No. 02-1794

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MANUEL FLORES-MONTANO

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a) is unreported. The order of the district court (App., *infra*, 2a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

2. Section 1581(a), Title 19, U.S.C., provides:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

STATEMENT

1. On February 12, 2002, Customs Inspector Visente Garcia conducted an inspection of a 1987 Ford Taurus station wagon driven by respondent as he entered the Otay Mesa Port of Entry along the California border. As the inspector asked some questions, respondent avoided eye contact. Respondent's hand also was shaking as he handed the agent his passport. The inspector tapped on the vehicle's gas tank with a screwdriver and noticed that the tank sounded solid. The inspector was also informed that a dog had alerted to the vehicle.

Respondent was then removed from the vehicle, and the vehicle was driven to a secondary inspection station. At 4:20, Customs Inspector Jovita Pesayco at the secondary station inspected the gas tank by tapping it and observing a solid sound. He subsequently requested a mechanic under contract with Customs to come to the border station to remove the tank. Within 20 to 30 minutes, the mechanic arrived. He raised the car on a lift, loosened the straps and unscrewed the bolts holding the gas tank to the undercarriage of the vehicle, and then disconnected some hoses and electrical connections. That process took 10 to 15 minutes. After the gas tank was removed, Inspector Pesayco hammered off bondo (a putty-like hardening substance that is used to seal openings) from the top of the gas tank. That process took an additional 5 to 10 minutes. The inspector opened an access plate underneath the bondo and found 37 kilograms of marijuana bricks. App., *infra*, 4a-5a (Declaration of Visente Garcia, senior border inspector for the United States Customs Service); *id.* at 7a-9a (Declaration of Jovito Pesayco, senior border inspector for the United States Customs Service).

On February 27, 2002, respondent was indicted on one count of unlawfully importing approximately 37 kilograms of marijuana, in violation of 21 U.S.C. 952, 960, and one count of possession of that marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Relying on *United States* v. *Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002), respondent moved to suppress the marijuana uncovered from the gas tank. In *Molina-Tarazon*, a divided panel of the Ninth Circuit held that the removal of the gas tank is a nonroutine border search that requires reasonable suspicion. *Id.* at 713-717. The court also held that, on the facts in that case,

the inspectors had reasonable suspicion to conduct the search. *Id.* at 717-718.[1]

In response to respondent's motion in this case to suppress evidence of the marijuana found during the gas tank search, the government advised the district court that it was not relying on reasonable suspicion as a basis for denying respondent's suppression motion, but that it believed that *Molina-Tarazon* was wrongly decided. The government contended that when a vehicle seeks to cross the border, 19 U.S.C. 1581(a) authorizes customs officers to "search the * * * vehicle and every part thereof," without any requirement of a warrant or particularized suspicion. The government also contended that "[t]his statute is coextensive with the Constitution." Gov't Response and Opp. to Def's Mot. to Suppress Evidence Based on Alleged Non-Routine Border Search 5 (filed June 17, 2002). The government's response also included as exhibits four affidavits concerning the procedure in this case and the need to conduct such procedures in other cases. App., *infra*, 4a-18a.

2. On June 19, 2002, the district court ordered the suppression of the drugs seized from respondent's gas tank. Relying on *Molina-Tarazon*, the court held that the search was nonroutine and therefore required reasonable suspicion. App., *infra*, 3a. The court further found that "the Government has waived its right to rely on the alternative basis of reasonable suspicion, and * * * that, in this case, the Government has declined to establish reasonable suspicion." *Ibid.* The district court also found "that the facts set forth in the Govern-

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[1] The court of appeals' decision in *Molina-Tarazon* is *reprinted in* the Appendix, *infra*, 19a-36a.

ment's declarations and motion exhibits are the facts in this case." *Ibid.*

3. On July 26, 2002, the government petitioned for initial hearing en banc, requesting the court to reconsider its decision in *Molina-Tarazon*. On March 14, 2003, the court of appeals issued an order summarily affirming the district court's judgment on the basis of *Molina-Tarazon*.[2]

REASONS FOR GRANTING THE PETITION

"Border searches, * * * from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977). Essential to the government's ability to protect the Nation from the entry of drugs, weapons, explosives, and unauthorized persons and things is the power to conduct searches of containers crossing an international border. "The border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country." *Id.* at 620.

The Ninth Circuit has adopted a rule that is wholly at odds with the government's urgent interest in preventing the smuggling of contraband and persons across our borders. In the view of the Ninth Circuit, the disassembly of a gas tank of a vehicle to inspect it for contraband—even when there is no other practicable means of determining what the gas tank contains—violates the Fourth Amendment unless Customs officers possess reasonable suspicion that the gas tank

[2] The clerk's office advised the government that, on March 3, 2003, the court denied the government's petition for initial hearing en banc without a written order.

conceals contraband. The Ninth Circuit's approach invalidates, in part, Congress's authorization in 19 U.S.C. 1581(a) of suspicionless border searches of vehicles—a statutory provision whose antecedents reach back to the Nation's origins. The Ninth Circuit's holding also departs from this Court's Fourth Amendment analysis in border search cases, under which the minimal intrusion in the removal, disassembly, and reassembly of the gas tank makes its search routine and permissible without any quantum of particularized suspicion.

The court of appeals' holding deprives Customs officers of an essential tool to protect against the smuggling of drugs, persons, weapons, and other contraband. Gas tanks are commonly used to smuggle contraband and persons into this country. In recent years, seizures from gas tanks have accounted for 25% of all drug seizures along the Southern California border. The authority to search gas tanks without any level of suspicion is critical to the government's ability to deter and detect smuggling and is an issue of substantial and recurring practical significance to the protection of the United States and its citizens. This Court's review of the Ninth Circuit's unjustified restriction of that authority is therefore warranted.

A. The Ninth Circuit's Conclusion That A Gas Tank Search Requires Reasonable Suspicion Is Inconsistent With The Recognized Broad Power Of Customs Officials To Conduct Searches At The Border

This Court has made clear that the government has broad authority to conduct routine searches at the border without any level of particularized suspicion. *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985) ("[r]outine searches of the persons and effects of entrants [at the border] are not subject to any

requirement of reasonable suspicion, probable cause, or warrant"). The Court has also made clear, with respect to non-routine searches, that the appropriate Fourth Amendment rule depends on a balancing of the government's "longstanding concern for the protection of the integrity of the border" against the individual's limited privacy expectations at the border. *Id.* at 538-540. In *Montoya de Hernandez*, the Court 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." *Id.* at 541. The Court also stated that it was "suggest[ing] no view on what level of suspicion, if any, is required for *nonroutine* border searches such as strip, body-cavity, or involuntary x-ray searches." *Id.* at 541 n.4 (emphasis added).

In *Molina-Tarazon*, the Ninth Circuit held that the removal and disassembly of a vehicle's fuel tank constitutes a "nonroutine" border search that requires reasonable suspicion. 279 F.3d at 713. That holding is fundamentally unsound. Under this Court's decision in *Montoya de Hernandez*, and in light of historical practice and the practical need for thorough searches of vehicles at the border, the search in this case was routine. In holding otherwise, the Ninth Circuit's analysis understated the government's interest and overstated the private interests at stake. And even if such a search were considered nonroutine within the meaning of *Montoya de Hernandez*, a suspicionless gas tank search is nonetheless reasonable under the Fourth Amendment, given the balance between the government's overriding need to protect the border and the modest intrusion on individual interests.

1. *Removal and disassembly of a vehicle's gas tank at the border is a routine search*

The scope of the government's power to conduct routine searches at the border without any level of suspicion is informed by the historical power of customs officials to conduct border searches, and the sovereign necessity to control unwanted persons and effects as they enter the Nation. The power of customs officials to conduct searches at the border has an "impressive historical pedigree." *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 585 (1983). "Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Montoya de Hernandez*, 473 U.S. at 537.

