

Rights At United States Borders^{*}

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Customs agents cannot detain a person longer than necessary to conduct a routine inspection without implicating the Fourth Amendment. Routine Customs inspections are directed at determining whether any impermissible items are being brought into the United States and/or whether any persons are attempting to illegally enter the United States. There is no reasonable suspicion or probable cause required for a routine Customs stop or search at a border. Any person asked to complete an extra form or declaration, not pursuant to routine Customs search and procedure, can invoke a Fifth Amendment privilege against self-incrimination, especially when the only purpose of completing such a form is clearly the incrimination of the person completing it. If any property is taken, a receipt must be given, and a specific procedure must be followed that includes notification to the person deprived of the property of the process for retrieving it.

The discussion will be divided into three sections. The first will focus on the extent to which Customs agents may detain or search a person in compliance with the Fourth Amendment. The second will focus on when Miranda warnings must be given and whether a person has a Fifth Amendment right to refuse to complete an addition to a declaration when the only purpose of such is incrimination. The third and final section will focus on whether Customs agents can take a person's possessions, and, if they do, what procedure must be followed.

I. When And How Long Can Customs Agents Detain Or Search A Person At A Border: The Fourth Amendment and Its Protections: Reduced, But Not Gone

As a preliminary matter, it is important to indicate a *lack of consent* to retain one's Fourth Amendment rights. Consent can render an otherwise unconstitutional action valid.¹

A. The Border Exception To The Fourth Amendment

Routine stops and searches are permissible under the “border exception” to the Fourth Amendment. A border is any point of entry into the United States. An international airport is viewed as the functional equivalent of a border.² The border search exception applies equally to passengers departing from and arriving into the United States.³

It is well established that “[r]outine searches of the persons and effects of entrants [at international borders] are not subject to any requirement of reasonable suspicion, probable cause, or warrant.”⁴ Only Customs, immigration, and Coast Guard officials may make routine searches and seizures at a border.⁵

¹ *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984) (“[t]he initial contact between the officers and respondent, when they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest”).

² *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *U.S. v. Terrani*, 826 F. Supp. 789 (D. Vt. 1993).

³ *U.S. v. Berisha*, 925 F.2d 791 (5th Cir. 1991) (border search exception to the Fourth Amendment applies to persons exiting or entering the country); *United States v. Benevento*, 836 F.2d 60, 68 (2d Cir.1987).

⁴ *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985); *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (“[S]earches made at the border ... are reasonable simply by virtue of the fact that they occur at the border...”); *United States v. Ezeiruaku*, 936 F.2d 136, 140 (3d Cir.1991). See also *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 537-38 (1985) (executive branch has “plenary authority” to conduct warrantless routine searches “in order to regulate the collection of duties and to prevent the introduction of contraband into this country”); *U.S. v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993) (no articulable suspicion required for Customs agents to conduct routine luggage search at border); *U.S. v. Charleus*, 871 F.2d 265, 267 (2d Cir. 1989) (neither probable cause nor

Import restrictions and searches of persons or packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad comprehensive powers ‘[t]o regulate Commerce with foreign Nations,’ Art. I, § 8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.’ *Ramsey, supra*, 431 U.S. at 618-19, *quoting United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 125 (1973). Consistently, therefore, with Congress’ power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior. *Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant, and first-class mail may be opened without a warrant on less than probable cause, Ramsey, supra*, 562-563 (1976), and boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever [emphasis supplied].⁶

Is there a border seizure exception? If there is a border search exception, there must be a border seizure exception for at least the amount of time consumed by an excepted border search. But after the completion of a valid, routine border search, or after the completion of a more detailed search and seizure supported by reasonable suspicion, the person subjected to the valid search and seizure must be allowed to depart. Any further detention violates the Fourth Amendment.⁷

reasonable suspicion required for customs officials to conduct routine border search of personal belongings and effects); *U.S. v. Asbury*, 586 F.2d 973, 976 (2d Cir. 1978) (routine searches at the border are acceptable at the border even without reasonable suspicion).

⁵ *U.S. v. Sandoval Vargas*, 854 F.2d 1132, 1136 (9th Cir. 1988), *distinguished on other grounds, U.S. v. Taghizadeh*, 41 F.3d 1263, 1266 (9th Cir. 1994).

⁶ *United States v. Montoya de Hernandez*, 473 U.S. 531, 537-38 (1985).

⁷ *U.S. v. Bews*, 715 F. Supp. 1206 (W.D.N.Y. 1989) (border patrol agents’ detention of alien at airport near international border to determine whether he was alien traveling in United States for illegal purpose exceeded scope of that justification when, after alien showed proper identification and explained reasons for traveling in the United States, one agent asked for permission to view contents of his travel bag); *U.S. v. Ek*, 676 F.2d 379 (9th Cir. 1982) (neither warrant nor probable cause is necessary to detain persons for a search at the border so long as the period of detention does not exceed what is reasonably necessary to conduct a valid search); *U.S. v. Fernandez*, 18 F.3d 874 (10th Cir. 1994) (after a ticket for having tinted windows was issued, further detention was in violation of the Fourth Amendment).

Immigration officials may conduct warrantless searches pursuant to 8 U.S.C. § 1357 (1996), which states in relevant part that immigration officials may:

(a)(4) ...make arrests for felonies...but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States...

(a)(5) ...make arrests...(A) for any offense against the United State, if the offense is committed in the officer's or employee's presence...or (B)...for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony, if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

(c) Any officer or employee of the Service...shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this chapter which would be disclosed by such search.

B. What Are “Routine” Stops And Searches?

Although routine stops and searches are excepted from Fourth Amendment protection, further detention or search is subject to some Fourth Amendment protection. In order to determine when any Fourth Amendment protections attach, it is necessary to determine the nature of a routine search and when it becomes unreasonable under the Fourth Amendment as lacking the required reasonable suspicion or probable cause.

There must be reasonable suspicion for a stop or search more extensive than a routine search. There must be probable cause to execute a full arrest.⁸

⁸ See *U.S. v. Delgado*, 797 F. Supp. 213 (W.D.N.Y. 1991) (border patrol agent's placing suspect in back seat of patrol car exceeded scope of permissible investigative seizure, even if agent had reasonable suspicion to justify detaining suspect's duffel bag until agent could confirm whether package within bag contained cocaine; at time suspect was placed in car, agent did not have probable cause for arrest).

Courts rarely find a sufficient level of intrusiveness to render a general border search nonroutine.⁹ A routine, preliminary search may include a person's luggage, personal belongings, outer clothing, wallet, purse, and even a person's shoes.¹⁰

Officials may photocopy material routinely inspected at the border.¹¹ The government may also install electronic devices in the articles searched to track contraband discovered during a valid border search.¹² The important question is: how long can a routine search continue before it becomes a nonroutine search? At what point does a nonroutine search become a seizure?

