (noting societal standards change over time with respect to privacy and dignity of individuals).

90. See Yale, supra note 1, at 750-52 (noting that exception which removes "the probable cause and warrant requirement makes the judicial task of guarding against excesses carried out by law enforcement officials far more difficult"). Commentators have argued that when courts remove the requirement of advance judicial approval, they ignore the safeguards of the Fourth Amendment. Id. at 751. Indeed, Justice Jackson cautioned that "[w]e must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." Brinegar v. United States, 398 U.S. 160, 182 (1949) (Jackson, J., dissenting).

91. Sims, supra note 13, at 1647; see, e.g., United States v. Martinez, 481 F.2d 214, 217 (5th Cir. 1973) (developing elastic border); United States v. Glaziou, 402 F.2d 8, 12 (2d Cir. 1968) (same), cert. denied, 393 U.S. 1121 (1969); Marsh v. United States, 344 F.2d 317, 324 (5th Cir. 1965) (same).

92. United States v. Jackson, 825 F.2d 853, 854-55 (5th Cir. 1987). The Jackson court noted, however, that the Almeida Court only gave two examples of a "functional equivalent" and did not define the term. Id. "The circuit courts, however, have examined in some detail the notion of functionally equivalent borders." Id. For a discussion of the Fifth Circuit's use of the term, see Jackson, 825 F.2d at 855-60. For a more complete discussion of the decision in Almeida and its effect on the "elastic border" concept, see supra notes 52-59 and accompanying text.
A second trend among the circuit courts involves expanding the exception to outgoing searches. Until twenty years ago, most courts recognized a substantial difference between incoming and outgoing searches by requiring probable cause before a warrantless outgoing search occurred. More recently, however, courts have discounted this difference and require no probable cause for outgoing searches. While the Supreme Court has not directly ruled on this issue, lower courts have primarily relied upon dicta in two Supreme Court decisions to justify this expansion.

The Ninth Circuit represents the first court to expressly expand the border search exception to outgoing travellers. The court reviewed Supreme Court decisions in this area and, while noting that it may extend present law, held that similarity of purpose, rationale and effect in outgoing and incoming searches support the application of the border search exception to outgoing travellers. Although the Supreme Court has never directly confronted the issue, on at least two occasions it has impliedly addressed the extension of the exception to outgoing travellers.

95. Ezeiruaku, 936 F.2d at 141. This trend started with a Ninth Circuit decision in 1976. United States v. Stanley, 545 F.2d 661 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978); see also United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980) (justifying border search exception's applicability to outgoing searches), cert. denied, 449 U.S. 1111 (1981). The Stanley court held that the border search exception warranted extension to outgoing searches based on several similarities between incoming and outgoing searches. Stanley, 545 F.2d at 667. These similarities include: (1) the government interest in protecting its citizens from drug smuggling; (2) the likelihood of smuggling attempts at the border; (3) the difficulty in detecting drug smuggling; (4) an individual receives notice of potential searches when crossing the border; and (5) the inspectors search the individual only because he represents a member of a morally neutral class (international traveller). Id. Conceding that this "may be an extension of present law," the Stanley court justified its holding on the "similarity of purpose, rationale and effect between [incoming and outgoing searches]." Id.
97. Stanley, 545 F.2d at 661.
98. Id. at 667.
99. Julian, 463 U.S. at 1310 (stating that outgoing border search requires neither probable cause nor warrant (citing United States v. Ramsey, 431 U.S. 606, 616-19 (1977)); California Bankers Ass'n, 416 U.S. at 63 (noting in dicta that "those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment").

The recent Fourth Circuit decision of United States v. Oriakhi, 57 F.3d 1290 (4th Cir. 1995) contains a good discussion of the limited Supreme Court treatment of the border search exception in outgoing search cases. The majority opinion, which upheld the border search exception as applied to outgoing searches, stated: [A]lthough the Supreme Court has not yet ruled directly on the question of whether the border search exception to the Fourth Amendment applies to persons leaving the country, a chambers opinion and other dicta suggest that it does. See Julian v. United States, 463 U.S. 1308, 103 S. Ct.
Circuit court decisions since *Stanley* have relied upon these two Supreme Court decisions in holding the border search exception applicable to outgoing searches. Presently, virtually every Circuit Court of Appeals decision on this issue applies the border search exception to searches of outgoing as well as incoming travellers.

Likewise, circuit courts define the "functional equivalent" broadly and rarely base a decision on a finding that the search did not occur at a border or its "functional equivalent." Often, the courts responsible for

3522, 77 L. Ed.2d 1290 (Rehnquist, Circuit Justice 1983) (applying border search exception articulated in *Ramsey* to a person and his effects as he attempted to depart the country on a flight destined for Peru); California Bankers Ass'n v. Shultz, 416 U.S. 21, 63, 94 S. Ct. 1494, 1518, 39 L. Ed. 2d 812 (1974) (dicta) (suggesting that those "entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment").

*Oriakhi*, 57 F.3d at 1296, n.4.

In a dissenting opinion, however, Judge Phillips argued that in the context of outgoing searches, courts should employ the normal balancing test. *Id.* at 1300 (Phillips, J., dissenting). This test entails a comparison of the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental purposes. *Id.* at 1301 (Phillips, J., dissenting). Phillips argues that the Supreme Court has simply not ruled, directly or indirectly, on the issue of the applicability of the border search exception to outgoing searches. *Id.* at 1303 (Phillips, J., dissenting). Additionally, circuit courts should not look to these cases for guidance. *Id.* (Phillips, J., dissenting).