The gas tank search in this case was authorized by Section 1581(a), which states that custom officials "may at any time go on board of any vessel or vehicle * * * and examine, inspect, and search the vessel or vehicle *and every part thereof* * * * and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance." 19 U.S.C. 1581(a) (emphasis added). That statute derives from a statute passed by the First Congress, the Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 164, see *Villamonte-Marquez*, 462 U.S. at 584, which "authorized customs officers to board and search vessels bound to the United States and to inspect their manifests, examine their cargoes, and prevent any unlading while they were coming in." *Maul* v. *United States*, 274 U.S. 501, 505 (1927). Section 31 of the 1790 Act permitted customs and revenue officers "to go on board of ships or vessels * * * for the purposes of * * * examining and searching the said

ships or vessels," and provided that the officers "shall have free access to the cabin, and every other part of a ship or vessel" to seal and mark containers and packages that were to remain on the ship. § 31, 1 Stat. 164. The Act also gave customs officials the power to place inspectors on board ships "to examine the cargo or contents" of ships entering the country, and authorized the seizure and forfeiture of goods upon violation of the Act. Act of Aug. 4, 1790, ch. 35, §§ 27, 28, 30, 50, 60, 70, 1 Stat. 163-164, 170, 174, 177. Because the 1790 Act was passed by the same Congress that proposed the Fourth Amendment, "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." *Ramsey*, 431 U.S. at 617 (quoting *Boyd* v. *United States*, 116 U.S. 616, 623 (1886) (emphases removed)).[3]

Neither Section 1581(a) nor its lineal ancestor requires reasonable suspicion to search. Rather, the statutory authority of customs officials to search vehicles at the border is plenary and entitles officers to

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[3] In *Ramsey*, this Court observed that the earliest customs statute, Act of July 31, 1789, ch. 5, 1 Stat. 29, was passed two months before Congress proposed the Bill of Rights and contained an "acknowledgment of plenary customs power" to conduct warrantless inspections of vessels. *Ramsey*, 431 U.S. at 616. The 1789 Act granted customs officials "full power and authority" to enter and search "any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed"; in contrast, searches of any "particular dwelling-house, store, building, or other place" were authorized with a warrant upon "cause to suspect" concealment of dutiable goods. § 24, 1 Stat. 43. That provision was carried forward in the Act of Aug. 4, 1790, ch. 35, §48, 1 Stat. 170, and is distinct from the separate authority of customs to conduct suspicionless searches of articles and effects when presented for entry at the border.

search, without suspicion, concealed and opaque compartments, where contraband may be secreted. The authority thus includes, for example, luggage, trunks, and glove compartments. "Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods much be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container." *United States* v. *Ross*, 456 U.S. 798, 820 (1982). Given those practical realities, "[d]uring virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." *Id.* at 820 n.26. The historical power to conduct a routine border search of a vehicle similarly extends to the vehicle's gas tank, a large and opaque container in which contraband may be stored.

The government's vital interest in "protect[ing] the Nation by stopping and examining persons entering this country" supports the conclusion that a gas tank search at border is routine. *Montoya-Hernandez*, 473 U.S. at 538. It requires no "extended demonstration" to prove "[t]hat 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." *Ramsey*, 431 U.S. at 616; accord *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973) ("It is also without doubt that [the power to exclude aliens] can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders."). The Court has long distinguished searches and seizures of vehicles

within this country, which require probable cause, from border searches, which do not. As explained in *Carroll* v. *United States*:

> It 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 such a 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.*

267 U.S. 132, 153-154 (1925) (emphasis added).

"At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives." *Montoya de Hernandez*, 473 U.S. at 544; accord App., *infra*, 11a (Declaration of Jayson P. Ahern, Director, Field Operations, for the Southern California Customs Management Center) (The "primary mission at Customs is ensuring border security, working on anti-terrorism initiatives, and interdicting drugs, contraband, and dangerous materials, while maintaining the smooth flow of legitimate travel and trade.").

That analysis applies with particular force to gas tanks, which are large and commonly used containers for smuggling contraband and persons across the border. See pp. 17-18, *infra*. Removal and disassembly of the gas tank is a highly effective means to search for

contraband hidden within the tank. That process may be the only practicable alternative for the government to determine whether the gas tank has been modified or altered. *Molina-Tarazon*, 279 F.3d at 712 & nn.2-3 (noting the presence of manufacturer-installed anti-siphoning valve in gas tank that blocked the use of fiberoptic scope). The government accordingly must have wide latitude to remove and disassemble a vehicle's fuel tank to deter and detect illegal smuggling into this country. That need is "heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." *Montoya de Hernandez*, 473 U.S. at 538. The government's interest also extends to the prevention of smuggling of aliens and of bombs, explosives, or other implements of terrorism that likewise may be concealed in gas tanks. Pp. 17-19, *infra*. Inspection of gas tanks therefore falls within the category of routine measures needed to conduct a thorough inspection of a vehicle seeking entry at the international border.

A search should be regarded as "nonroutine" only when its level of intrusiveness equals or exceeds the monitoring of a traveller's bowel movements involved in *Montoya de Hernandez*, 473 U.S. at 534-535, or the other nonroutine searches of the person identified in the Court's decision, *i.e.*, "strip, body-cavity, or involuntary x-ray searches," *id.* at 541 n.4. See, *e.g.*, *United States* v. *Nieves*, 609 F.2d 642, 645-646 (2d Cir. 1979) (holding that search of shoes that entailed removal of shoes and drilling two small holes through the soles was a routine search requiring no level of suspicion because search did not approximate a strip search), cert. denied, 444 U.S. 1085 (1980). Those searches of the person are far more intrusive than searches of a vessel or vehicle,

which have long been conducted without any particularized level of suspicion.

The removal, disassembly, and reassembly of a gas tank involves no extraordinary intrusion upon either the individual or his vehicle. The actual disassembly of respondent's gas tank in this case took only 5 to 10 minutes. App., *infra*, 8a. The procedure also involved no destruction of property and was reversible by reassembling the tank. As the inspector who performed the procedure in this case testified:

> At most, my hammering off the bondo slightly scratched and possibly slightly dented the gas tank, but the gas tank was just as workable as it was before I removed the bondo. The gas tank was not damaged as far as safety and workability were concerned. This did damage the bondo, but new bondo could easily have been applied. * * *
>
> The force used to lower the gas tank was not damaging. * * * Nothing was permanently altered and nothing was damaged. I have witnessed this procedure hundreds of times * * *. It was easy to disconnect the gas tank, and it would have been easy to connect it back again. The gas tank could have been reconnected without damaging it or the vehicle.

Ibid. Although the tank here was not reconnected upon discovery of the drugs, in cases where "no contraband is discovered, it is Customs' policy to reassemble and reinstall any gas tanks that are disassembled during a border search." *Id.* at 13a (Declaration of Jayson P. Ahern).

2. The court of appeals' reasoning in concluding that a gas tank search is nonroutine is flawed

In holding that the removal and disassembly of a fuel tank was nonroutine, *Molina-Tarazon* erred by failing to give any weight to the government's interest in securing the border by conducting suspicionless searches. Rather, the court of appeals reasoned that "[t]hree aspects of the search here render it nonroutine: Force was used to remove and disassemble the fuel tank; the procedure involved some risk of harm; and someone whose vehicle was subjected to such a search is likely to feel a diminished sense of security." 279 F.3d at 713.