1. When Is A Search A Seizure?

A seizure occurs when a person or thing is not free to depart. At borders, a person is seized and not free to go for the length of time it takes to conduct a valid search. But once that valid, routine search has been completed, the person must be allowed to leave unless there is reasonable suspicion or probable cause.¹³

⁹ *U.S. v. Beras*, 183 F.3d 22 (1st Cir. 1999) (Customs agent's patdown of traveler going from Puerto Rico to Dominican Republic was routine border search that meant there was no Fourth Amendment violation even if there was no reasonable suspicion or probable cause); *U.S. v. Ramos-Saenz*, 36 F.3d 59 (9th Cir. 1994) (search of individual's shoes immediately after clearing airport Customs is a routine border search); *U.S. v. Dorsey*, 641 F.2d 1213, 1219 (7th Cir. 1981) ("[t]he suspicion justifying a patdown search, like that required for a strip search, must be based on objective factors and judged in the light of the experience of the Customs agents. Also, in assessing these objective factors the factors relevant in strip search cases apply equally to the propriety of a patdown search"); *infra* Part I.E.2 and Part I.E.3; *United States v. Kallevig*, 534 F.2d 411 (1st Cir. 1976) (border search less intrusive than strip search requires no level of suspicion by Customs officials).

¹⁰ *United States v. Grotke*, 702 F.2d 49, 51-52 (2^d Cir. 1983); *see also United States v. Turner*, 639 F. Supp. 982, 986 (E.D.N.Y. 1986).

¹¹ *See U.S. v. Fortna*, 796 F.2d 724, 738-39 (5th Cir. 1986).

¹² *See U.S. v. Most*, 789 F.2d 1411, 1416 (9th Cir. 1986) (placement of monitoring device inside package after lawful search uncovered heroin valid).

¹³ *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *U.S. v. Ek*, 676 F.2d 379 (9th Cir. 1982) (reasonable suspicion or probable cause is required whenever a search exceeds the length of a routine search).

When does the length of time of a routine search transform it into a nonroutine search for which reasonable suspicion is required? One might investigate how long people are routinely detained to set a benchmark for the length of the maximum permissible routine stop. Or one could consider a blanket rule that seizures which cause people to miss connecting flights are *per se* nonroutine and require reasonable suspicion or probable cause.¹⁴

2. Length Of Detention

The general rule for border stops is that routine searches are expected from the Fourth Amendment, but nonroutine searches must be supported by at least reasonable suspicion if not full probable cause. Any detention longer than what is necessary to conduct a valid, routine search is nonroutine. Because each case differs, it is difficult to ascertain an exact time requirement. Some non-border Fourth Amendment cases provide some guidance. The analysis for non-border Fourth Amendment cases, where reasonable suspicion and probable cause are required, should provide guidance relating to nonroutine border searches for which reasonable suspicion and probable cause requirements do attach.

A search with no evidence for any further detention which lasts two hours violates of the Fourth Amendment.¹⁵ Customs agents who detain someone in a nonroutine search

¹⁴ See *infra* Part I.C; Part I.D.

¹⁵ See *United States v. \$191,910.00*, 16 F.3d 1051 (9th Cir. 1993) (government's two-hour detention of currency, without warrant and without probable cause, until dog could be obtained to conduct drug sniff, was so excessive that by itself it violated passenger's Fourth Amendment rights, even assuming that officers had acted with reasonable diligence in attempting to procure a dog), *superseded by statute on other grounds as stated in U.S. v. \$80,180.00 in U.S. Currency*, 303 F.3d 1182 (9th Cir. 2002).

cannot detain that person unless they are taking reasonable steps to determine whether a valid reason for continuing the detention exists.¹⁶

The Supreme Court has noted that normal Fourth Amendment requirements are relaxed somewhat for the stopping of a vehicle that an officer suspects may contain illegal aliens, which constitutes a borderline case between a border stop and a non-border stop. As the Court said, “The *Brignoni-Ponce* Court noted the limited holdings of Terry [*Terry v. Ohio*, 392 U.S. 1, 21, n.18 (1968)] and Adams [*Adams v. Williams*, 407 U.S. 143 (1972)] and while authorizing the police to ‘question the driver and passengers about their citizenship and immigration status, and...ask them to explain suspicious circumstances,’ the Court expressly stated that ‘any further detention or search must be based on consent or probable cause.’ [*United State v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975)].”¹⁷

Place, supra held that the detention of defendant’s luggage for 90 minutes without probable cause was unreasonable. Although declining to specify the maximum appropriate length of time for a detention, *Place* indicated that courts should take into account “whether the police diligently pursue[d] their investigation.”¹⁸ Further, the Court noted that agents should “accurately inform [the particular individual] of the place to which they were transporting his luggage, the length of time he might be dispossessed,

¹⁶ See *United States v. Sharpe*, 470 U.S. 675 (1985) (where Drug Enforcement Administration agent diligently pursued his investigation and no delay unnecessary to the investigation was involved, a 20-minute detention of a suspect met Fourth Amendment’s standard of reasonableness).

¹⁷ *United States v. Place*, 462 U.S. 696, 713 (1983).

¹⁸ *Place, supra* at 709.

and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion.”¹⁹

In a nonroutine detention it seems that two hours without reasonable suspicion, or 90 minutes without probable cause, is clearly unreasonable. A shorter, nonroutine detention, such as one of 20 minutes with the relevant official taking reasonable steps to investigate the propriety of further detention, can be valid.

C. Nonroutine Stops And Searches

An encounter becomes nonroutine when it goes outside the bounds of a normal stop – when it is perceptively outside the scope of normal activity.²⁰ In dicta, the Supreme Court has given examples of what would be nonroutine searches, which include “strip, body cavity, or involuntary x-ray searches” [emphasis supplied].²¹ However, leaving the area somewhat open to the lower courts, the Court said, “we express no view on what level of suspicion, if any, is required for [such] nonroutine border searches.”²²

The exact level of suspicion required for a nonroutine stop or search has been largely left to the discretion of the lower courts.

The First Circuit has compiled a non-exhaustive list of six factors to be considered when determining the degree of invasiveness or intrusiveness of a border search: (1) whether the search required the suspect to disrobe or expose any intimate body parts; (2) whether physical contact was made with the suspect during the search; (3) whether force was used; (4) whether the type of search exposed the suspect to pain or danger; (5) the overall manner with which the search was conducted; and (6) whether the suspect’s reasonable expectations of

¹⁹ *Place, supra* at 709.

²⁰ *U.S. v. Ventura*, 947 F. Supp. 25 (D.P.R. 1996) (“secondary questions” are not *per se* custodial . . . an experience must be perceptibly outside of the routine Customs process); *U.S. v. Beras*, 918 F. Supp. 38 (D.P.R. 1996) (removing suspect from stream of activity and questioning singly or searching constitutes a situation in which Miranda warnings attach).

²¹ *Montoya v. Hernandez*, 473 U.S. 531, 541 (1985).

²² *Montoya, supra* at 541.

privacy, if any, were abrogated by the search.²³

The First Circuit noted that based on these factors, only strip searches and body cavity searches are consistently nonroutine.²⁴

Reasonable suspicion is required for other types of similarly intrusive searches.²⁵

It is important to note that a nonroutine search must be supported by reasonable suspicion

²³ *U.S. v. Braks*, 842 F.2d 509, 511-12 (1st Cir. 1988).

²⁴ *Id.*, at 512-13. See “*United States v. Reyes*, 821 F. 2d 168, 170-71 (2d Cir. 1987) (reasonable suspicion that defendant concealing contraband required for strip search at border); *United States v. Adekunle*, 2 F.3d 559, 562 (5th Cir. 1993) (same); *United States v. Oyekan*, 786 F.2d 832, 837 (8th Cir. 1986) (reasonable suspicion that person carrying drugs outside body ‘may insulate’ strip search at border from Fourth Amendment challenge); *United States v. Vance*, 62 F. 3d 1152 , 1156 (9th Cir. 1995) (‘real suspicion’ standard for strip search at border met when defendant appeared glassy-eyed, had taken one-day trip to Hawaii from Guam, and pat-down revealed wearing two pairs of underwear in tropical climate and suspicious bulge under his pants); *United States v. Vega-Barvo*, 729 F. 2d 1341, 1349 (11th Cir. 1984) (reasonable suspicion evidenced by particularized, articulable facts required for strip search at border).