100. *Ezeiruaku*, 936 F.2d at 141 (relying upon *California Bankers Ass'n* and *Julian* to extend border search exception); United States v. Ajlouny, 629 F.2d 830, 834 (2d Cir. 1980) (noting that *California Bankers Ass'n* decision removed any doubt about applying border search exception to outgoing travellers).

101. *Oriakhi*, 57 F.3d at 1296; *Ezeiruaku*, 936 F.2d at 140; United States v. Berisha, 925 F.2d 791, 795 (5th Cir. 1991); United States v. Benevento, 836 F.2d 60, 68 (2d Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988); United States v. Hernandez-Salazar, 813 F.2d 1126, 1138 (11th Cir. 1987); United States v. Udofot, 711 F.2d 831, 839 (8th Cir.), *cert. denied*, 464 U.S. 896 (1983); *see also* Kyriazis & Caldwell, supra note 19, at 636 n.56 (noting that circuit courts often seem hesitant to perform their own analysis and instead refer to other circuit court decisions that characterize outbound searches as routine). *But see* United States v. Des Jardins, 747 F.2d 499, 504 (9th Cir. 1984) (refusing to apply border search exception to outgoing travellers), *vacated in part*, 772 F.2d 578 (9th Cir. 1985).

Some commentators have attacked the border search exception as applied to outgoing travellers.

Although widely applied, the reverse border search exception has been severely criticized. Yet, despite the differences between the two exceptions, the standard of proof required under the reverse border search exception parallels the standard used in traditional border searches. Therefore, since a routine border search does not require a quantum of proof, the border search and reverse border search exception would permit a customs service agent to conduct, at will, a routine search of any departing passenger.


102. *See Ramsey*, 431 U.S. at 606 (holding that New York's Kennedy Airport constitutes functional equivalent of border); Almeida Sanchez v. United States, 413 U.S. 266 (1973) (noting that St. Louis airport might constitute functional equivalent if flight originated in Mexico City); *Ezeiruaku*, 936 F.2d at 136 (holding
these expansions offer little new analysis, but simply refer to the historical argument advanced by Boyd and the other Supreme Court cases dealing with traditional border search analysis.103

In conclusion, many of these cases deal with the Mexican-American border, where an epidemic of both drug smuggling and illegal alien smuggling exists.104 At least one commentator notes that the vast majority of border search cases occur in the Fifth and Ninth Circuits, which include those states bordering Mexico, particularly California and Texas.105 Because the smuggling of illegal aliens across the international border in the Third Circuit does not appear problematic, this smuggling concern may not apply to the Third Circuit.

Finally, the recent expansion of the border search exception among the circuits has other non-judicial motivations. Courts find express congressional authority in federal statutes that authorize expanding the border search exception to officials attempting to detect currency smuggling.106 The federal currency reporting statute, for example, gives customs officers authority to conduct border searches in order to control the flow of unreported currency through the borders of the United States.107 One justification for this statute involves the relationship between imported drugs, general drug trafficking and smuggling of associated currency out of the United States.108 Against this backdrop, considering the Supreme Court cases discussed earlier, the brief summary of the other circuits' treatment of the border search exception and the concept that not all "borders" pose the same threats and concerns, this Casebrief now examines the Third Circuit's treatment of the border search exception.

Philadelphia International Airport represents functional equivalent of international border).

103. Yale, supra note 1, at 737-39. The only question left for the court involves determining whether the search is "routine."

104. Patrick McDonnell, Judge Rejects Drug Searches at Checkpoints; Civil Rights: Federal Government's Bid To Allow Stops Without Probable Cause Is Called Unconstitutional, L.A. TIMES, May 26, 1990, at 1. McDonnell notes that federal prosecutors submitted statistics demonstrating that the volume of drug trafficking across the 2,000 mile long U.S.-Mexico border has soared. Id. Border seizures of cocaine increased from fewer than 60 kilograms in 1982 to almost 12,000 kilograms in 1989, while seizures of marijuana increased from approximately 27,000 kilograms to almost 200,000 kilograms in the same period. Id.

105. Waples, supra note 14 at 55 n.10. The author notes that other courts look to Fifth and Ninth Circuits for guidance on the border search issue because of frequency of cases they receive from smuggling across Mexican-American border. Id.

106. 31 U.S.C. § 5317(b) (1988). For the text of this statute, see supra note 40.


B. The Border Search Exception In the Third Circuit

The Third Circuit, like the other Circuit Courts of Appeals, has expanded the parameters of the border search exception. Indeed, Third Circuit culture regarding the border search exception has favored a broad application for over twenty years. For example, the Third Circuit quickly joined other courts in applying the exception to mail and packages. Likewise, the Third Circuit rapidly embraced the "elastic border" concept by extending the exception in the early 1970s. In 1984, the Third Circuit dispelled any doubt surrounding its future position.


110. See United States v. Diaz, 503 F.2d 1025 (3d Cir. 1974). The Diaz court, dealing with a strip-search occurring at the border, stated:

[i]nstead of the usual requirement of probable cause to believe that an individual possesses contraband or that he has committed a crime demanded by the Fourth Amendment, a customs officer need only have a reasonable suspicion of illegal activity . . . . A customs officer has the unique power to stop a person at an international entry point to conduct a "border search" without having a search warrant and even having probable cause to believe the person has committed a crime. . . . Recognition of this diminished constitutional standard is reflected in 19 U.S.C. § 482, specifically authorizing customs officers to stop and search vehicles or persons in or on which they suspect there is merchandise illegally brought into the United States. It does not, of course, exempt border searches from the constitutional test of reasonableness.