As to the first factor, the court noted that a gas tank search requires "the use of tools" and "the use of force" in the removal of the tank from the vehicle. 279 F.3d at 714. As to the second factor, the court expressed its view that "the procedure involved some risk of harm," because "[a]n error in removing, disassembling and then reassembling the portion of a motor vehicle that contains a highly flammable and potentially explosive substance like gasoline might well result in disastrous consequences for the vehicle's owner." *Id.* at 713, 715. As to the third factor, the court found the search "psychologically intrusive," because an individual subjected to such a search would experience fear or a "diminished sense of security" associated with driving a "potentially unsafe" motor vehicle reassembled by a mechanic not chosen by the individual. *Id.* at 713, 715, 716. The court's reliance on each of those factors was erroneous.

First, the only "[f]orce" involved in a gas tank search is the *non-destructive* removal and disassembly of the tank, and that procedure can easily be reversed upon completion of the search without any effect on the tank's safety or operation. P. 13, *supra*. Moreover, as

the Ninth Circuit recognized, the use of force is not "dispositive" in rendering a search nonroutine. *Molina-Tarazon*, 279 F.3d at 714. "For example, if the lock is jammed on a suitcase or its owner refuses to present a key, [customs] agents have to employ some degree of force to gain access to its interior." *Ibid.*; 19 U.S.C. 1461. *Second*, the court of appeals' perception of the safety risks of the procedure is entirely speculative. The court pointed to no reported instance of any mechanical error, much less an accident, associated with a gas tank search. Nor is Customs aware of any such instance. Gas tank searches, at least as a factual matter, are routine, occurring several hundred times a year in Southern California alone. P. 17, *infra*. Moreover, Customs informs us that such services are performed under contract by qualified mechanics who are employed as regular mechanics in Southern California by other employers. See App., *infra*, 7a (Declaration of Pesayco). *Third*, given the absence of any empirical basis for concluding that gas tank searches pose a danger to the driver of the vehicle or its passengers, any fear occasioned by being informed of a gas tank search would be unreasonable.

Accordingly, the rationale of the Ninth Circuit is unsupported factually and legally. The quick, safe, and nondestructive removal of a gas tank is not outside the routine sorts of inspections that international travelers should anticipate when seeking entry into this country.

3. *A suspicionless gas tank search is reasonable even if such a search is not regarded as routine*

Even assuming, *arguendo*, that *Molina-Tarazon* were correct in characterizing a gas tank search as nonroutine, the court of appeals' decision nonetheless erred in assuming that any "search that goes beyond the

routine" requires reasonable suspicion. 279 F.3d at 712. This Court in *Montoya de Hernandez* expressly stated that its holding that customs officials need reasonable suspicion to detain a traveler for monitoring her bowel movements was limited to the circumstances of that case; the Court accordingly "suggest[ed] no view on what level of suspicion, *if any*, is required for non-routine border searches such as strip, body-cavity, or involuntary x-ray searches." 473 U.S. at 541 n.4 (emphasis added). As the Court in *Montoya de Hernandez* explained, the essential inquiry is one of *reasonableness*, based on a balance of "the sovereign's interests at the border" against the rights of individuals who "present[] [themselves] at the border for admission." 473 U.S. at 539; see *Villamonte-Marquez*, 462 U.S. at 588-593 (conducting balancing test in upholding constitutionality of the suspicionless boarding of vessels by customs officials for document inspection).

Under such an inquiry, a suspicionless border search of a vehicle's gas tank that requires its removal and disassembly is reasonable. The Court has recognized that "not only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck must more favorably to the Government at the border." *Montoya de Hernandez*, 473 U.S. at 539-540 (citations omitted). As discussed, a gas tank search imposes only a minimal intrusion on the individual whose vehicle is subject to the search at the border. Any interest of the individual in avoiding that intrusion is outweighed by the government's paramount interest in protecting its borders from unwanted items and effects that may be concealed in gas tanks—an interest not even considered by the court of appeals in *Molina-Tarazon*.

B. The Court of Appeals' Decision Threatens To Impair The Government's Ability To Protect The Border From The Unwanted Entry Of Persons And Things

1. The Ninth Circuit's imposition of a reasonable suspicion requirement to conduct gas tank searches at the border warrants this Court's review. Because 19 U.S.C. 1581(a) authorizes such searches without requiring reasonable suspicion, the court of appeals' decision effectively declares unconstitutional an important and long-standing application of the government's statutory authority to enforce the country's laws at the border.

The power to conduct suspicionless searches of gas tanks and other vehicular compartments is critical to the ability of customs officials to guard the country's border against smuggling. App., *infra*, 12a (Declaration of Jayson P. Ahern). Over the last five and one-half years, approximately 25% of all drug seizures at land border crossings in the Southern California area arose from attempts to smuggle drugs in a vehicle's gas tank. During that period, there were 4619 drug seizures from gas tanks in the Southern California area. *Ibid.* "Gas tanks have been and continue to be the primary concealment area used to smuggle and hide drugs in vehicles." *Ibid.*

Significantly, gas tanks represent a relatively sizeable compartment of a vehicle that criminals may modify or alter to smuggle not only large quantities of drugs, but also persons. As the Assistant Director for Inspectors for the San Diego District, Immigration and Naturalization Service, Diane Hinckley, has explained, "[i]nstances of persons smuggled in and around gas tank compartments are not uncommon at the ports of entry, averaging one approximately every ten days at [the] San Ysidro and Otay Mesa [ports of entry]." App., *infra*, 16a. Such smuggling poses significant health and

safety risks to the persons being smuggled. *Id.* at 16a-17a. "Because these cases occur regularly, inspectors often search gas tank compartment areas and other compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles." *Id.* at 16a.

2. By requiring reasonable suspicion to conduct searches of one of the most commonly used vehicular compartments for concealing smuggled items, the Ninth Circuit's decision in *Molina-Tarazon* threatens to impair the ability of the United States to deter, detect, and prevent the unlawful smuggling of unwarranted items across our borders. A requirement of reasonable suspicion would remove the significant deterrent effect of suspicionless searches and encourages criminals to use fuel tanks as a means of smuggling contraband. The power of customs officials to conduct random searches "is an important deterrent to smugglers using gas tanks and other compartments to smuggle contraband, because they would believe that gas tanks and other compartments, as with other areas in a vehicle, could be searched randomly and with no level of suspicion." App., *infra*, 12a-13a (Declaration of Jayson P. Ahern). The Ninth Circuit's decision poses a serious risk of affirmatively increasing the level of gas tank smuggling since would-be smugglers are likely to hide contraband in gas tanks rather than other compartments of the vehicle that are subject to inspection without any level of suspicion. That risk becomes even more serious when coupled with the decrease in the frequency of gas tank searches and seizures that would inevitably result from a requirement of reasonable suspicion:

> To require reasonable suspicion for an INS inspector to search a gas tank compartment area * * *

> will likely result in fewer gas tank compartment area[s] * * * searches, additional persons being successfully smuggled in gas tank compartment areas * * *, and more attempts to use gas tank compartment area * * * for alien smuggling. Smugglers detect weak points readily and exploit them. * * * Requiring reasonable suspicion to search gas tank compartment areas * * * could lead to gas tank compartments * * * becoming the preferred choice for alien smuggling in the Southern District of California.