²⁵ See “*United States v. Adekunle*, 2 F. 3d 559, 562 (5th Cir. 1993) (reasonable suspicion required for continued detention and x-ray examination of suspected alimentary canal drug smuggler at border); *United States v. Oyekan*, 786 F. 2d 832, 837 (8th Cir. 1986) (reasonable suspicion required for x-ray search of defendant at border); *United States v. Gonzalez-Rincon*, 36 F. 3d 859, 864 (9th Cir. 1994) (same); *United States v. Vega-Barvo*, 729 F. 2d 1341, 1349 (11th Cir. 1984) (same); *United States v. Handy*, 788 F. 2d 1419, 1420-21 (9th Cir. 1986) (‘clear indication’ that defendant carried drugs internally required for body cavity search at border); *United States v. Pino*, 729 F. 2d 1357, 1359 (11th Cir. 1984) (rectal search requires higher level of suspicion than strip to x-ray search; experienced official must believe defendant carrying drugs in rectal area to justify rectal search at border).” A. Benison, M. Gardner, and A. Manning, *Warrantless Searches and Seizures*, 87 Geo.L.J. 1124, notes 309-10 (1999) (citations omitted); *Rhoden v. United States*, 55 F. 3d 428 (9th Cir. 1995) (denying summary judgement on issue of six-day detention without hearing of allegedly deportable permanent resident).

or probable cause in order to be valid.²⁶ Customs agents and border officials cannot simply detain someone for the sake of ill will or delay.²⁷

Any stop or search that causes a person to miss a normally connecting flight is arguably a *per se* nonroutine stop or search that must be supported by reasonable suspicion. Airlines know that internationally connecting passengers must pass through Customs and often undergo routine searches. They account for the length of time a routine search will take, and they add extra time to ensure that passengers will be able to arrive in time to their connecting flights after passing through Customs. This means that, arguably, any passenger who is delayed long enough to miss a connecting flight is *per se* undergoing a nonroutine stop or search that must be supported by reasonable suspicion.

D. Impermissible Reasons for Detention

Courts have discussed reasons that a judicial determination of probable cause cannot be delayed after an arrest. “Examples of unreasonable delay are delays for the

²⁶ See *United States v. Bews*, 715 F. Supp. 1206 (W.D.N.Y. 1989) (border patrol agents’ detention of alien at airport near international border to determine whether he was alien traveling in United States for illegal purpose exceeded scope of that justification when, after alien showed proper identification and explained reasons for traveling in the United States, one agent asked for permission to view contents of his travel bag).

²⁷ See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *United States v. Ek*, 676 F. 2d 379 (9th Cir. 1982) (neither warrant nor probable cause is necessary to detain persons for a search at the border ***so long as the period of detention does not exceed what is reasonably necessary to conduct a valid search***; see also *United States v. Tehrani*, 826 F. Supp. 789 (D.Vt. 1993) (aliens were seized within Fourth Amendment when asked to go to an area of the airport not frequented by the public. They were certainly seized when they were told they could not leave until their identifications were established because they were suspected of being illegal aliens; but forty-minute detention was not excessive where border patrol agent immediately made several phone calls to attempt to find out where aliens entered the U.S., continued to inquire of aliens and their documents, and was initially confronted with a hostile, defensive alien).

purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay of delay's sake.”²⁸

The Supreme Court could use a similar determination as to unreasonable delay in Fourth Amendment border cases. Border cases are different in that Fourth Amendment protections are diminished and routine stops and searches are expected. But the questionable area concerns that surrounding the extension of a routine search. There must be a reason for a stop or search when it exceeds what is routine. Delaying someone only until a connecting flight departs would qualify as delay motivated by ill will or delay sake.

Reasonable suspicion or probable cause can never be provided by race. Any stop motivated solely by race, whether in conjunction with the border or not, is highly disfavored by courts.²⁹

1. Detaining Luggage

For search and seizure purposes, detaining luggage is the same as detaining the person who owns the luggage. When a person is not free to leave without abandoning luggage or plane tickets, that person is not free to leave and is seized the same as if that person were in jail.³⁰ “*Brown v. City of Oneonta*, 195 F. 3d 111 (2d Cir. 1999), quotes the Supreme Court’s observation in *Mendenhall* that the factors indicating seizure include ‘prolonged retention of a person’s personal effects, such as airplane tickets or

²⁸ See *County of Riverside v. McLaughlin*, *supra* at 56; *United States v. Ek*, *supra*; *United States v. Faherty*, 692 F. 2d 1258 (9th Cir. 1982).

²⁹ See *Gonzalez-Rivera v. INS*, 22 F.3d 1443 (9th Cir. 1994); *infra* Part I.D.3.

³⁰ See *United States v. \$191,910.00 in U.S. Currency*, 16 F. 3d 1051 (9th Cir. 1993) (detaining currency means detaining the person whose currency is detained); *United States v. Place*, 462 U.S. 696, 713 (1983) (90-minute detention of luggage without probable cause was unreasonable under the Fourth Amendment).

identification' (emphasis added). *See Brown*, 195 F.3d at 122.”³¹ “There are a number of cases holding that prolonged detention of personal belongings is a factor pointing to seizure. *See, e.g., Florida v. Royer*, 460 U.S. 491 (1983); *Mendenhall*, 446 U.S. 544; *Glover*, 957 F. 2d 1004; *United States v. Lee*, 916 F.2d 814 (2d Cir. 1990).”³²

In *United States v. McCain*, 556 F. 2d 253 (5th Cir. 1977), a woman was in custody for Miranda purposes when she could only leave by abandoning her luggage. “[Ms. McCain] was obviously able to leave only if she was willing to abandon her luggage, and this itself is a sufficient restriction on one’s freedom of action so as to trigger the giving of Miranda warnings before proceeding with any interrogation.”³³ This means that if Customs agents keep luggage and claim that a person is free to go but that the luggage must stay, that person is actually not free to go and is in custody for Miranda purposes.³⁴

2. Detaining Plane Tickets

Detaining tickets such that a person cannot depart amounts to a seizure in the same way that detaining luggage so that a person cannot depart amounts to a seizure. If someone’s luggage is kept until they miss a connecting flight, a seizure has taken place in the same way that a seizure has taken place if a plane ticket is kept until a connecting flight is missed. Certainly, keeping an entire person until a connecting flight is missed amounts to a seizure.³⁵

³¹ *United States v. Rogers*, 2000 WL 101235, *13 (S.D.N.Y. 2000).

³² *Id.*

³³ *McCain*, *supra* at 255.

³⁴ *But see Patterson v. Cuyler*, 729 F.2d 925 (3rd Cir. 1987) (man not in custody for Miranda purposes when girlfriend is being questioned and is not free to leave), *overruling on other grounds recognized by Carter v. Rafferty*, 826 F.2d 1299 (3rd Cir. 1987).