Id. (citing United States v. Beck, 483 F.2d 203, 207 (3d Cir. 1973)); see also United States v. Nelson, 593 F.2d 542 (3d Cir. 1979) (holding that Mount Pocono Airport in Pennsylvania represents "functional equivalent" of border when flight originated abroad).

111. United States v. Glasser, 750 F.2d 1197 (3d Cir. 1984), cert. denied, 471 U.S. 1018, 1065 (1985). The Glasser court held that customs officers have the authority to open and search packages mailed to the country at their port of entry, even without articulating a "reasonable cause to suspect." Id. at 1200.

112. Beck, 483 F.2d at 203. The Beck court stated that a desire to stop illegal smuggling supported its rationale. Id. at 207. "The magnitude of the smuggling and theft problems on our extensive international borders and numerous international airports and seaports had led to the formulation of special, pragmatic standards for judging the legality of stops and searches in or around such border areas or international port facilities." Id. In evaluating the extent of the exception, the court noted "[p]ractical considerations dictate a certain amount of elasticity in describing the area within which the border search standard is constitutionally appropriate." Id. After noting the necessity of a case-by-case determination, the court stated that the border "has been expanded to a reasonably extended geographic area in the immediate vicinity of any entry point." Id. at 207-08 (citing United States v. Glaziou, 402 F.2d 8, 13 (2d Cir. 1968)).

113. Glasser hinted at the court's future direction when it stated that "[i]t cannot be questioned that Congress has plenary power to police the borders of the United States." Glasser, 750 F.2d at 1201 (citing United States v. 12 200-Ft. Reels of Super 8MM Film, 413 U.S. 125, 126 (1973); Weber v. Freed, 299 U.S. 925, 929 (1915); Buttfield v. Stranahan, 192 U.S. 470, 492 (1904)); see also Beck, 483 F.2d at 202 (stating that "[o]n a constitutional level, then, it is beyond question that agents of the federal government may, without cause, search persons and packages entering the country without violating the rights guaranteed by the Fourth Amendment").
Since then, the Third Circuit has not limited the expansion of the border search exception in any significant manner. Additionally, the most recent Third Circuit statements on the border search exception reflect little desire to restrict the exception.

In 1991, the Third Circuit addressed the question of whether the border search exception applied to outgoing travelers in *United States v. Ezeiruaku*. In *Ezeiruaku*, customs officials at Philadelphia International Airport conducted an operation designed to detect the smuggling of currency out of the United States. During the operation, officials targeted Mr. Ezeiruaku because he fit a possible smuggler's profile. Inspectors searched Mr. Ezeiruaku's checked luggage, without his knowledge. The search uncovered various shipping documents and $265,000 in cash.

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114. See, e.g., *United States v. Caminos*, 770 F.2d 361 (3d Cir. 1985) (holding Pittsburgh International Airport represents "functional equivalent" of border and reinforcing validity of border searches without warrant or probable cause as long as government shows relevant individual or item searched crossed border).

In fact, at least one commentator urges that any retreat by the courts in the area of the border search exception would place the burden on Congress to amend the Constitution to expressly authorize the exception. Barnett, supra note 33, at 48.

The writer cannot stress too vigorously the importance of the issues raised so blithely, without reason or authority by those individuals who attack the rights of the Government at its border.

Should these attacks prevail it would require amendment (modification) of the Fourth Amendment of the Constitution to recognize expressly the border search power of the Bureau of Customs implicitly recognized therein since 1789 to cure the immediate and catastrophic injury that would result from such an interpretation of the governing statutes and regulations.

*Id.* (emphasis added).


117. *Ezeiruaku*, 936 F.2d at 137.

118. *Id.* at 137-38. Specifically, customs agents noted that Mr. Ezeiruaku dressed in expensive clothing, checked two large, overweight suitcases, paid for the overweight charges in cash, travelled with a woman who appeared nervous and spoke with a Nigerian accent. *Id.* At least one of the inspectors knew that certain Nigerians were at risk for smuggling money and merchandise out of the country without paying duty. *Id.* at 138. Both of these items require an export license. *Id.*

119. *Id.*
The federal currency reporting statute, which controls the flow of currency out of the country, authorized this search. The Government argued that the statute represents a codification of the border search exception and, therefore, specifically applied to outgoing searches.

The Third Circuit held that, because the search of Mr. Ezeiruaku's luggage constituted a "routine" search and occurred at the "functional equivalent" of the border, it represented a reasonable and valid search. The court, relying in large part on prior decisions of the Fifth and Eleventh Circuits, held that the same justifications for the search of incoming travellers applied to outgoing travellers. In reaching this decision, the court "join[ed] the Second, Fifth, Ninth and Eleventh Circuit Courts of Appeals in concluding that the traditional rationale for the border search exception applies as well in the outgoing border search context."

More recently, in United States v. Hyde, the Third Circuit reversed a ruling of the District Court of the Virgin Islands regarding the border search exception. The reason for searching Mr. Ezeiruaku's bags included his destination, his cash payment for the overnight pass, his female companion's nervous appearance, his unusual interest in the customs area and the prior experience of the customs officials in these types of searches. A later search of Mr. Ezeiruaku and his carry-on luggage uncovered more documents indicating shipments to Nigeria and $2,000 in cash. This cash, however, did not exceed the $10,000 reporting limit.

For purposes of ensuring compliance with the requirements of section 5316 [the currency reporting statute], a customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States.