Id. at 16a-17a (Declaration of Diane Hinckley). That analysis applies with equal force not only to the smuggling of narcotics, but also to the smuggling of other hazardous substances into the United States. Indeed, customs officials intercepted one would-be terrorist, Ahmed Ressam, who entered the country with a vehicle containing explosives hidden in the trunk. In what became known as the "Millennium Plot," Ressam intended to detonate the explosives at LAX airport as part of a terrorist attack. *United States* v. *Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002). The Ninth Circuit's decision creates an appreciable risk of encouraging terrorists to use gas tanks as a means to avoid the detection of explosives or other hazardous substances crossing the country's borders.[4]

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[4] Courts have long recognized that the imposition of a requirement of particularized suspicion on customs searches under 19 U.S.C. 1581(a) would open a significant loophole in the ability of federal agents to thwart smugglers. *United States* v. *146,157 Gallons of Alcohol*, 3 F. Supp. 450, 456 (D.N.J. 1933) (rejecting requirement of a warrant or probable cause, because if such restrictions on searches of American vessels existed, "it will mean that the smugglers * * * need only maintain an outward air of respectability and legality to escape discovery, and it will surround

Customs officials face a formidable task in protecting our borders from the smuggling of unlawful items and aliens in vehicles. In fiscal year 2002, more than 90 million vehicles carrying more than 250 million passengers entered the United States through the ports of entry along the Southwestern border. Customs & Border Protection, *Southwest Border Workload Statistics: Windows of Opportunity for Drug Smuggling* (last modified Nov. 1, 2002) <http://www.cbp.gov/xp/cgov/toolbox/about/accomplish/swborder_workload_stats.xml>. The risks to the Nation require that Customs officials be able to exercise the full authority conferred on them by Congress, consistent with the Constitution. Given the significant extent to which smuggling occurs in gas tanks, the Ninth Circuit's holding in *Molina-Tarazon* that customs officials may not conduct such searches without reasonable suspicion warrants this Court's review.

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them with and assure them of an immunity that was never intended. * * * If such power [to conduct searches without probable cause] does not rest in the properly constituted authorities nothing can prevent a shipowner or charterer from storing dynamite, high explosives, etc., aboard his boat * * *, safe from the scrutiny of any officer charged by law to regulate such storage and traffic.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LISA S. BLATT
Assistant to the Solicitor General

JUNE 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-50306
D.C. NO. CR-02-00536-IEG

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MANUEL FLORES-MONTANO, DEFENDANT-APPELLEE

[Filed Mar. 14, 2003]

ORDER

Before: CANBY, O'SCANNLAIN and T.G. NELSON, Circuit Judges

A review of the record and appellant's opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument. See *United States* v. *Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002); *United States* v. *Hooton*, 693 F.2d 857 (9th Cir. 1982) (per curiam).

Accordingly, we summarily affirm the district court's judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

Crim. Case No. 02cr0536-IEG

UNITED STATES OF AMERICA, PLAINTIFF

v.

MANUEL FLORES-MONTANO, DEFENDANT

[Filed June 20, 2002]

ORDER SUPPRESSING EVIDENCE

On June 4, 2002, defendant Flores-Montano filed a motion seeking to suppress the 37 kilograms of marijuana seized from the gas tank of his vehicle, contending that the border search that uncovered the drugs was a "non-routine" border search requiring reasonable suspicion and that there was no reasonable suspicion. On June 10, 2002, the Government filed its response in which it contended that the border search was routine and that reasonable suspicion was not required.

This matter was heard on June 17, 2002. Neither side called any witnesses. Defendant Flores-Montano did not introduce any evidence. The Government's evidence consisted of declarations and motion exhibits.

Since no declarations were filed by Flores-Montano and no evidence introduced by him, the Court finds that the facts set forth in the Government's declarations and motion exhibits are the facts in this case.

Relying on the recent case of *United States* v. *Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002), the Court holds that the search of the gas tank in this case was "non-routine" and therefore reasonable suspicion was required to justify the search. The Court further holds that the Government has waived its right to rely on the alternative basis of reasonable suspicion, and the Court finds that, in this case, the Government has declined to establish reasonable suspicion. Accordingly, defendant Flores-Montano's motion to suppress the drugs seized from the gas tank is granted.

DATED: June 19, 2002

/s/ IRMA E. GONZALEZ
IRMA E. GONZALEZ
United States District Court
Judge

APPENDIX C

DECLARATION OF VISENTE GARCIA

I, Visente Garcia, declare:

1. I am currently a senior border inspector for the United States Customs Service, and I have been employed as a Customs border inspector since March of 1997.

2. I am familiar with and knowledgeable about the matters set forth in this declaration.

3. On February 12, 2002, at approximately 4:00 p.m., I was working at pre-primary inspection at the Otay Mesa Port of Entry. I approached a 1987 Ford Taurus station wagon (Cal. license #4RXD937) to perform a routine border inspection. I asked the driver, Manuel Flores, routine border inspection questions, such as where he was going, what was he doing in Mexico, whose vehicle it was, what was his citizenship, etc. When Manuel Flores was answering my questions, he avoided eye contact. When he handed me his permanent resident card and his California license, his hand was shaking.

4. After I tapped on the gas tank with my screwdriver and noticed that the fuel tank sounded solid, and I was informed that a narcotics detector dog had "alerted" to the vehicle, I escorted Manuel Flores to the security office. His vehicle was driven to the secondary inspection lot to be more closely inspected.

5. Government motion exhibit 1(a) is a picture of defendant Manuel Flores, the driver of the Ford Taurus station wagon (Cal. license #4RXD937) on February 12, 2002. Government motion exhibit 1(b) is the rear of the

Ford Taurus station wagon (Cal. license #4RXD937) that I referred to secondary inspection on February 12, 2002, a few minutes after 4:00 p.m.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 11, 2002.

/s/ VISENTE GARCIA
VISENTE GARCIA
Customer Border Inspector

Photographs Intentionally Omitted

APPENDIX D

DECLARATION OF JOVITO PESAYCO

I, Jovito Pesayco, declare:

1. I am currently a senior border inspector for the United States Customs Service, and I have been employed as a Customs border inspector since January of 1997.

2. I am familiar with and knowledgeable about the matters set forth in this declaration.

3. On February 12, 2002, at approximately 4:20 p.m., I conducted a routine border inspection of the 1987 Ford Taurus station wagon (Cal. license #4RXD937) at the secondary inspection area of the Otay Mesa Port of Entry. The rear of this vehicle is depicted in Government motion exhibit 1(b). I was informed that a narcotics detector dog had "alerted" to the gas tank area of the vehicle at pre-primary. I tapped the gas tank and it sounded solid.

4. I then requested for a Customs contract mechanic to come to the Otay Mesa Port of Entry so that the gas tank could be searched. Within approximately 20 to 30 minutes, the mechanic arrived. The mechanic put the vehicle on a lift and raised it up. The mechanic then used a portable lift to lower the gas tank so it could be looked at. To lower the gas tank, the mechanic first had to loosen the straps and unscrew the bolts holding the gas tank to the undercarriage of the vehicle. The mechanic also had to disconnect some hoses and electrical connections. The mechanic used force and tools to do this. I estimate that it took approximately 10 to 15 minutes for the gas tank to be lowered.

5. Once the gas tank was lowered, I saw bondo on top of the gas tank. Bondo is a putty like substance that hardens and is used to seal openings and adhere to surfaces. I hammered off the bondo and this revealed an access plate underneath. At most, my hammering off the bondo slightly scratched and possibly slightly dented the gas tank, but the gas tank was just as workable as it was before I removed the bondo. The gas tank was not damaged as far as safety and workability were concerned. This did damage the bondo, but new bondo could easily have been applied. I opened the access plate and found packages wrapped in cellophane and tape inside packages. I tested one of the packages and it was marijuana. All of this took approximately 5 to 10 minutes.

6. The force used to lower the gas tank was not damaging. The straps were undone, some bolts were unscrewed, and some hoses were disconnected. Nothing was permanently altered and nothing was damaged. I have witnessed this procedure hundreds of times in my five years of working as a border inspector. It was easy to disconnect the gas tank, and it would have been easy to connect it back again. The gas tank could have been reconnected without damaging it or the vehicle.

7. Government motion exhibits 2(a-d) are pictures of the gas tank of the Ford Taurus station wagon (Cal. license #4RXD937) that I searched on February 12, 2002. 2(a) shows the gas tank before it was lowered. 2(b) shows the underneath of the vehicle after the gas tank was lowered. 2(c) shows the gas tank after it was lowered and the bondo on it. 2(d) shows the marijuana bricks (approximately 37 kilograms) inside the gas tank.