3. Stops Based on Ethnicity

Border patrol agents and Customs agents cannot lawfully stop someone based solely on that person's race. Race cannot be used to support reasonable suspicion or probable cause. As a practical matter, since no reasonable suspicion is needed to conduct a routine search at a border, a Customs agent could routinely search a person he would not have routinely searched solely because of that person's race or ethnicity. However, "[g]eneralized suspicion of criminal activity based primarily on race does not justify seizure."³⁶ Where evidence showed that officers stopped a deportee solely on basis of his Hispanic appearance, the stop was an "egregious constitutional violation."³⁷

The "general circumstances of a person's race or ethnicity are not a proper factor in determining reasonable suspicion or probable cause. Admittedly a number of drug traffickers in Utah are Hispanic. However, they are also white, black, native, and Asian. The overwhelming majority of Hispanics are not involved in drug trafficking or any other criminal endeavor. To stop and question on the basis of ethnicity alone is impermissible."³⁸ Race might be a factor as to probable cause or reasonable suspicion if

³⁵ See *infra* Part I.D.1 and accompanying cases.

³⁶ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975) (Mexican ancestry impermissible reason); *United States v. Grant*, 920 F. 2d 376, 388 (6th Cir. 1990) (skin color, dreadlocks, and possible Jamaican ethnic background impermissible reasons).

³⁷ See *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1443 (9th Cir. 1994) (suppressing evidence and stating that border patrol agents' "stop, which resulted solely from Gonzalez' Hispanic appearance, constituted a bad faith and egregious violation of the Fourth Amendment"); *United States v. Galindo-Gonzales*, 142 F.3d 1217 (10th Cir. 1998) (person's racial characteristics are insufficient to establish reasonable suspicion necessary to justify detention after checkpoint stop conducted substantial distance from Mexican border).

³⁸ See *United States v. Brignoni-Ponce*, *supra* (Mexican ancestry); *United States v. Anderson*, 923 F. 2d 450 (6th Cir. 1991) ("suspicions based solely on race of the person stopped cannot give rise to a reasonable suspicion justifying a Terry stop"). *But see United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985), quoting *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) ("[a]utomotive travelers may be stopped at fixed

it matches a description of an offender or fits the facts relevant to a particular person, place, or circumstance of an offense.³⁹

4. Delay of Probable Cause Hearing

For any arrest, a judicial determination of probable cause must be provided within 48 hours, but “[s]uch a hearing may nonetheless violate *Gerstein* [420 U.S. 103,] if the arrested individual can prove that his or her probable cause determination was delayed unreasonably...In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility.”⁴⁰

E. Reasonableness Of Border Stops And Searches

The reasonableness of a border stop or search only comes into play when a stop and search goes beyond what is routine. Since routine stops and searches are excepted from the Fourth Amendment at borders, no determination of reasonableness attaches.⁴¹

When a stop or search goes beyond routine and becomes nonroutine, there must be reasonable suspicion. If a stop or search reaches the level of full arrest, or is sufficiently invasive, there must be probable cause in addition to reasonable suspicion.

It should be noted that the sections that concern routine searches and nonroutine searches, Parts I.B and I.C, *supra*, respectively, necessarily entail some discussion of

checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity”); *Illinois Migrant Council v. Pilliod*, 540 F. 2d 1062 (7th Cir. 1976) (INS may not stop and question persons as to their alienage merely because they are Mexican or have Spanish surnames).

³⁹ *Draper v. United States*, 358 U.S. 307 (1959); *United States v. Bautista*, 684 F. 2d 1286 (9th Cir. 1982); *United States v. Tehrani*, 49 F.3d 54 (2d Cir. 1995); *U.S. v. Ruiz*, 961 F. Supp 1524, 1532 (D. Utah 1997).

⁴⁰ *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

⁴¹ *But see infra* Part I.D.3 concerning the impermissibility of stops based only on race or ethnicity.

reasonableness. Additionally, Part I.D, *supra*, concerning impermissible reasons for stops and searches, also necessarily entails some discussion of reasonableness.

This section will address the issue of reasonableness alone. Throughout this section it should be noted that reasonableness determinations in border cases attach when a stop and search goes beyond that which is routine.

1. Facts As A Whole Considered

Courts have been somewhat reluctant to draw bright lines in the area of reasonableness, with most factors (*see infra* Part I.E.3) being part of a larger determination of reasonableness.⁴²

It seems clear that a reasonableness requirement is not eviscerated simply because the facts are viewed as a whole.⁴³ “Although the probable cause standard of the Fourth Amendment need not be met, the officer conducting the search must have a reasonable

⁴² See *United States v. Martinez*, 481 F. 2d 214 (5th Cir. 1973) (border search must be reasonable, which requires determination of surrounding facts). See also *Huquez v. United States*, 406 F. 2d 366 (9th Cir. 1968); *United States v. Mastberg*, 503 F. 2d 465 (9th Cir. 1974) (test of reasonableness of border search was whether all facts viewed as a whole by experienced Customs inspector would lead to necessary satisfaction of real suspicion test. The Supreme Court rejected the real suspicion standard, somewhere in between reasonable suspicion and probable cause, in *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985), because it added more confusion than clarity); *United States v. Ogberaha*, 771 F. 2d 655, 658-59 (2d Cir. 1985) (body cavity search justified where the following factors were present: (1) excessive nervousness, (2) unusual conduct, (3) loose fitting or bulky clothing, (4) an itinerary suggestive of wrongdoing, and (5) inadequate luggage); *United States v. Asbury*, 586 F. 2d 973, 976-77 (2d Cir. 1978).

⁴³ See *United States v. Diemler*, 428 F.2d 1070, 1072 (5th Cir. 1974) (“***It has also been consistently held that border searches are not entirely exempt from the Fourth Amendment but rather are subject to the requirement that they be reasonable***” [emphasis supplied]); *United States v. Rodriguez-Hernandez*, 493 F. 2d 168 (5th Cir. 1974); *United States v. Warner*, 441 F. 2d 821 (5th Cir. 1971), *cert. denied*, 404 U.S. 829, (1971).

suspicion of illegal activity.”⁴⁴ Although courts wish to have the discretion to view all the facts together, they still expound on some unclear rules.⁴⁵

2. Reasonable Suspicion

There are numerous cases of alimentary canal smuggling, and an examination of such cases provides a good discussion as to calculations of reasonableness. Alimentary canal smuggling is difficult to detect, and effectively preventing it without great costs to law-abiding individuals poses an enormous challenge.

In *Montoya v. Hernandez*, 473 U.S. 531, 540 (1985), the court rejected the creation of a “clear indication” standard that would have been somewhere in between reasonable suspicion and probable cause. Continuing, the Court, *supra* at 541, held that “the detention of a traveler at the border, beyond the scope of a routine Customs search and inspection, is justified at its inception if Customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.”⁴⁶

⁴⁴ *United States v. Newell*, 506 F.2d 401, 404 (5th Cir. 1975).

⁴⁵ *See Zimmermann v. Wilson*, 105 F. 2d 583 (3rd Cir. 1939) (a search is “unreasonable” when it is out of proportion to the end sought); *United States v. Aman*, 624 F. 2d 911 (9th Cir. 1980) (no *per se* requirement of a warrant exists for a body cavity search; the warrant is merely one fact to consider in deciding reasonableness); *United States v. Grotke*, 702 F.2d 49 (2d Cir. 1983) (border searches, intrusions, greater than searches of luggage and personal belongings, into a person’s privacy, such as strip searches, require reasonable suspicion on part of the border official, and the standard is that in each case the reasonableness is determined by weighing the warranted suspicion of the border official against the offensiveness of the intrusion). *See also Montoya de Hernandez*, 473 U.S. 521, 543-44 (1985) (reasonable that officers held suspect for sixteen hours waiting for suspect to have bowel movement after concluding that the suspect had swallowed balloons containing cocaine where suspect refused x-ray or other methods of determining truth or falsity of smuggling suspicion).