The cases referred to by the Third Circuit include: Berisha, 925 F.2d at 795; Hernandez-Salazar, 813 F.2d at 1126; United States v. Udofot, 711 F.2d 831 (8th Cir.), cert. denied, 464 U.S. 896 (1983); United States v. Ajlouny, 629 F.2d 830, 834 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981); United States v. Swarovski, 592 F.2d 131 (2d Cir. 1978); United States v. Stanley, 545 F.2d 661 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978). Ezeiruaku demonstrated the Third Circuit's tendency to join in the expansion of the border search exception beyond its original scope.

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search exception. In Hyde, three defendants prepared to board a plane from St. Thomas to Miami, Florida. Subsequently, customs inspectors asked them some routine questions. The customs inspectors became suspicious when the defendants appeared nervous while answering the questions. Consequently, the inspectors conducted a routine pat-down search. As a result of these searches, the inspectors discovered a package of cocaine taped to each defendant's body.

The district court held that the border search doctrine did not apply because the defendants' travel from St. Thomas to Florida did not involve crossing an international border. On the other hand, the Court of Ap-

128. Id. at 117.
129. Id.
130. Id. at 117-18.
131. Id.
132. Id. As previously noted, the defense did not argue that the search constituted anything other than a "routine" search. Id. at 118 n.1. For a more complete discussion of what constitutes a "routine" search, see supra notes 59, 72-80, 124-33 and infra notes 153-58 and accompanying text.
133. Id. at 118.
134. United States v. Hyde, No. 93-65, 1993 WL 730994 (D.V.I. Oct. 21, 1993), rev'd, 37 F.3d 116 (3d Cir. 1994). The district court noted that United States v. Chabot, 531 F. Supp. 1063 (D.V.I. 1982), represents the only case dealing with this issue. Hyde, 1993 WL 730994, at *4. This case concerned the search of a small plane flying from Puerto Rico to the Virgin Islands. Id. at *4-5. The court, however, stated that because the Chabot court found no reasonable suspicion for that search, its statement upholding the validity of the search constituted mere dicta. Id. at *5.

The district court stated that because the Virgin Islands do not border the United States mainland, it does not necessarily create a "customs zone" between the two areas. Id. at *4. "[T]he existence of a border hinges on notions of sovereignty and not upon traditional concepts of geography." Id. (footnote omitted) (citing Torres v. Commonwealth of Puerto Rico, 442 U.S. 465 (1979)). The court also stated that inspectors cannot dispense with the protections of the Fourth Amendment because of the urgent law enforcement needs in preventing smuggling. Id. The court further evaluated the relationship between the United States and the Virgin Islands in stating:

There is no quarrel with Chabot's observation that the unique customs position of the Virgin Islands is largely due to the historical fact that, when the Virgin Islands were purchased by the United States, Danish law "was already in place which provided for Customs duties to be levied upon the goods coming into the Virgin Islands, with the revenue going to the colonial treasury."

Id. at *5 (quoting Chabot, 531 F. Supp. at 1069 (citing Danish Colonial Law of Apr. 6, 1906, § 56, reprinted in V.I. CODE ANN., tit. 1 (1967))). The United States government continued these laws. Id. Nonetheless, the Hyde court could not find any case law or legislative history demonstrating that by continuing them, the government intended to remove the protections of the Fourth Amendment from people in the Virgin Islands. Id.

This court has not found any case law to support the legal concept of a border, intermediate or otherwise, between the Virgin Islands and the continental United States merely because of the Islands' political status as a territory of the United States. To the contrary, the Ninth Circuit has suggested that there is no such border for United States territories.

Id. at *4, n.10 (citing Barsuch v. Calvo, 685 F.2d 1199 (9th Cir. 1982)).
peals concluded that the United States/Virgin Islands border (US/VI border) constituted the "functional equivalent" of an international border. Applying the border search exception, the Third Circuit held "that routine customs searches of persons and their belongings without probable cause as they leave the Virgin Islands for the continental United States are not unreasonable under the Fourth Amendment."

Noting that previous Supreme Court decisions do not directly support the application of the border search exception to this search, the Third Circuit relied upon the rationale employed by those cases in upholding the reasonableness of these searches. In finding that the US/VI border constitutes the "functional equivalent" of an international border, the Hyde court relied in part upon a prior Third Circuit case which held that the Virgin Islands represent an unincorporated territory of the United States. The court in Hyde also cited two early Supreme Court cases concerning Puerto Rico and the Panama Canal. Finally, the court overruled two recent decisions of the District Court of the Virgin Islands that did not classify the US/VI border as a "customs zone." Thus, the Hyde decision continued the expansion of the border search exception under Third Circuit jurisprudence.

Generally, the trend in the Third Circuit, as well as in most other circuit courts, involves expanding the border search exception. In particular, the Third Circuit's recent treatment of the border search exception evidences this trend. In order to gauge when the Third Circuit will stop this expansion, one needs to review thoroughly the rationale of the Third Circuit decisions expanding the exception.

135. Hyde, 37 F.3d at 117.
136. Id.
137. Id. at 122 (citing United States v. Ramsey, 431 U.S. 606 (1977); Carrol v. United States, 267 U.S. 132 (1925); Kaufman & Sons, Co. v. Smith, 216 U.S. 610 (1910); Downes v. Bidwell, 182 U.S. 244 (1901)).
139. Hyde, 37 F.3d at 121 (citing Smith, 375 F.2d at 714; Kaufman & Sons, Co., 216 U.S. at 611; Downes, 182 U.S. at 244.
140. See, e.g., United States v. Douglas, 854 F. Supp. 383 (D.V.I. 1994) (holding that Virgin Islands do not constitute border for purposes of border search exception); United States v. Hyde, No. 93-65, 1993 WL 733094 (D.V.I. Oct. 21, 1993) ("Since the United States is sovereign over the United States Virgin Islands, it would seem obvious that there is no basis for a border search of individuals travelling directly to the mainland from the territory."); rev'd, 37 F.3d 116 (3d Cir. 1994); cf. United States v. Reyes, No. 92-337, 1993 WL 151880, at *4-5 (D.P.R. Apr. 23, 1993) (holding that Virgin Islands represents separate and distinct "customs zone" and therefore, border search exception applied to boat travelling from Virgin Islands to Puerto Rico because agents could reasonably assume boat crossed customs border).
141. For a discussion of this trend, see supra notes 87-108 and accompanying text.
142. See Hyde, 37 F.3d at 116 (expanding concept of border to include border between United States and Virgin Islands); United States v. Ezeiruaku, 996 F.2d 136, 136 (3d Cir. 1991) (applying border search exception to outgoing travellers).
IV. How Far Will the Third Circuit Extend the Border Search Exception?