8. I have reviewed the facts from the case of *United States* v. *Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002).

The way the gas tank was lowered and disconnected here is similar to how the gas tank was lowered and disconnected in the *Molina-Tarazon* case.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: June 10, 2002.

/s/ JOVITO PESAYCO
JOVITO PESAYCO
Customer Border Inspector

Photographs Intentionally Omitted

APPENDIX E

DECLARATION OF JAYSON P. AHERN

I, Jayson P. Ahern, declare:

1. Currently, I am the Director, Field Operations, for the Southern California Customs Management Center. I am the principal field officer for Customs Field Operations in Southern California and have been assigned here since February of 2001. In this position, I am responsible for all inspectional operations at the five land border ports of entry in Southern California and at the San Diego airport-seaport facilities. Our primary mission at Customs is ensuring border security, working on anti-terrorism initiatives, and interdicting drugs, contraband, and dangerous materials, while maintaining the smooth flow of legitimate travel and trade.

2. I entered on duty as a United States Customs Service Inspector in June 1977, and my previous work history is as follows:

I served as an Inspector, Senior Inspector and Supervisory Inspector for ten years in San Ysidro, Los Angeles, and Miami. I served as a National Program Manager in Customs Headquarters for Contraband Enforcement Teams as Assistant District Director for four years in Houston. I returned to headquarters as the Director, Anti-Smuggling Division for four years. This was followed by assignments as the Port Director for Customs operations in Miami and Los Angeles for four years, and two years, respectfully.

3. In my capacity as Director, Field Operations, I am familiar with and knowledgeable of the matters set forth in this declaration.

4. Over the past few fiscal years (October 1 through September 30), drug seizures at the Southern California ports of entry have been as follows:

Fiscal Year (FY)	Total Number of Seizures	Gas Tank Seizures (%)
FY 2002 (Oct-Mar)	1,602	478 (29.8%)
FY 2001	3,250	667 (20%)
FY 2000	3,252	754 (23%)
FY 1999	3,959	1,000 (25%)
FY 1998	4,053	1,114 (27%)
FY 1997	2,672	606 (23%)
	18,788	4,619 (24.58%)

Over the past five and a half fiscal years, gas tank drug seizures have accounted for approximately 25% (24.58) of *all* vehicle drug seizures. Gas tanks have been and continue to be the primary concealment area used to smuggle and hide drugs in vehicles.

5. Because of the number of gas tank drug seizures, searching gas tanks is routine and finding drugs in them is routine. It is not unusual or infrequent. Searching other compartments is routine and finding drugs in them is routine, not unusual or infrequent.

6. For the Customs Service to be able to carry out its primary function of interdicting drugs, contraband, and harmful materials from entering the United States, it is very important that Customs continues to have the ability to conduct random and suspicionless searches for drugs in gas tanks and other compartments of vehicles at the border. This is an important deterrent to smugglers using gas tanks and other compartments to smuggle contraband, because they would believe that gas tanks and other compartments, as with other areas

in a vehicle, could be searched randomly and with no level of suspicion.

7. Gas tanks and compartment searches are sometimes performed because of confidential information. Having to disclose this information as a matter of course to prove "reasonable suspicion" would compromise confidentiality and jeopardize informants.

8. Gas tank smuggling is already the most common type of vehicle drug smuggling at the Southern California ports of entry. In my opinion, requiring reasonable suspicion to search gas tanks would result in an increase in gas tank smuggling of drugs and other contraband, and other dangerous materials. Requiring reasonable suspicion to search gas tanks would also likely result in greater overall danger to the public, because of the increased danger from more altered gas tanks. Requiring reasonable suspicion for compartment searches involving necessary damaging force would result in an increase in compartment smuggling of drugs, contraband, and other dangerous materials.

9. In cases where a border search at the California ports of entry takes place and no contraband is discovered, it is Customs' policy to reassemble and reinstall any gas tanks that are disassembled during a border search. Customs will inform the driver whenever a border search resulting in the disassembly of a vehicle gas tank or property damage to a vehicle takes place. Finally, if Customs causes any damage to property during such a border search, Customs will provide the necessary forms to the driver or owner so that a monetary claim can be filed under applicable law.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: June 10, 2002.

/s/ JAYSON P. AHERN
JAYSON P. AHERN
Customs Field Operations
Director

APPENDIX F

DECLARATION OF DIANE HINCKLEY

1. Currently, I am the Assistant Director for Inspections, Immigration and Naturalization Service (INS), San Diego District. I am the inspections manager for the district's six ports of entry, which include the ports of San Ysidro, Otay Mesa, Tecate, Calexico, Calexico East, and Andrade. I oversee the operation of the ports, manage new initiatives, coordinate with INS regional and headquarters components, and am the supervisor of the INS port directors for these six ports.

2. I entered on duty with the INS on April 24, 1978, as an inspector in El Paso, Texas. Later I became a first-line supervisor in El Paso, Texas. Later I became a first-line supervisor in El Paso, then INS regional officer, then headquarters officer, and subsequently a supervisor of the Headquarters Land Border Inspections staff. Afterwards, I transferred to the Calexico Port of Entry as port director, and then became manager of all the ports for the San Diego District.

3. In my capacity as Assistant District Director for Inspections, I am familiar with and knowledgeable about the matters set forth below.

4. In Inspections, we distinguish between smuggling aliens in trunks and in other vehicle compartments, reserving the term "compartments" for non-trunk smuggling cases. One reason for this distinction is that compartment cases are usually more dangerous for the persons smuggled than trunk cases. Compartment cases involving smuggling in and near gas tanks are especially dangerous because often fumes remain in the tanks, oxygen does not circulate well in these rebuilt or

modified enclosed areas, movement by the occupant is extremely restricted, and the person smuggled is usually unable to extricate himself or herself from the compartment.

5. Instances of persons smuggled in and around gas tank compartments are not uncommon at the ports of entry, averaging one approximately every ten days at San Ysidro and Otay Mesa. Because these cases occur regularly, inspectors often search gas tank compartment areas and other compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles.

6. To require reasonable suspicion for an INS inspector to search a gas tank compartment area, or to use necessary damaging force to search a vehicle compartment, will likely result in fewer gas tank compartment area and other compartment searches, additional persons being successfully smuggled in gas tank compartment areas and other compartments for alien smuggling, and more attempts to use gas tank compartment area and other compartments for alien smuggling. Smugglers detect weak points readily and exploit them. Such a situation would increase the likelihood of someone dying in a gas tank compartment area or other compartment while being smuggled. Most of the persons the INS pulls from gas tank compartment areas and other compartments are nauseated, dehydrated, their skin is flushed, they are weak and sometimes unable to stand. We often give them immediate first aid and send them to a hospital in an emergency unit. The INS has pulled not only adults but children and old people, sometimes two at a time, from gas tank compartment areas and other compartments. Twin compartments in or near a gas tank are not unusual. As

part of the vehicle's modification, gasoline is sometimes siphoned into the motor from a plastic bottle in the engine or from a specially built small tank in the trunk; there are many variations in reconstructing the working gas tank. An established key to effective enforcement for inspectors is random checking, coupled with following up on suspicions. Random checking reduces inspector fallibility and helps deter attempts to break the law because everyone is subject to random selection. Requiring reasonable suspicion to search gas tank compartment areas and other compartments could lead to gas tank compartments and other compartments becoming the preferred choice for alien smuggling in the Southern District of California.