⁴⁶ *United States v. Saldarriaga-Marin*, 734 F.2d 1425 (11th Cir. 1984) (Customs agents can detain a suspected internal drug smuggler until nature reveals the truth or falsity of suspicions).

The Supreme Court said in a prior decision that officials at the border must have a “particularized and objective basis for suspecting the particular person” of alimentary canal smuggling before proceeding with any intrusive tests or lengthy detentions.⁴⁷

In *United States v. Sokolow*, 490 U.S. 1, 4 (1989) the Court found that reasonable suspicion existed where, “[w]hen respondent was stopped, the agents knew, inter alia, that (1) he paid \$2,100 for two round-trip plane tickets from a roll of \$20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he appeared nervous during his trip; and (6) he checked none of his luggage. Respondent was indicted for possession with intent to distribute cocaine.”⁴⁸

⁴⁷ *United States v. Cortez*, 449 U.S. 411, 417-18, (1981), citing *Terry v. Ohio*, 392 U.S. 1, 21, n. 18 (1968).” *Montoya v. Hernandez*, 473 U.S. 531, 541-42 (1985).

⁴⁸ See *United States v. Lavado*, 750 F.2d 1527 (11th Cir. 1985) (length of time that nonCustoms officers can maintain status quo at the border or its functional equivalent, awaiting arrival of persons with Customs authority, must be brief); *United States v. Moore*, 638 F.2d 1171, (9th Cir. 1980) (detention during which police moved defendant from a taxi, to caged back seat of police car, while waiting for Customs officers, to airport manager’s office for questioning by Customs officials held to be Terry stop rather than arrest), *cert. denied*, 449 U.S. 1113 (1981); *United States v. Wilmot*, 563 F.2d 1298 (9th Cir. 1977) (while a pat-down search by Customs officials might become so extensive that it would be unreasonable without sufficient factors in addition to entry into the country, the facts of the instant case did not present such a situation; furthermore, defendant’s suspicious conduct, during course of secondary inspection, in resisting the mere spreading of his legs clearly constituted a reasonable basis for an “extensive” pat-down search; and once the officers felt an object in the groin area during the justified pat-down inspection, there was the requisite suspicion to justify a strip search); *United States v. Amuny*, 767 F.2d 1113 (5th Cir. 1974) (defendants flight from scene of plane was insufficient to support finding of probable cause to search plane; Customs agent climbing on plane constituted highly intrusive trespass; defendants possessed reasonable expectation of privacy as to the interior of plane; **government agent’s conduct in climbing on plane and peering in windshield constituted unreasonable search within meaning of Fourth Amendment**); *United States v. Wardlaw*, 576 F.2d 932 (1st Cir. 1978) (searching person okay when reasonable suspicion exists); *United States v. Turner*, 639 F. Supp. 982, 986 (E.D.N.Y. 1986) (“[t]he border search exception does not, of course, completely eviscerate the protections of the Fourth Amendment merely because the search takes place at the border or its functional equivalent. Customs Inspectors, for

3. Probable Cause

When the detention of a traveler rises to the level of full arrest, there must be probable cause.⁴⁹

4. Factors That Can Be Used in Reasonableness Determination

The Circuits “are substantially in accord concerning the factors which may be taken into account in determining the issue of reasonableness.”⁵⁰ Those factors include:

- (1) Excessive nervousness;⁵¹
- (2) Unusual conduct;⁵²
- (3) An informant’s tip;⁵³

example, must have ‘reasonable suspicion’ before they may detain an incoming traveler for a search beyond the normal, routine Customs search and inspection, e.g., for a strip search. *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985); *United States v. Ogberaha*, 7741 F.2d 655, 658 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 887 (1986); *United States v. Asbury*, 586 F.2d 973, 975-76 (2d Cir. 1978)”.

⁴⁹ See *United States v. Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979) (where motorist, pursuant to informer’s tip, was legally stopped by border agents for purpose of custodial interrogation and taken to interrogation room at checkpoint station and detained for three hours, including a two-and-a-half hour delay pending arrival of Drug Enforcement Administration agents, detention was so similar to an arrest as to be valid only if supported by probable cause, but there is no probable cause where an informant’s tip is vague). *But see Florida v. J.L.*, 529 U.S. 266, 268 (2000) (holding that “anonymous tip that a person is carrying a gun is, without more” not sufficient “to justify a police officer’s stop and frisk of that person”). See also *United States v. Delgado*, 797 F. Supp. 213 (W.D.N.Y. 1991) (border patrol agent’s placing suspect in back seat of patrol car exceeded scope of permissible investigative seizure, even if agent had reasonable suspicion to justify detaining suspect’s duffel bag until agent could confirm whether package within bag contained cocaine; at time suspect was placed in car, agent did not have probable cause for arrest).

⁵⁰ *United States v. Asbury*, 586 F.2d 973, 976 (2d Cir. 1978).

⁵¹ See *United States v. Chiarito*, 507 F.2d at 1100; *United States v. Mastberg*, 503 F.2d 465, 468 (9th Cir. 1974); *United States v. Diaz*, 503 F.2d 1025, 1026 n. 1 (3d Cir. 1974).

⁵² See *United States v. Diaz*, *supra*, 503 F.2d at 1026 n. 1; *United States v. Shields*, 453 F.2d 1235, 1236 (9th Cir.), *cert. denied*, 406 U.S. 910 (1972).

⁵³ See *United States v. Afanador*, 567 F.2d 1325 (5th Cir. 1978); *United States v. Castle*, 409 F.2d 1347 (9th Cir.), *cert. denied*, 396 U.S. 975 (1969). *But see Florida v. J.L. supra* at 268 (holding that “anonymous tip that a person is carrying a gun is, without more” not sufficient “to justify a police officer’s stop and frisk of that person”).

- (4) Computerized information showing pertinent criminal propensities;⁵⁴
- (5) Loose-fitting or bulky clothing;⁵⁵
- (6) An itinerary suggestive of wrongdoing;⁵⁶
- (7) Discovery of incriminating matter during routine searches;⁵⁷
- (8) Lack of employment or a claim of self-employment;⁵⁸
- (9) Needle marks or other indications of drug addiction;⁵⁹
- (10) Information derived from the search or conduct of a traveling companion;⁶⁰
- (11) Inadequate luggage;⁶¹
- (12) Evasive or contradictory answers.^{62, 63}

F. Border Search Exception Applies Only To Customs / Immigration Laws

There is authority to support the position that Customs and border agents are not to enforce laws other than those related to the smuggling, immigration, and other laws which Customs and border agents are charged to enforce. Accordingly, the relaxed

⁵⁴ See *United States v. Kallevig*, 534 F.2d 411, 412, 414 (1st Cir. 1976).

⁵⁵ See *id.*, at 414; *United States v. Chiarito*, *supra* at 1099; *United States v. Diaz*, *supra* at 1026 n. 1.

⁵⁶ See *United States v. Kallevig*, *supra* at 414; *United States v. Chiarito*, *supra* at 1100; *United States v. Diaz*, *supra* at 1026 n. 1; *United States v. Shields*, *supra* at 1236.