In both Hyde and Ezeiruaku, the Third Circuit reinforced the border search exception. In each case, the Third Circuit cited Boyd and its progeny to justify the searches in question. Although virtually unquestioned by courts for over 100 years, certain commentators have challenged this justification. The real question facing the court involves whether the particular facts of each case constitute a routine search and, therefore, fit within the clear parameters of the exception. The manner in which the Third Circuit evaluated the facts and circumstances in each case reflects its commitment to expanding the exception’s reach.

A. The Expansion to Outgoing Travellers

The major issue that the Ezeiruaku court settled involved applying the exception equally both to the search of persons entering and persons exiting the United States. The Third Circuit noted that the Supreme Court had not ruled directly on the issue and, therefore, turned to other Circuit Courts of Appeals. The Third Circuit also relied on dicta from two Supreme Court decisions, cited by the other Circuit Courts of Appeals, to justify its decision. Congress also enacted a statute that authorized warrantless searches for discovering smuggled currency. Additionally, the rationale underlying this decision evidenced the Third Circuit’s fear of drug smuggling and its attempts to curtail this activity.

143. Hyde, 37 F.3d at 118 (noting that border searches constitute exception to Fourth Amendment requirements); Ezeiruaku, 936 F.2d at 140 (“[W]e have stated that ‘it is well established that searches of persons or property at the border are considered reasonable within the meaning of the Fourth Amendment simply by virtue of the fact that they occur at the border,’ “ (quoting United States v. Glasser, 750 F.2d 1197, 1201 (3d Cir. 1984), cert. denied, 471 U.S. 1018, 1068 (1985))).

144. Hyde, 37 F.3d at 118-19; Ezeiruaku, 936 F.2d at 140.

145. Wallace, supra note 115, at 243. Wallace argues that the traditional justification of a border search’s reasonableness, because it occurs at the border, represents a circular argument which sidesteps the traditional constitutional balancing test. Id.; Yale, supra note 1, at 745-52.

146. Hyde, 37 F.3d at 116; Ezeiruaku, 936 F.2d at 136.

147. For a detailed review of these decisions, see supra notes 116-40 and infra notes 148-79 and accompanying text.

148. Ezeiruaku, 936 F.2d at 137.

149. Id. at 141.

150. Id. (“[T]hose entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment.”) (citing California Bankers Ass’n v. Shultz, 416 U.S. 21, 63 (1974); Julian v. United States, 463 U.S. 1308 (1983)).


152. Ezeiruaku, 936 F.2d at 143. The court explained that:

This, too, must be said. Although there is not the slightest suggestion that [Mr. Ezeiruaku] was implicated in drug trafficking, in an environment that sees a massive importation of drugs across our borders, we are cognizant that there must be a concomitant outflow of cash to pay for this
Congressional authority for the legal search for currency, coupled with the assumption that smuggled currency relates to drug trade, provided the Third Circuit with the support necessary to extend the border search exception to outgoing travellers. The Third Circuit based its decision upon prior rulings from the other circuit courts evidencing an intent to apply the border search exception to outgoing travellers, congressional authority and the Third Circuit's general attitude toward the border search exception. Thus, the Third Circuit's extension of the border search exception should not be surprising.

As a result, the key issue facing the Ezeiruaku court concerned classifying the search as routine. The court quickly resolved this issue by noting that the search only involved the inspection of Mr. Ezeiruaku's luggage. Affording customs officials wide latitude, the court stated "the border search of luggage is 'routine' and requires no degree of suspicion." The Third Circuit criticized the district court's characterization of this search as "non-routine." The Court of Appeals stated that the district court's determination "flies in the face of the clear teachings of this court as well as [authority from other jurisdictions]." Once the court classified the search as "routine," the evidence became admissible. Therefore, based on the Third Circuit's broad approach of applying the border search exception, the ultimate disposition in many cases turns on whether the court deems the search "routine" or "non-routine."

Nefarious traffic. Strong dictates of public policy reinforce the necessity of identifying, if not monitoring or controlling, a cash outflow from the country as well as an influx of narcotics into the country.

Id.