7. The pictures from Government motion exhibit 4(a)(1-5) depict an illegal alien being found in the gas tank compartment area of a vehicle being searched at the San Ysidro Port of Entry in the past 18 months. The pictures from Government motion exhibit 4(b)(1-5) depict an illegal alien being found in the gas tank compartment area of a vehicle being searched at the San Ysidro Port of Entry in the past 18 months. The pictures from Government motion exhibit 4(b)(1-5) depict an illegal alien being found in the gas tank compartment area of a vehicle being searched at the San Ysidro Port of Entry in the past 18 months. The pictures from Government motion exhibit 4(c)(1-7) depict an illegal alien being found in the modified gas tank of a vehicle being searched at the San Ysidro Port of Entry.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 4, 2002.

/s/ DIANE HINCKLEY
DIANE HINCKLEY
Assistant Director of
Inspection Director
Immigration and
Naturalization Service

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-50171

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JOSE MOLINA-TARAZON, DEFENDANT-APPELLANT

DEC. 7, 2000
[Filed Jan. 29, 2002]

OPINION

Before: D.W. NELSON, BRUNETTI and Kozinski, Circuit Judges.

KOZINSKI, Circuit Judge.

Looking for contraband, customs agents removed and dismantled Jose Molina-Tarazon's fuel tank. We consider whether this procedure is a "routine" border search for which no suspicion whatsoever is required.

I

At approximately 3:30 one early morning, Molina entered the United States from Mexico driving a pickup truck. Molina was directed to secondary, where Customs Inspector Kevin Brown ordered a narcotics-trained dog to sniff the truck. When the dog failed to

alert, Brown inspected the truck's undercarriage with an autocreeper.[1] Brown then turned his attention on the gas tank.

Brown first tried to look into the tank with a fiber-optic scope,[2] but was stopped by an anti-siphoning valve.[3] He then summoned an off-site contracting mechanic, who arrived fifteen or twenty minutes later. The mechanic hoisted the truck onto a lift and removed several bolts and straps that connected the tank to the truck, disengaging electrical connections and hoses in the process. The mechanic then removed the sensing unit, revealing thirty-one packages of marijuana inside the tank.

Charged with violating 21 U.S.C. §§ 841(a)(1), 951 and 960, Molina challenged the search on the grounds that the government lacked reasonable suspicion. The government argued that it needed no suspicion because the search was routine. The district court held that, even if the search was not routine, the officers had reasonable suspicion based on unnatural mud patterns they observed during their visual inspections of the gas tank. Molina entered a conditional guilty plea and now appeals the district court's suppression ruling.

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[1] An autocreeper is a mirror attached to the end of a long pole with which one can view the undercarriage of a vehicle.

[2] Brown testified that a fiberoptic scope is similar to a telescope with six feet of light-carrying cable that the operator can feed into the fill neck.

[3] A manufacturer-installed device consisting of a ball that prevents insertion of a solid object into the gas tank.

II

While the Fourth Amendment generally prohibits warrantless searches without probable cause, it is subject to a few narrow and well-delineated exceptions. One such exception is the border search. *Carroll* v. *United States*, 267 U.S. 132, 154, 45 S. Ct. 280, 69 L.Ed. 543 (1925). Authorized by the same Congress that proposed the Fourth Amendment, the border search has a long history of judicial and public acceptance. See 4 Wayne R. LaFave, *Search and Seizure* § 10.5(a), at 531, 535 (3d ed. 1996).[4] As the Supreme Court has observed, "[b]order searches . . . [are] considered to be 'reasonable' by the single fact that the person or item in question ha[s] entered into our country from outside." *United States* v. *Ramsey*, 431 U.S. 606, 619, 97 S. Ct. 1972, 52 L. Ed. 2d 617 (1977). Pursuant to this exception, routine searches of persons and their effects entering the country may be conducted without any suspicion whatsoever. *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537-38, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985).

But border searches are not exempt from the irreducible constitutional requirement of reasonableness. The border search exception therefore authorizes only *routine* searches; it does not authorize any kind of

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[4] The border search exception is codified at 19 U.S.C. § 1581(a), which provides that "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States . . . or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers, and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

search in any manner whatsoever. In order to conduct a search that goes beyond the routine, an inspector must have a reasonable suspicion that the person to be searched may be carrying contraband. *United States* v. *Ramos-Saenz*, 36 F.3d 59, 61 (9th Cir.1994).

While we have never defined the limits of a routine search, we have observed that the critical factor is the degree of intrusiveness it poses. *Id.* at 61. This is consistent with the approach of several other circuits, which have held that the distinction between "routine" and "nonroutine" turns on the level of intrusiveness. See, e.g., *United States* v. *Uribe-Galindo*, 990 F.2d 522, 525-26 (10th Cir.1993); *United States* v. *Braks*, 842 F.2d 509, 511-12 (1st Cir. 1988). Our case law recognizes four categories of searches as being so intrusive as to be clearly nonroutine: Body cavity, strip, pat down and involuntary x-ray searches. See *Montoya de Hernandez*, 473 U.S. at 541 n.4, 105 S. Ct. 3304; *United States* v. *Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995). By contrast, we have held that searches of handbags, luggage, shoes, pockets and the passenger compartments of cars are clearly routine. See *Montoya de Hernandez*, 473 U.S. at 538, 105 S. Ct. 3304; *Ramos-Saenz*, 36 F.3d at 61-62; *United States* v. *Sandoval Vargas*, 854 F.2d 1132, 1134 (9th Cir. 1988); *United States* v. *Palmer*, 575 F.2d 721, 723 (9th Cir. 1978).

In *Ramos-Saenz* we observed that a border search goes beyond the routine "only when it reaches the degree of intrusiveness present in a strip search or body cavity search." *Ramos-Saenz*, 36 F.3d at 61. The government seizes on this phrase to argue that a border search is always routine unless it involves a search of the person; at oral argument government counsel went so far as to assert that "the border search authority

gives the government the right to dismantle a car with no reasonable suspicion whatsoever." Were we to accept this argument, it would mean that customs agents at the border could, acting on no suspicion, order a car disassembled down to the last o-ring, and hand it back to the owner in a large box. We think not. We hold, rather, that some searches of inanimate objects can be so intrusive as to be considered nonroutine.

Determining when an inanimate object search becomes as intrusive as a body search is tricky. Object searches certainly do not cause the same degree of personal indignity as searches of the human body. But causing indignity is just one way a search can be intrusive; there are others. We write on a relatively clean slate because we have never identified what factors render the search of an object nonroutine. However, our analysis is informed by factors we consider in the border search context, as well as those from our general Fourth Amendment jurisprudence.

III

Three aspects of the search here render it nonroutine: Force was used to remove and disassemble the fuel tank; the procedure involved some risk of harm; and someone whose vehicle was subjected to such a search is likely to feel a diminished sense of security.[5]

A. *Use of Force*

Courts that have considered searches of inanimate objects in the border context have found the use of force to be a critical factor in assessing intrusiveness.

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[5] These happen to be the factors relevant in our case. We do not rule out the possibility that other factors, such as protracted delay in completing the search, may render a search nonroutine.

See *United States* v. *Rivas*, 157 F.3d 364, 367-68 (5th Cir. 1998); *United States* v. *Robles*, 45 F.3d 1, 5 (1st Cir. 1995). We have noted, albeit not in the border search context, that force is a factor that bears on the intrusiveness of the search. *United States* v. *Perez*, 37 F.3d 510, 516 (9th Cir. 1994) (observing that sniff search of a car is unintrusive because it involves no forcing of closed containers or sealed areas). Searches of inanimate objects that courts have held to be routine generally have not involved the use of force. See e.g., *United States* v. *Uribe-Galindo*, 990 F.2d 522 (9th Cir. 1993).