⁵⁷ See *United States v. Wilson*, 488 F.2d 400, 401-02 (5th Cir. 1973), *cert. denied*, 416 U.S. 989 (1974); *United States v. Flores*, 477 F.2d 608, 609 (1st Cir.), *cert. denied*, 414 U.S. 841 (1973); *United States v. Summerfield*, 421 F.2d 684, 685 (9th Cir. 1970).

⁵⁸ See *United States v. Smith*, 557 F.2d 1206, 1209 (5th Cir. 1977), *cert. denied*, 434 U.S. 1073 (1978).

⁵⁹ See *United States v. Shields*, *supra* at 1236.

⁶⁰ See *United States v. Wilson*, *supra* at 402; *United States v. Gil de Avila*, 468 F.2d 184, 186-87 (9th Cir. 1972), *cert. denied*, 410 U.S. 958 (1973).

⁶¹ See *United States v. Smith*, *supra* at 1209; *United States v. Diaz*, *supra* at 1026 n. 1; *United States v. Holtz*, 479 F.2d 89, 91 (9th Cir. 1973).

⁶² See *United States v. Himmelwright*, 551 F.2d 991, 996 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977).

⁶³ *United States v. Asbury*, 586 F.2d 973, 976 (2d Cir. 1978) [internal citations omitted].

Fourth Amendment requirements for routine searches only apply to the laws that Customs and border agents are charged with enforcing.⁶⁴

The border search exception to the Fourth Amendment only applies to Customs and immigration laws. A probable cause or reasonable suspicion determination would proceed whereby the prosecutor would allege that there was reasonable suspicion under the laws in question. It would be reasonable to think that Customs agents would be enforcing immigration and smuggling laws and that most determinations of probable cause or reasonable suspicion would involve such laws. It would be slightly different if a Customs agent wanted to search a bag to find evidence of an illegal act committed outside the United States.

A border search can be conducted for any reason, and therefore Customs agents can effectively look for evidence of other wrongdoing under the lesser Fourth Amendment standard of the border exception. They could then hand that evidence over

⁶⁴ See *United States v. Diemler*, 498 F.2d 1070, 1072 (5th Cir. 1974) (“the reasonable suspicion must be not merely of any violation, but of a Customs or immigration violation. *United States v. Storm*, 480 F.2d 701 (5th Cir. 1973)”); *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 410 U.S. 932 (1973); *United States v. Solis*, 469 F.2d 1113, 1114-1115, n. 2 (5th Cir. 1972), *cert. denied*, 410 U.S. 932 (1973)” [some citations omitted]; *United States v. Massie*, 65 F.3d 843 (10th Cir. 1995) (border patrol agents at a routine, fixed checkpoint stop may question *briefly* about cargo, destination, and travel plans, *as long as such questions are reasonably related* to agent’s duty to prevent *unauthorized entry* and to prevent *smuggling*); *United States v. Newell*, 506 F.2d 401 (5th Cir. 1975) (mere act that automobile 56 miles north of Mexican border was occupied by two women who were alone at night and that automobile bore license plates from an adjacent county was not sufficient to give rise to reasonable suspicion that the occupants or the vehicle had been involved in violation of a custom or immigration law); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (except at the border and its functional equivalents, officers on roving patrol can stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that vehicles contain aliens who might be in the country illegally). *But see United States v. Cortez*, 449 U.S. 411 (1981) (a peace officer may stop and question person if there is a reasonable ground to believe that such person is wanted for past criminal conduct).

to prosecutors for use, but a reasonable court should suppress the evidence after finding that it was obtained in a border search that was not related to laws governing smuggling or immigration.

Customs officials may search for contraband. Contraband includes items which are legal in the United States but are brought into the United States illegally. In such cases Customs agents are enforcing smuggling laws. Contraband also includes items which are illegal in the United States and which accordingly cannot enter.

In one case, a person could be entering the United States with a drug that is illegal to have without a prescription. In this case a Customs agent can probably conduct a nonroutine search for the prescription to determine that the drug is properly entering the country. Without a prescription, a person violates the relevant smuggling laws of the United States.

It is easier to make a reasonableness determination where smuggling is concerned because Customs agents must decide the chances that someone is smuggling an illegal item and then appropriately search for the item in question. Illegal acts performed outside the United States that do not concern smuggling or immigration do not fall within border search exception to the Fourth Amendment. If Customs agents wish to become general law enforcement officers and undertake the task of enforcing other laws, courts would probably not ignore such evidence. But the border search exception only applies to the immigration and smuggling laws that are particular to borders and which Customs agents enforce. The exception would not properly apply to any acts by Customs agents conducted in conjunction with a determination of whether someone had engaged in other

illegal activity, and it should not apply to the enforcement of any other nonimmigration or nonsmuggling laws.

In *United States v. Brignoni-Ponce*, *supra*, a roving border patrol was subject to Fourth Amendment limits. The border officials in that case were enforcing immigration and smuggling laws, but they were not at the border. In the same way, Customs agents that enforce nonimmigration and nonsmuggling laws at the border are not be entitled to the border search exception.

Customs agents can conduct routine border searches of people that have traveled to countries known to traffic drugs, just as they can conduct routine border searches of anyone. But in order to detain anyone longer than is necessary to conduct a routine border search, Customs agents must at least be acting on reasonable suspicion. It is somewhat difficult to determine how long or what constitutes a routine border search.⁶⁵ An itinerary suggestive of wrongdoing is one factor that can be considered.⁶⁶

In any case, it seems clear that people who have traveled to countries known to traffic drugs cannot be detained or made to miss connecting flights merely because a Customs agent harbors ill will in general or ill will toward an individual, country, race, or ethnicity.⁶⁷

II. At What Point Must Miranda Warnings Be Given To A Person At A Border, And When Does A Person Have A Fifth Amendment Privilege Against Self-incrimination As Against Being Made To Complete An Additional Declaration?

⁶⁵ See *infra* Parts I.B, I.C, I.D.

⁶⁶ See *United States v. Asbury*, 586 F. 2d 973 (2d Cir. 1978). See also *infra* Part I.E.4 (listing factors).

⁶⁷ See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (“[e]xamples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay’s sake”).

It should be noted that one must invoke one's Fifth Amendment privilege, or it is lost.⁶⁸

A. Additional Declarations

1. Self-incrimination

Routine questioning does not invoke the Fifth Amendment guarantee against self-incrimination.⁶⁹ But compelling an additional declaration is not routine questioning.

Each person entering the United States is asked to complete a declaration. Those declarations are not invalid under the Fifth Amendment.⁷⁰

Courts have said in the past that a declaration revealing an illegal substance would insulate the declarant from prosecution because, otherwise, requiring the declaration would be in violation of the Fifth Amendment.⁷¹ But more recently it has been held that, although the declaration itself does not subject the declarant to prosecution, the possession from the point at which the border was crossed to the point of declaration can be prosecuted as import of an illegal substance.⁷²

⁶⁸ See *Leary v. United States*, 544 F.2d 1266 (5th Cir. 1977) (no invoking of Fifth Amendment privilege means no violation of right against self-incrimination).

⁶⁹ See *United States v. Lueck*, 678 F. 2d 895 (11th Cir. 1982) (Fifth Amendment guarantee against self-incrimination is not offended by routine questioning of those seeking entry to the United States).

⁷⁰ See *Walden v. United States*, 417 F.2d 698, 700 (5th Cir. 1969) (“[i]t would be strange indeed if one could Constitutionally be required to declare ordinary merchandise at the border and be punished for failure so to do, if, at the same time, surreptitious importation of contraband does not have to be declared and a failure to declare cannot be punished. The importation is not compelled and the Fifth Amendment privilege against compulsory self-incrimination does not apply. *Rule v. United States*, 362 F.2d 215, 217 (5th Cir. 1966)”).