153. Id. at 140.
155. Ezeiruaku, 936 F.2d at 140.
156. Id. (relying upon prior Third Circuit case of United States v. Scheer, 600 F.2d 5 (3d Cir. 1979) (per curiam), which held that border search of luggage constitutes "routine" search and requires no degree of suspicion).
158. Ezeiruaku, 936 F.2d at 143 ("National interests in the flow of currency justify the diminished recognition of privacy inherent in the crossing into and out of the borders of the United States.").
159. Id. at 141. For a listing of those cases cited by the court as authority from other jurisdictions, see supra note 157.
160. Id. at 139 (noting that district court suppressed evidence based on its classification of search in question as "non-routine" and, therefore, in violation of Fourth Amendment); see also Kyriazis & Caldwell, supra note 19, at 620 ("The one crack in this otherwise monolithic rule has been the 'non-routine' border search of . . . passengers.").
B. The Expansion of the Term “Border”

The Hyde court found express congressional consent for its holding. Like the Ezeiruaku court, the court in Hyde began by reinforcing prior case law upholding the border search exception. The critical issue facing the Hyde court involved defining the US/VI border as an “international border” or a “functional equivalent” thereof. The Hyde court conceded that prior Supreme Court decisions, relating to the border search exception, dealt with “international borders” and, therefore, did not directly control this case. By holding that the border search exception applies to individuals travelling from the Virgin Islands to the United States mainland, however, the court relied on the rationale supporting these Supreme Court decisions.

In addition, the court focused on the historical treatment of the Virgin Islands by Congress and other unincorporated territories by the Supreme Court. Ironically, in expanding the reach of the border search exception, Hyde cited to the Almeida decision, which arguably limited the “elastic border.”

After reviewing the Supreme Court decisions establishing the border search exception, the Hyde court detailed two early Supreme Court decisions dealing with customs laws governing Puerto Rico and the Panama Canal Zone. These decisions defined the status of territories acquired by the United States and Congress’ authority to impose customs laws in such territories. The Hyde court concluded that because the Virgin Is-

161. Hyde, 37 F.3d at 121. The statute giving this consent provides that:
Whenever a vessel from a foreign port or place or from a port or place in any Territory or possession of the United States arrives at a port or place in the United States . . . the appropriate customs officer for such port or place of arrival may . . . cause inspection, examination, and search to be made of the persons, baggage, and merchandise discharged or unloaded from such vessel.

Id. (citing 19 U.S.C. § 1467). The court also noted that the inspection “conducted in this case, at the point of departure from the Virgin Islands instead of arrival within the United States, is authorized by 19 C.F.R. § 122.144(b).” Id. n.4.


163. Id. at 120.

164. Id. at 122 (agreeing with appellants that prior Supreme Court cases such as Boyd, Downes and Kaufman & Sons, Co. do not directly support application of border search exception to search at issue).

165. Id. at 122-23.

166. Id.

167. Id. at 120 n.4.

168. Id. at 120-21. For a discussion of these two cases, see infra note 169 and accompanying text.

169. Id. The first case, Downes v. Bidwell, 182 U.S. 244 (1901), dealt with the question of whether new territory acquired by the United States automatically be-
lands do not "materially" differ from Puerto Rico and the Panama Canal Zone at the time of those decisions, "it is clear that Congress has the authority to create a border for customs purposes between the Virgin Islands and the rest of the country." The court specifically examined Congress' treatment of customs laws regarding the Virgin Islands to determine if Congress created a "customs zone" between the United States and the Virgin Islands.

The Hyde court viewed Congress' post-acquisition actions as intending to create a border between the United States and the Virgin Islands for customs purposes. After examining a series of customs laws passed by Congress, the Hyde court noted that customs searches repeatedly occurred at the US/VI border for over seventy-five years.

Next, the court addressed the similarities between Congress' broad power to regulate commerce among the United States and its territories, and its power to regulate commerce with foreign nations. Based on these powers and the historical treatment of the US/VI border, the court stated that the same protections which justify the use of routine warrantless searches at this internal customs border exist at the traditional international customs border. Consequently, the court stated that "as far as the interests of the sovereign are concerned, we perceive the interest of

came incorporated into the United States. In Downes, the plaintiff claimed a customs law, which charged a duty for merchandise shipped from Puerto Rico to the United States, violated Article I, Section 8, of the Constitution providing "all duties, imports and excises shall be uniform throughout the United States." Downes, 182 U.S. at 246. Although the Court did not reach a majority, five Justices agreed that territory acquired by the United States does not become "incorporated" until Congress specifically acts. Id. For a more complete discussion of the distinction between "incorporated" and "unincorporated" territories, see infra note 184. A later case, Kaufman & Sons, Co. v. Smith, 261 U.S. 610 (1910), relied upon Downes in upholding congressional authority to adopt a statute which provided that: all laws affecting imports of articles, goods, wares, and merchandise and entry of persons into the United States from foreign countries shall apply to articles, goods, wares, and merchandise and persons coming from the Canal Zone, Isthmus of Panama, and seeking entry into any State or Territory of the United States or the District of Columbia. Kaufman & Sons, Co., 261 U.S. at 611.

170. Hyde, 37 F.3d at 121.
171. Id.
172. Id. at 121.
173. Id. at 122. The court went so far as to say that Congress expressly authorized customs searches for travellers between the mainland and the Virgin Islands. Id. The court cited 19 U.S.C. section 1467, which provides in part: Whenever a vessel from a foreign port or place or from a port or place in any Territory or possession of the United States arrives at a port or place in the United States ... the appropriate customs officer for such port or place of arrival may ... cause inspection, examination, and search to be made of persons, baggage, and merchandise discharged or unladen from such vessel.
174. Hyde, 37 F.3d at 122.
175. Id.
the United States in warrantless searches without probable cause at this 'internal' border to be little different from its interest in such searches at its international borders."\textsuperscript{176}

In examining the individual's right to privacy, the \textit{Hyde} court also analogized to traditional international travellers and stated that a diminished reasonable expectation of privacy existed at the US/VI border.\textsuperscript{177} At least one commentator has criticized this analysis of an individual's reasonable expectation of privacy, arguing that "[m]erely because someone or something is entering the country is no reason to dispense with the safeguards ordinarily provided by the Fourth Amendment."\textsuperscript{178} Finally, the court further noted that the public's knowledge of the Virgin Islands' distinctive status would alert travellers "to the possibility of border inquiries not experienced at state lines."\textsuperscript{179}

C. \textit{Will the Border Search Exception Expand to State Borders?}

Can the courts continue to expand the border search until it reaches beyond international borders or functional equivalents thereof? Will courts determine that the country has not effectively eliminated the evils it sought to prevent through border searches? Will this determination cause the courts to expand the border search exception again? The Supreme Court has attempted to limit the use of the border search exception, stating that different considerations apply to searches once a person enters the country.\textsuperscript{180} The Third Circuit appears to agree with this approach.\textsuperscript{181} A careful reading of the Third Circuit's reasoning and rationale, however, might support another expansion of the border search exception.