While force is a factor in assessing a search's intrusiveness, it is not dispositive. For example, if the lock is jammed on a suitcase or its owner refuses to present a key, agents have to employ some degree of force to gain access to its interior. But this fact alone does not render a search overly intrusive. Conversely, other types of searches for which force is *not* required have been deemed overly intrusive: No degree of force is required to effect an x-ray search or to issue an order to disrobe, both of which we have consistently found to be so intrusive as to be nonroutine. *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982). While not dispositive, the use of force in conducting a search will weigh against finding the search routine.

What constitutes the use of force depends on the circumstances. Certainly, if the search requires breaking, drilling into or permanently altering a portion of the item being searched, that is a use of force. Similarly, if the search involves the use of tools and the application of physical force to those tools, this will also amount to the use of force.

The search of Molina's truck required the use of tools. The mechanic hoisted the truck onto a lift, loosened the straps holding the tank to the chassis, disconnected the filler and the sending hoses, detached electrical connections, disengaged the fill neck and unscrewed the bolts. He then detached the tank itself by unscrewing the pump unit and removing the pressed in "bushing" which held the tank to the truck. All of those actions required the use of force and in their totality they raise the inference that this was not a routine search.

B. *Danger*

The Supreme Court has held that if a search poses a danger to the subject, this is a significant factor bearing on whether the search is reasonable under the Fourth Amendment. In *Winston* v. *Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985), the Court considered whether forcing a suspect to undergo minor surgery to remove a bullet was such a serious intrusion as to be unreasonable. In holding that it was, the Court noted that a crucial factor in analyzing the magnitude of a search's intrusiveness "is the extent to which the procedure may threaten the *safety* or health of the individual." *Id.* at 761, 105 S. Ct. 1611 (citing *Schmerber* v. *California*, 384 U.S. 757, 771, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)) (emphasis added). The Court reached this conclusion despite a dispute over how much danger, if any, the surgery would actually pose.[6]

In *Schmerber*, the Court held that forcing a suspect to have his blood drawn was insufficiently intrusive to

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[6] In *Winston*, there was testimony that the surgery would require only a small incision and could be performed under local, as opposed to general, anesthesia. 470 U.S. 753, 763-64 & nn.7-8, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985).

overcome society's interest in preserving evidence of drunk driving. In reaching this conclusion, the Court focused on three factors: First, the procedure involved no risk, trauma or pain. *Id.* at 771, 86 S. Ct. 1826. Second, a physician—a licensed professional—performed the procedure in a hospital environment, according to accepted medical practices. *Id.* Third, having blood drawn is "routine in our everyday li[ves]" and a requisite for many entering particular schools, professions and institutions (and therefore, presumably, did not involve a significant degree of risk). *Id.* at 771 n. 13, 86 S. Ct. 1826 (quoting *Breithaupt* v. *Abram*, 352 U.S. 432, 436, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957)).

In assessing the intrusiveness of border searches, we have also considered the dangerousness of the search. In *Ek*, concerns over the danger and potential long-term health effects posed by an x-ray search weighed heavily in our conclusion that x-ray searches were more intrusive than strip searches. We observed that being subjected to an x-ray search, although not as humiliating as being instructed to disrobe, is nonetheless more intrusive because of its potentially dangerous health consequences. *Id.* at 382. Notably, we came to this conclusion even though the record was silent on the danger or harmful effects associated with x-ray searches.

The border search jurisprudence of other circuits supports the view that the relative safety of various search methods is an important factor in the intrusiveness analysis. See *United States* v. *Johnson*, 991 F.2d 1287, 1292 (7th Cir. 1993) (noting, as a factor in categorizing the search as routine, that it involved no harm); *Braks*, 842 F.2d at 512 (an important factor in determining whether a search is routine is "whether

the type of search exposes the suspect to pain or danger"); *United States* v. *Vega-Barvo*, 729 F.2d 1341, 1345 (11th Cir. 1984) (risk of injury is a factor entitled to independent consideration); *United States* v. *Sandler*, 644 F.2d 1163, 1167 (5th Cir. 1981) (search at issue presented a relatively low degree of intrusiveness because it was, inter alia, not dangerous).

The search in this case presents a similar, and arguably more immediate, risk of danger than the x-ray in *Ek*.[7] An error in removing, disassembling and then reassembling the portion of a motor vehicle that contains a highly flammable and potentially explosive substance like gasoline might well result in disastrous consequences for the vehicle's owner. For example, the mechanic charged with reattaching the hoses and electrical connections might fail to secure them properly, leading to a fuel leak that causes a fire or explosion. Or, he might not reattach the straps securing the tank to the body of the truck tightly enough, causing the tank to shake loose.[8] These examples do not represent an exhaustive list of the dangers associated with this type of search. Yet they provide

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[7] While the record does not address the danger associated with driving a vehicle after certain critical internal parts have been dismantled and reattached, the point is not one that requires much documentation. The government seems to acknowledge that different searches implicate different kinds of risks: In urging that the use of the fiberoptic scope was part of a routine search, for example, the government's brief noted that such devices allow for the inspection of cars without damaging them.

[8] These risks need not come to fruition in every case. It is sufficient that, if the search is repeated, the risks will materialize on occasion, such as when the mechanic employed to do the work is careless or unskilled.

ample support for the view that the search in this case created a risk of harm.

C. *Fear*

A third factor we consider is whether the search is psychologically intrusive. People's minds are as vulnerable to intrusion as their physical possessions. As Justice Brandeis observed in *Olmstead* v. *United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L.Ed. 944 (1928)

> The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id. at 478, 48 S. Ct. 564 (Brandeis, J., dissenting).

The imposition of fear is a type of psychological intrusion. The Supreme Court has therefore recognized that the level of fear a particular search is likely to engender is a significant factor in evaluating its intrusiveness. In *United States* v. *Ortiz*, 422 U.S. 891, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975), the Court concluded that fixed checkpoints are "far less intrusive" than roving patrols, observing that the latter are more apt to "frighten[ ] or annoy[ ]" motorists. *Id.* at 894-95, 95 S. Ct. 2585. The Court reaffirmed its preference for fixed checkpoints in *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976), noting that, in comparison to roving searches, "the subjective intrusion

—the generating of concern or even fright on the part of lawful travelers—is appreciably less." *Id.* at 558, 96 S. Ct. 3074. We read these cases for the proposition that government intrusions into the mind—specifically those that would cause fear or apprehension in a reasonable person—are no less deserving of Fourth Amendment scrutiny than intrusions that are physical in nature.

We conclude that the search conducted here would make a reasonable driver—one aware that a mechanic working for the government dismantled and reassembled a component critical to his vehicle's safe operation—apprehensive about getting back into his vehicle and continuing on his way. The driver's apprehension would certainly be heightened if he faced the prospect of driving a long distance at high speed. The diminished sense of personal security associated with driving a potentially unsafe one-and-a-half ton automobile is exactly the type of unwarranted psychological intrusion against which the Fourth Amendment was meant to protect.

The type of search conducted here could contribute to a driver's apprehension in various ways. First, the work was performed by a government contractor whose qualifications, reputation and expertise are unknown to the vehicle's owner, rather than by a mechanic the owner knows and trusts. The owner does not know whether the contractor is licensed to perform the work or what standards, if any, were used in selecting him. The owner is unable to choose a mechanic in whom he does have confidence.

Second, the driver might doubt the mechanic's incentive to take adequate precautions in dismantling and reassembling portions of the vehicle, considering that

the mechanic's objectives are materially different in the border search context than in a traditional market setting. The mechanic lacks the independent incentive to undertake the procedures with the caution, skill and precision he might exercise if the owner were a repeat customer; those having their vehicles searched at the border are unlikely to return for additional work in the future. The mechanic's concern is to remove and dismantle parts quickly, so that the agents can search for contraband; if they come up emptyhanded, the mechanic's primary concern will be to finish the job promptly, not necessarily to reassemble the vehicle with the greatest care.