⁷¹ See *Leary v. United States*, *supra* (affirmative declaration with resulting disclosure of illegal items in the declarant's possession, results only in the seizure of the contraband).

⁷² See *United States v. Kenny*, 601 F.2d 211 (5th Cir. 1979) (possession from the border to the point of declaration constitutes illegal importation).

Under both *Leary* and *Kenny, supra*, the Fifth Amendment clearly protects against self-incrimination. Courts are careful to note that Customs declarations themselves do not constitute requests for self-incriminating information even at borders. As the Fifth Circuit noted, *supra*, importation of illegal substances is not compelled. An additional sworn declaration, which must be completed before one is free to go, is compelled. And the sole purpose of such an additional declaration is the incrimination of the person completing it.

If a person has indeed violated a law about which an additional declaration is required, the only purpose for such an additional declaration is the incrimination of the person of whom it is requested. There are two possibilities for people compelled to make a sworn declaration about an illegal act or acts they committed. Either they can admit in the sworn declaration that they acted illegally and incriminate themselves, or they can lie under oath and incriminate themselves for perjury. In both cases the sole purpose served by an additional declaration is the incrimination of the person of whom it is demanded. As such, additional declarations are unlawful under the Fifth Amendment and its privilege against self-incrimination.⁷³ In *Albertson* and *Marchetti, supra*, the “person who registered pursuant to the statute risked criminal punishment,” and that violated the Fifth Amendment.⁷⁴ The intended result of an additional declaration is the incrimination

⁷³ See *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965) (federal law requiring Communist party members to register violates Fifth Amendment’s privilege against self-incrimination); *Marchetti v. United States*, 390 U.S. 39 (1968) (federal law requiring gamblers to register and pay excise and occupational tax violates Fifth Amendment’s privilege against self-incrimination); *Haynes v. United States*, 390 U.S. 85 (1968) (federal law requiring registration of certain firearms).

⁷⁴ *United States v. Candanoza*, 431 F.2d 421, 424 (5th Cir. 1970). See *Marchetti, supra* at 49 (“direct and unmistakable consequence” of disclosure requirements was the incrimination of the person making the disclosure. The “application of the constitutional privilege to the entire registration procedure [which called for self-incrimination] was in

of the person asked to complete it. Besides the fact that additional, compelled declarations are in clear violation of the Fifth Amendment's privilege against self-incrimination, they also cannot be presented without a Miranda warning.

2. Miranda

Routine questioning at a border does not require any Miranda warning.⁷⁵ However, once a person is in custody, Miranda warnings must be given. A person is in custody when that person believes he or she is not free to leave, and when that person has been removed from the stream of normal activity and taken for nonroutine questioning.⁷⁶

this instance neither 'extreme' nor 'extravagant,'" quoting *United States v. Sullivan*, 274 U.S. 259, 263 (1927)"); see also *United States v. Candanoza*, 431 F.2d 421 (5th Cir. 1970) (statute making it criminal offense to smuggle marijuana into the United States without invoicing or declaring it at border did not violate Fifth Amendment privilege against self-incrimination); *United States v. San Juan*, 405 F. Supp. 686 (D. Vt. 1975) (foreign reporting requirements of Bank Secrecy Act involve transactions which take place across national boundaries and, as such, involve substantial governmental interest which, in view of remote possibility of incrimination, do not violate guarantees of Fifth Amendment).

⁷⁵ See *United States v. Lueck*, 678 F.2d 895 (11th Cir. 1982) (individuals arriving in this country who are subjects of routine border questioning are not entitled to Miranda warnings); *United States v. Gomez Londono*, 553 F.2d 805 (2d Cir. 1977) (questioning about \$5,000 is not a custodial interrogation); *United States v. DeLaCruz*, 420 F.2d 1093 (7th Cir. 1970) (Miranda warnings not necessary in routine Customs searches); *United States v. Tai-Hsing*, 738 F. Supp. 389 (D. Or. 1990) (no Miranda warnings necessary where a person was referred to a secondary area as part of routine practice); *United States v. Ventura*, 947 F. Supp. 25 (D.P.R. 1996) ("secondary questions" are nor *per se* custodial...an experience must be perceptibly outside of the routine Customs process).

⁷⁶ See *United States v. Del Socorro Castro*, 573 F.2d 213 (5th Cir. 1978) (person accompanied to Customs search area by officers intending to arrest her was in custody for Miranda purposes); *United States v. Beras*, 918 F. Supp. 38 (D.P.R. 1996) (removing suspect from stream of activity and questioning singly or searching constitutes a situation in which Miranda warnings attach); *United States v. Berard*, 281 F. Supp. 328 (D.Mass

a. Miranda And Additional Declarations

Compelling a person to complete an additional declaration entails detaining that person until such declaration is made. This detention involves taking the person out of the stream of normal activity, and Miranda warnings must be given.⁷⁷

b. Detaining Tickets Or Luggage And Miranda

Detaining luggage or tickets is the *de facto* equivalent of detaining a person. This means that Miranda attaches equally whether a person is not free to go because their body is being detained, or because their luggage or tickets are being detained.⁷⁸ For example, in one case, a “[Ms. McCain] was obviously able to leave only if she was willing to abandon her luggage, and this itself is a sufficient restriction on one’s freedom of action so as to trigger the giving of Miranda warnings before proceeding with any interrogation.”⁷⁹ Accordingly, if Customs agents keep luggage and claim the owner is free to go but that the luggage must stay, such person is actually in custody for Miranda purposes.⁸⁰

1968) (when a person is not allowed to leave after being taken to a personal search room, that person is in custodial interrogation where Miranda warnings must be given).

⁷⁷ See *Benitez-Mendez v. INS*, 760 F.2d 907 (9th Cir. 1983) (where, following initial questioning of alien by border agent, border patrol officer put alien in vehicle, alien was seized); *United States v. Estrada-Lucas*, 1651 F.2d 1261 (9th Cir. 1980) (to trigger Miranda requirements at a Customs inspection, person must reasonably believe in not being free to leave); *United States v. Des Jardins*, 772 F.2d 578, 580 (9th Cir. 1985) (no Miranda warnings are required “unless and until the questioning agents have probable cause to believe that the person questioned has committed an offense, or the person questioned has been arrested, whether with or without probable cause,” citing *United States v. Moore*, 638 F.2d 1171 (9th Cir. 1980)).

⁷⁸ See *United States v. McCain*, 556 F.2d 253 (5th Cir. 1977) (a woman was in custody for Miranda purposes when she could only leave by abandoning her luggage).

⁷⁹ *Id.*, at 225

3. The Fifth Amendment Protects Against Abusive Behavior

The Fifth Amendment's privilege against self-incrimination and Miranda were in part designed to prevent the type of abusive behavior that some people experience at the hands of Customs agents. Additional declarations for the purpose of incrimination and custodial interrogation without Miranda warnings both clearly violate the Fifth Amendment, and the use of both against innocent and guilty people alike can amount to the kind of harassment that the Fifth Amendment historically prevents.