1. \textit{The Relationship Between the United States and the Virgin Islands, as Interpreted by the Third Circuit}

In order to properly analyze the Third Circuit's treatment of the border search exception in \textit{Hyde} and address its possible future ramifications to state borders, one must obtain at least a cursory understanding of the relationship between the United States and the territory of the United States Virgin Islands.\textsuperscript{182} The United States acquired the Virgin Islands in

\begin{thebibliography}{182}
\bibitem{176} \textit{Id.}
\bibitem{177} \textit{Id.}
\bibitem{178} Yale, \textit{supra} note 1, at 751.
\bibitem{179} \textit{Hyde}, 37 F.3d at 122.
\bibitem{180} United States v. Carroll, 267 U.S. 132 (1925).
\bibitem{181} \textit{Hyde}, 37 F.3d at 122. The \textit{Hyde} court stressed that the United States' strong interest in protecting its borders and the similarity of the "internal" border at issue in the case to traditional international borders provides justification for its holding. \textit{Id.}
\bibitem{182} The United States Virgin Islands represents one of five island political communities existing in the Pacific and Caribbean that constitute a part of the United States, but have not attained statehood. Jon M. Van Dyke, \textit{The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands}, 14 U. \textit{Haw. L. Rev.} 445, 447 (1992). "The island groups that now fly the U.S. flag but are
1916 and placed it among the territories comprising the Third Circuit.\textsuperscript{183} The Third Circuit declared the Virgin Islands an “organized” but “unincorporated” territory of the United States.\textsuperscript{184} Because the Virgin Islands have not and may never become a state,\textsuperscript{185} disagreement exists over its not states are the Territory of American Samoa, the Territory of Guam, the Commonwealth of the Northern Mariana Islands (CNMI), the Commonwealth of Puerto Rico and the Territory of the United States Virgin Islands.” \textit{Id.}

183. The Virgin Islands consist of the islands of St. Thomas, St. Croix and St. John, which the United States purchased from Denmark in 1916 for the sum of $25 million. \textit{Van Dyke, supra note 182, at 494-95.} At that time the Naval Department controlled the Islands. \textit{Id. at 495.} The Navy planned to use the Islands as a base of operations against German Naval activity in the Atlantic Ocean. \textit{Id.} In a series of Acts by Congress, the United States government struggled over how to run the new islands and what type of representation they should have in the United States government. \textit{Id. at 496-98.}

In 1981, Congress finally approved a Constitution for the Virgin Islands. \textit{Id. at 498.} The Virgin Islands do not, however, have autonomy from federal regulation. \textit{Id. As the Third Circuit has consistently held, “Congress has plenary power to legislate on matters affecting these islands.” \textit{Id.}}

184. Smith v. Government of Virgin Islands, 375 F.2d 714, 717-18 (3d Cir. 1967); \textit{see also Van Dyke, supra note 182, at 450 (noting that Virgin Islands “are now considered by the federal government’s executive branch to be an ‘unincorporated’ territory[!]”).}

In a series of cases in 1901, the Supreme Court introduced the distinctions between “incorporated” and “unincorporated” territories of the United States. \textit{Id. at 449.} These cases represent a response to the problems which “arose from the territorial acquisitions by the United States after the Treaty of Paris in 1899 following the Spanish-American War.” \textit{Smith, 375 F.2d at 717.} These cases became known as the \textit{Insular Cases.} \textit{Van Dyke, supra note 182, at 449 (citing DeLima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901)). Another distinction made between territories involves “organized” and “unorganized” territories. \textit{Id. at 450.}

“An ‘organized’ territory is one that has established a civil government under an organic act passed by Congress.” \textit{Id. at 450.} Basically, a territory does not become “incorporated” until Congress consents to its incorporation. \textit{Id. at 449.} Incorporation, therefore, represents an important step on the road to statehood. \textit{Id.} The Virgin Islands became an “organized territory” by 1936, when Congress adopted the Organic Act for the Virgin Islands. \textit{Smith, 375 F.2d at 719; see also Van Dyke, supra note 182, at 494-99 (discussing historical treatment of Virgin Islands). Congress amended this 1936 Act in 1954, when “Congress made it clear that although it was providing a detailed frame of government for the Islands this was not to be taken as an indication that it had destined the territory for statehood.” \textit{Smith, 375 F.2d at 718.} The Virgin Islands, therefore, do not constitute an “incorporated” territory. \textit{Id.} For a more complete discussion of these distinctions, see generally \textbf{ARNOLD L. LEIBOWITZ, DEFINING STATUS} 10-16 (1989); Frederic R. Coudert, \textit{The Evolution of the Doctrine of Territorial Incorporation}, 26 COLUM. L. REV. 823 (1926); \textit{Van Dyke, supra note 37, at 448-71.}

Although not crucial to our analysis of the border search exception, a practitioner should note this classification in analyzing judicial treatment of the United States/Virgin Islands border (US/VI border).

