



## Ambiguous Boundaries at Our Borders

Upon arriving at the airport in Salt Lake City, you are required to pass through a “Biological Screening Center” established in the wake of last year’s swine flu pandemic pandemonium and ostensibly designed to prevent anyone infected with a communicable disease from passing into the interior of the United States where containment would be more difficult and exposure would be potentially harmful to the citizenry. At this inspection station, the Customs and Border Patrol (CBP) agent asks you to step to one side and wait in a room marked “Lab.” You ask the CBP officer why you are being asked to wait in that room and you are informed that due to the possibility of exposure to mad cow disease while on vacation in Europe, you will be subjected to a higher level of scrutiny. Your first thought is to protest, but your desire to avoid such intrusive inspection is counter-balanced by your need to get back home and get to work.

As you and your family enter the room marked “Lab” you see several other travelers sitting at stations, arms extended with rubber tubes around their biceps, having blood drawn by uniformed CBP officers. One of the officers asks for your passports and then gives you a number and orders you to have a seat and wait for your number to be called. When it’s your turn, you will sit and have a vial of blood drawn so that a screen for mad cow disease can be performed. After that, you must wait for 48 hours while the test is completed, during which time you will be quarantined in a holding area inside the airport. If the results of the test are negative, you will be allowed to continue home. If the results are positive, however, you will be sent to one of a handful of federally designated hospitals to await treatment and eventual release.

There was a time when such a scenario would have been dismissed instantly as far-fetched and fantastical. No longer. Americans and those visiting this country from abroad are becoming more and more accustomed to increasing levels of intrusive searches at the border. Retina scans, fingerprints, and photographs are a part of the regular routine of inspection at airport border patrol locations. These and other arguably unobtrusive measures have been declared “reasonable” and thus permissible by the U.S. Supreme Court. However, the late proliferation of new viruses and new strains of old viruses is increasing the intrusiveness of the examinations. Consequently, this is bringing to light potential challenges to the rationality of the deprivation of privacy suffered in the searches being conducted at the borders and the applicability of the 14th Amendment’s “Due Process Clause” to those searches and the seizures made incident thereto.



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### ***U.S. v. Flores-Montano* – The Current Standard**

As recently as 2004, the Supreme Court ruled that suspicionless searches at the borders are reasonable and thus constitutional. In that case, Manuel Flores-Montano attempted to enter the United States from Mexico at the Otay Mesa Port of Entry. While being detained, a border agent decided that Flores-Montano's car should undergo a more thorough search, specifically, that the fuel tank should be removed from the car and inspected inside and out. The search, although warrantless and arguably suspicionless, revealed 81 pounds of marijuana that was hidden behind a false wall in the gas tank.

Flores-Montano sued the U.S. government and argued that such an intrusive search required reasonable suspicion in order to comply with the Fourth Amendment. The District Court and the Ninth Circuit Court of Appeals decided in favor of Mr. Flores-Montano's assertion, but the government appealed to the Supreme Court, where the lower courts decisions were overturned in an opinion written by then Chief Justice William Rehnquist on behalf of a unanimous bench.

The specific part of the Supreme Court's undivided opinion in the Flores-Montano case that is most germane to the present situation vis-a-vis the swine flu and other potentially fatal viral outbreaks beyond the horizon is where Justice Rehnquist held that "highly intrusive [border] searches of the person" might require a level of suspicion. Furthermore, in a shocking lack of oversight and defense of Due Process, the Supreme Court went on to explain that it was suggesting "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." Astonishingly, then, in this decision handed down a mere five years ago, the court markedly refused to establish a reliable standard for whether a search and seizure at border entry points is constitutional, regardless of the level of intrusion into a person's privacy interests or the disregard for individual dignity.

### **Backscatter – The Naked Truth**

In February 2007, the Transportation Security Administration (TSA) announced that it would begin limited testing of a new X-ray machine capable of penetrating clothing, thus eliminating the need for strip searches and pat downs of suspicious travelers. In the inimitable vague and ostensibly innocuous style of government nomenclature, the new screening device is called by the TSA "Passenger Imaging Technology" and is being tested in a select few airports including Salt Lake City and Phoenix. The device is called a backscatter machine because the wave used in the scan of the body relies on backscatter technology wherein a high-energy beam moves rapidly over a person's form and delivers a high-resolution image that is essentially nude. Arguably, this prevents terrorists from hiding weapons in places undetectable with traditional x-ray technology.

Despite the understandable and vociferous opposition by a variety of civil liberty advocate groups, the TSA reports that 79 percent of travelers opt to pass through a backscatter machine instead of the pat-down typically used during secondary screenings. Regardless of such a reported preference, the fact is that such machines can generate images that are surprisingly clear, almost photo-quality in fact, and indeed reveal a person's naked form, thus leading to genuinely embarrassing invasions of privacy and humiliating displays of otherwise unexposed parts of the body.

In response to the outcry, the TSA promises that it will implement procedures that will obviate such concerns. First, it will use a type of "chalking" procedure that will blur the private parts of a person's anatomy. The problem with such a solution is that it would enable someone determined to smuggle contraband on board a plane to hide it by placing it in that area of the body. This is ironic considering



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the purported purpose for such a revealing screening device. The TSA also assures concerned passengers and privacy advocates that they will allow those required to pass through the new machines to stand as far away from the source of the beams as possible, thus allowing the TSA agents to see what they need to see, while preventing them from seeing what they need not. Predictably, border patrol agents at the airports where the backscatter machines are utilized reportedly are not following such restrictions.

### **The Future — Unpredictable Predictability**

A cursory review of history reveals that the government will not restrain itself and will only be checked under duress and after an exhaustive dodge and parry with the Constitution and with those citizens still vigilant enough to force the government to recognize the fetters placed on its behavior by our founding document. These chains are strong and well-defined, but few there are who are willing to steadfastly stand against the powerful and constant surge of government intrusion and disregard for checks and balances enshrined in the Constitution.

Recently, it was fear of a swine flu pandemic that led to enhanced security measures being senselessly, hastily, and haphazardly implemented at border entry points. This is not the last such scare that will be used as justification for further and more intrusive searches and seizures of those wishing to enter the United States. Moreover, one must recognize that such measures are being used at airports and thus only applicable to those seeking to legally enter the United States.

Finally, as described in the opening scenario of this article, there will undoubtedly be newer and more potent viruses that soon will fuel hysterical worldwide panic and lead to emergency searches and seizures of a person's property (blood? urine? DNA?) in order to "protect" the citizens of the United States. This, married with the Supreme Court's determined inaction and refusal to announce an applicable standard of constitutionality, makes it easy to predict the outright obliteration of all boundaries around government intrusion into the few remaining sectors of personal privacy and dignity.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Section 1, 14th Amendment to the United States Constitution]



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