B. Verbal Abuse

Verbal abuse includes yelling, screaming, threatening with arrest, and otherwise harassing. Verbal abuse that is designed to elicit a confession or other admission of illegality is prohibited by the Fifth Amendment's privilege against self-incrimination.⁸¹ Alternatively, if such verbal abuse is not unlawful because of the Fifth Amendment's privilege against self-incrimination, it is unlawful because the invoking of the Fifth Amendment gives the verbal abuser no further reason to detain the person in question, and further detention is in violation of the Fourth Amendment.⁸²

Verbal abuse cannot be undertaken without Miranda warnings, since presumably the person is being compelled to undergo such verbal abuse, is not free to leave, and is in

⁸⁰ *But see Patterson v. Cuyler*, 729 F.2d 925 (3rd Cir. 1984) (man not in custody for Miranda purposes when girlfriend is being questioned and is not free to leave), *overruling on other grounds recognized by Carter v. Rafferty*, 826 F.2d 1299 (3rd Cir. 1987).

⁸¹ *See infra* Part II.A.1.

⁸² *See United States v. Fernandez*, 18 F.3d 874 (10th Cir. 1994) (after ticket for having tinted windows was issued, further detention was in violation of the Fourth Amendment); *United States v. Bews*, 715 F. Supp. 1206 (W.D.N.Y. 1989) (border patrol agents' detention of alien at airport near international border to determine whether he was alien traveling in the United States for illegal purpose exceeded scope of that justification when, after alien showed proper identification and explained reasons for traveling in the United States, one agent asked for permission to view contents of his travel bag).

custodial interrogation. But even without any such presumption of custody, verbal abuse alone has violated Miranda.⁸³

McCain goes directly to yelling or threatening with arrest. Where the sole purpose of verbal abuse is the eliciting of a confession, a Miranda warning must be given.

Threatening with arrest may be enough to make some people actually believe that they are under arrest. A Miranda warning must be given in such a case, and the Fifth Amendment's privilege against self-incrimination can be invoked.

C. Conclusion: Fifth Amendment Rights At Borders

Any demand that a person complete sworn statement to the effect that no illegal activity has taken place is in violation of the Fifth Amendment's privilege against self-incrimination. Any detention solely for the purpose of forcing a person to sign a sworn statement to the effect that a crime was or was not committed after the privilege has been invoked serves no purpose but the attempted violation of the Fifth Amendment's right against self-incrimination. In the absence of any evidence of any wrongdoing, further detention for the purpose of forcing completion of a sworn statement is not a routine stop or search, is not supported by probable cause or reasonable suspicion, and violates the Fourth and Fifth Amendments.

⁸³ See *United States v. McCain, supra* (where the whole purpose of a talk given to defendant at Customs was to persuade her to confess that she had narcotics in her body, and her confession that she did have narcotics in her body was made after she was warned that she could harm herself seriously, perhaps fatally, if she was carrying contraband in her body and if the container ruptured and a narcotic substance was in immediate contact with her body or internal organs, confession was not voluntary but rather was in response to investigation or interrogation, and, in absence of Miranda warnings, suppression was required).

III. When And How Can Customs Agents Take A Person's Property?

The lawful possessions of a person entering the country by definition cannot be taken by a Customs agent. Customs agents may seize property if it is illegal to possess that property or to introduce it into the United States, but they must give a receipt and a notice of seizure that includes a list of the property seized, where it was seized, the laws alleged to have been violated that gave rise to the seizure, and the procedure for retrieving the property.

By definition lawfully possessed property cannot be legally seized, but a Customs agent might nonetheless seize lawful possessions because of an incorrect belief that the property in question is properly subject to seizure. The law is structured to remedy errors by Customs agents who seize material by mistake in that it requires a receipt, and a notice of seizure. *See* 19 C.F.R. § 162.31.

An agent who seizes property for forfeiture has a duty to report it. “Once an agent seizes property for forfeiture, he has a duty to report the seizure ‘immediately’ to the appropriate district Customs officer.”⁸⁴ After a forfeiture case has been referred to a United States Attorney by a district Customs officer, it is the United States Attorney’s duty to investigate the facts “immediately,” and if necessary to begin legal proceedings “forthwith.” 19 U.S.C. § 1604. And “when a Customs director is in possession of an article, the law now provides that he shall ‘promptly’ report seizure to the United States Attorney.”⁸⁵

Additional statutes and regulations codify the searches of Customs agents.⁸⁶

⁸⁴ 19 U.S.C. § 1602.

⁸⁵ 19 U.S.C. § 1603.

⁸⁶ *See* 19 U.S.C.A. § 1582 (“[t]he Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for

A proper judicial proceeding must be instituted within fourteen days of the seizure of property. In *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971), the Court considered a seizure of photographs under 19 U.S.C. § 1305(a). That section allows Customs agents to seize obscene material that is being imported into the United States. Once a seizure has taken place, the government must bring a forfeiture proceeding in district court. Like Section 1603 before the 1978 amendment, Section 1305(a) does not provide for any time limit between an initial seizure and institution of judicial proceedings. The Supreme Court has concluded, however, that to save the statute from being unconstitutional only a fourteen-day period might be allowed.⁸⁷ The seizing process cannot take an unreasonably long period of time without being in violation of the Fourth Amendment, since a person is deemed to have been seized when luggage or plane tickets are taken and withheld.

the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations”). *See also* 19 C.F.R. § 162.0 (“[t]his part contains provisions for the inspection, examination, and search of persons, vessels, aircraft, vehicles, and merchandise involved in importation, for the seizure of property, and for the forfeiture and sale of seized property. It also contains provisions for Customs enforcement of the controlled substance laws. Provisions relating to petitions for remission or mitigation of fines, penalties, and forfeitures incurred are contained in part 171 of this chapter”).

⁸⁷ *See also United States v. Von Neumann*, 474 U.S. 242 (1986) (due process rights not violated when government took 36 days to decide petition on undeclared car released on \$25,000 when posted two weeks after being seized); *United States v. 12 200-Ft. Reels of Super 8mm Film, et al.*, 413 U.S. 123 (1973) (statute prescribing forfeiture of obscene material at border was constitutional – Congress has broad powers to regulate international commerce); *Geye v. INS*, 121 F.3d 1285 (9th Cir. 1997) (aliens whose vehicles were seized by the INS for allegedly transporting unauthorized aliens were entitled under Fifth Amendment’s due process clause to more than mere notice that they could choose between judicial and administrative proceedings, and timely processing of their claims if they elected administrative forfeiture).

IV. Conclusion

It is clear that routine border searches are excepted from the Fourth Amendment's requirements. But activities by Customs agents that go beyond routine searches must be supported by reasonable suspicion, to justify further detention, or by probable cause, to justify a full arrest. Without reasonable suspicion or probable cause, the detention of travelers at borders is allowed only long enough to conduct a valid, routine search. Delay motivated by ill will or by other improper causes is not permissible under the Fourth Amendment. Fourth Amendment protections are not entirely eviscerated at borders. There must be reasonable suspicion to detain anyone longer than necessary to conduct a routine search. There must be probable cause to support a full arrest.

Terrorizing travelers by threatening them with arrest, by yelling, and by generally verbally abusing them is unlawful. It constitutes delay motivated by ill will, which violates the Fourth Amendment. Verbal abuse can violate the Fifth Amendment, especially when no Miranda warnings are given before the abuse. Verbal abuse additionally violates the privilege against self-incrimination when the privilege is invoked. Insisting that an extra declaration be completed is in clear violation of the Fifth Amendment's privilege against self-incrimination.

The border exception diminishes the protections of the Fourth Amendment. However, both the Fourth and Fifth Amendments still provide from limited up to more usual and full protections.