Finally, a search as extensive as the one performed on Molina's truck—one involving the dismantling and reassembling of components critical to the vehicle's functioning and safe operation—leaves the normal driver unable to confirm whether everything is restored to its original state. Absent special expertise, the driver has no way of verifying the correct reassembly of the fuel tank. If the pump unit is returned to its original position within the tank, and the tank is then reconnected via straps, bolts and hoses, the driver has no way to tell whether the tank and related mechanisms are in a safe working condition. In contrast to less intrusive techniques that employ minimal force or allow for ready inspection by the layperson, where the search includes the dismantling of a mechanical part in the motor vehicle, the driver has little independent opportunity to allay his fear that the vehicle may leave him stranded on the freeway—or far worse.

* * * * * *

The use of force required to effect the tank's removal, coupled with the potential danger associated with driving a vehicle after a component vital to its proper functioning is dismantled and reassembled, and the consequent diminution in the driver's sense of personal security, results in a significant degree of intrusiveness. We conclude that the removal, disassembly and search of Molina's fuel tank was not a routine search.

IV

That the search was not routine does not necessarily render it unlawful. The search would still have been lawful if the officers conducted it based on a reasonable suspicion that Molina might have been concealing contraband. See *United States* v. *Teague*, 18 F.3d 807, 812-13 (9th Cir. 1994). We therefore consider whether the customs agents had reasonable suspicion to justify the search.

At the primary inspection area, Customs Inspector George Volz took a look around the truck for signs of smuggling. Looking through the fender well, Volz observed an unusual distribution of mud in the areas of the truck's under-carriage surrounding the gas tank: While there was a lot of mud on top of the tank's sensing unit, the rest of the unit was entirely clean. Volz discovered an abundance of mud lodged in out-of-the-way spaces behind the bolts that attached the tank to the undercarriage of the truck. The hoses connecting the tank to the truck also had splattered mud. Volz found that the mud did not appear to have been "splattered" naturally, but instead appeared to have been sprayed on with a paint gun or pressure hose.[9]

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[9] Inspectors Volz and Brown both testified that they had extensive on-the-job training in the different types of mud appli-

The unnatural looking distribution and application of the mud suggested to Volz that someone had recently tampered with the tank. Inspector Volz also observed that the gas hoses looked freshly replaced—another factor that, in his experience, suggested recent removal of the tank. Based on these observations, he directed Molina to secondary. There, Inspector Brown observed the same unnatural mud distribution and application—in particular the fact that the tank's sensing unit was too clean in relation to the rest of the tank—and came to the same conclusion as Volz. He therefore examined the undercarriage of the truck and observed patterns of mud and clamp marks that indicated the sensing and pump units had recently been removed. These observations provided reasonable suspicion to justify the dismantling of Molina's fuel tank.

Accordingly, the search was lawful and the information gained from it could lawfully be used to prosecute Molina. The district court did not err in denying the suppression motion.

AFFIRMED.

BRUNETTI, Circuit Judge, concurring in the result:

FACTS

On September 10, 1999, at approximately 3:36 a.m., Jose Molina-Tarazon entered the Calexico West Port of Entry. He was the sole occupant of a 1991 Dodge Dakota pickup truck. He was met by U.S. Customs

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cation techniques employed by contraband smugglers, and that when mud is unnaturally applied, it tends to run before drying. Agent Volz also testified that unnaturally applied mud lacks the "fine white mist" characteristic of mud that splatters on vehicles naturally.

Inspector George Volz. Inspector Volz initially became suspicious because Molina Tarazon was wearing a brand new hat perched on top of his head "like he was afraid to mess up his hair", and also wearing black horn-rimmed glasses. Inspector Volz explained that prior experience working the pedestrian lanes, where mainly farm-workers enter, led him to suspect Molina Tarazon was impersonating a U.S. citizen. This led Inspector Volz to doubt Molina-Tarazon's declaration that he was a United States citizen, and to further inspect the vehicle for signs of smuggling.

After an inspection of the gas tank, Inspector Volz' suspicions were further heightened by the fact that the mud appeared to be artificially applied, rather than accumulated through normal wear. Specifically, although the top of the tank was dirty and there was mud behind the bolts that held the tank, the sensing unit was not dirty. Inspector Volz further noted that the gas tank hoses appeared new. At this point, Volz referred Molina-Tarazon to further inspection.

At the secondary inspection area, Molina-Tarazon was met by U.S. Customs Inspector Kevin Brown. Molina-Tarazon stated that the truck belonged to his wife. The truck was then inspected by a canine unit which failed to alert for drugs. Inspector Brown used a mirror to inspect the truck's gas tank. Brown also tried to insert a fiberoptic scope into the gas tank, but was unsuccessful because of a blockage. Brown then crawled underneath the tank to conduct a physical inspection. He observed what he believed to be signs that the "sending unit and/or pump unit had been off recently." Brown noted that the mud on the gas tank did not appear consistent with the bottom chassis of the truck and that the pump unit was basically clean. This

entire inspection lasted 10-12 minutes. At that point, Brown called a local contracting mechanic to come and remove the gas tank on site. It took approximately 15-20 minutes for the mechanic to arrive.

According to Inspector Brown, the removal of the gas tank involves: putting the truck on a mechanical lift, disconnecting the filler hose, the hose going to the engine and the corresponding electrical connections, and loosening the straps that hold the tank to the chassis. Neither a torch nor hacksaw was used, and the gas tank can be reattached without causing any damage. It took approximately 10-15 minutes to remove the gas tank. Drugs were ultimately recovered from the gas tank.

SPECIAL CONCURRENCE

I concur in the majority's opinion to the extent that vehicular border searches could conceivably be conducted in a manner so intrusive as to render the search non-routine. When such searches occur, a reasonable suspicion on the part of law enforcement is required. I also concur in the result as I believe the Customs Inspectors had a reasonable suspicion to justify this search no matter what its category.

I am unable, however, to concur in the analysis in Part III of the opinion because I believe it goes too far. There is a very real distinction between the removal or disassembly of part of an automobile in the ordinary course of inspection, and the application of destructive force in order to facilitate inspection. See *United States* v. *Carreon*, 872 F.2d 1436 (10th Cir. 1989) (drilling into camper required reasonable suspicion); *United States* v.

Rivas, 157 F.3d 364 (5th Cir. 1998) (drilling into body of trailer was not routine search and required reasonable suspicion); *United States* v. *Robles*, 45 F.3d 1 (1st Cir. 1995) (drilling into machine part required reasonable suspicion).

The search at issue here is an example of the simple disassembly of a gas tank in the ordinary course of inspection. As the district court pointed out:

> The intrusion here was not great. Nothing was broken. Some bolts
>
> > were unscrewed, and the tank was lowered. There wasn't any connection from the tank to the vehicle that was broken, it was just straps that held it in place, so it could be restrapped back. It is not like it is bonded or glassed or welded in place where they had to break the welds. Two hoses were removed, the filler hose and the sending hose, and the tank was lowered and the cap was unscrewed, and there was the marijuana.

This inspection was conducted in a matter of 10-15 minutes with no permanent alteration or resulting harm to Molina-Tarazon's vehicle.

The majority's opinion seizes on the use of tools and employment of a mechanic to "raise the inference that this was not a routine search." Such a finding labels any routine dismantlement by a mechanic, from the removal of fender to bumper, a non-routine inspection. As discussed above, the use of force that somehow alters or damages the vehicle is far more intrusive than the simple disassembly and reassembly that occurred here. The majority opinion also focuses on the inherent psychological fear that stems from the possibility that a mechanic not of the detainee's choosing may fail to re-

assemble the vehicle in a safe and reliable manner. The risk of negligent reassembly or replacement may create fear that would never be overcome in any circumstances, including the simplest dismantlement.

For these reasons, I cannot concur in the analysis in Part III of this opinion.