185. \textit{Van Dyke, supra note 182, at 447 (stating that “the U.S. Virgin Islands[ ] may never become [a] state[ ] because of [its] unique culture[, ], [its] small size, and [its] distance from the U.S. mainland, but [it] deserves a greater stature than is provided by the concept of ‘territory’ under U.S. law”).}
treatment by Congress, federal agencies and the courts. At least one commentator has noted that "the Constitution and [United States] laws have been interpreted and applied to [the Virgin Islands] in a manner that is different from the way they have been interpreted and applied to the states of the United States." The Third Circuit has held that "only the most fundamental constitutional rights extend to [the Virgin Islands] where Congress is silent on the subject.

Because the Fourth Amendment protection against unreasonable searches and seizures involves a fundamental constitutional right, courts must afford such protection to persons living in the Virgin Islands. The question becomes what level of protection exists for those persons who lawfully enter the Virgin Islands and travel to other areas of the United States. The answer hinges on the court's definition of the border relationship between the United States and the Virgin Islands. According to the Hyde court, the border's similarity to a traditional "customs zone" supports the application of the border searches' rationale. The question arising from this rationale involves whether the court may expand these searches to state borders in the future.

2. The Hyde View of the US/VI Border as Applied to State Borders

The Hyde court based its decision that the US/VI border constituted a "customs zone" on prior opinions evaluating Puerto Rico and the Panama Canal Zone. Importantly, all three areas pertain to unincorporated territories of the United States and therefore, fall within the power of Congress under Article IV, Section 3 of the United States Constitution.

186. Id. The Virgin Islands, along with the other U.S.-Flag Islands, have always enjoyed a unique legal status under U.S. law, which "occasionally works for the benefits of the inhabitants of these islands, but it frequently creates hardships or awkward situations." Id.

187. Id. at 447-48; cf. Smith, 375 F.2d at 717-18 (defining status of Virgin Islands as irrelevant for purposes of constitutional prohibition against special legislation).


189. See, e.g., Torres v. Commonwealth of Puerto Rico, 442 U.S. 465, 474 (1979) (noting that although Court has recognized exceptions to warrant requirement, it has "not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures").

190. United States v. Hyde, 37 F.3d 116, 121 (3d Cir. 1994) (holding that Congress created "customs zone" between United States and Virgin Islands).

191. Hyde, 936 F.3d at 121 (citing Downes v. Bidwell, 182 U.S. 244 (1901) (dealing with Puerto Rico) and Kaufman & Sons, Co. v. Smith, 216 U.S. 610, 611 (1910) (dealing with Panama Canal Zone)).

192. This article provides, in pertinent part: "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.
Because state borders involve different standards than borders between states and unincorporated territories, the risk that courts will expand the Hyde rationale to state borders appears minimal.

V. CONCLUSION

A. Challenging a Border Search in the Third Circuit Today

Will the Third Circuit exclude the evidence against your client in the introductory hypothetical? Probably not. Third Circuit jurisprudence establishes rules a practitioner must face when attempting to exclude evidence seized from this traveller. First, if the search occurs at an international border, or the functional equivalent thereof, the court will conclusively presume the reasonableness of the search.\(^{193}\) Second, if the court classifies the search as "routine," the court will most likely admit any evidence under the border search exception.\(^{194}\) Unfortunately, based on the broad scope of the exception, the court will virtually ignore any racial motivation for the search, absence of probable cause supporting the search and lack of consent to the search by the victim.

The best way to successfully challenge the introduction of the evidence entails establishing that either: (a) the search did not occur at the border or its functional equivalent; (b) the search involved "non-routine" or overly intrusive procedures; or (c) the inspectors detained the victim for an impermissible length of time.\(^{195}\) The challenger could also argue that the traditional justifications for the exception do not apply to the facts of his case. This argument would hinge on the type of evidence seized and how serious a threat it posed to national security.

B. Future Treatment of the Exception

Under current Supreme Court precedent, it does not appear likely that the border search exception will extend beyond international borders to the internal borders between states.\(^{196}\) However, recent decisions of the Third Circuit demonstrate an intent to expand the exception as far as the Supreme Court will permit.\(^{197}\) This trend leaves the practitioner with

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\(^{193}\) Hyde, 37 F.3d at 118-19.

\(^{194}\) United States v. Ezeiruaku, 936 F.2d 136, 140 (3d Cir. 1991) (stating that issue involves whether or not court classifies search as "routine").

\(^{195}\) See, e.g., Hyde, 37 F.3d 116 (evaluating concept of what constitutes border); Ezeiruaku, 936 F.2d 136 (evaluating whether to apply border search exception to outgoing searches); see also Sharon Alexander, Plane View Doctrine? Private Aircraft Searches, 55 J. Air L. & Com. 443, 463 n.117 (Winter 1989) (stating that main controversial issues surrounding border search exception involve "(1) determining whether a vehicle actually crossed an international border; (2) how long a detention is permissible; and (3) the scope of the search.")

\(^{196}\) For a discussion of the differing treatment given to searches occurring at internal borders, see supra notes 41-46 & 180-81 and accompanying text.

\(^{197}\) See Hyde, 37 F.3d 116 (expanding border search exception to internal United States/Virgin Islands border); Ezeiruaku, 936 F.2d 136 (extending exception to search of outgoing travellers).
little room to maneuver within the confines of the exception. In short, if
the Third Circuit classifies the search as routine, or if the search occurs at
the border or the functional equivalent thereof, the practitioner will most
likely not have the ability to exclude the seized evidence.

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