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MONEY-LAUNDERING AND NARCOTICS PROSECUTION

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During the course of a lifetime you meet and are impressed by a variety of people. Some are good-hearted, others professionally able, while still others, no matter what their position or status in life, are your friends. Rarely does one meet and is blessed by knowing and befriending an individual whose heart and brain are totally dedicated toward helping mankind. In 1978, when I met Joseph Crowley, I knew he was a great labor lawyer, I knew he was a famous arbitrator, I knew he was a learned professor, but over the years I also came to know that he was one of the purest, most compassionate and dedicated human beings that I would ever meet. Joe Crowley never viewed humanity in a hierarchical structure. If you were in trouble or in need, he was there. I never heard him disparage anyone. I have never known anyone who could not seek his solace or advice. His professional achievements are obvious, his teaching ability extraordinary, but these are not the primary attributes that I will always remember of Joe. It was his unique combination of heart and mind that I found to be unparalleled. He was the soul of Fordham Law School. He was not just a mentor to me in a pedagogical sense; he was my friend. I will never forget walking with him in Jerusalem. I will never forget his constant advice as to the true meaning and value of life. Materialism never impressed Joe, nor did status; it was not who you were but what you were made of that was important to him. His love for his family, his respect for anyone regardless of race, religion or creed set him apart from the rest of us. I have been blessed with four children and I wish that one day when they are older, I can look at them and say Joe Crowley would have been proud if he saw them now.

Whether it was in the little Yemenite town of Ramatym in Israel or in Lincoln Center or in Sam’s Gedney Way in White Plains, he was the same human being who always emerged as a thoughtful, kind, energetic and extremely loyal friend. After our trip to Israel he called me Avi; I in turn called him Yossi, a nickname for Joseph in Hebrew. To say that I loved him is an understatement. He was my mentor and guide, he made me for better or for worse what I am today professionally, but more importantly for what I am as a human being. In Hebrew we never say goodbye. We always say Lehitraot, which means we shall meet again. And so I conclude Lehitraot Yossi, one day we shall meet again. I will never forget you and I dedicate the following Article to your memory.

* Professor of Law, Fordham University School of Law; B.A. 1967, City University of New York (Queens); J.D. 1970, State University of New York (Buffalo); L.L.M. 1971, J.S.D. 1976, Columbia University. My thanks to Natalie A. Bocca for her research assistance.
INTRODUCTION

The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. . . . As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.¹

No one disputes the magnitude of the illegal drug problem in the United States.² The cost of investigating and prosecuting highly sophisticated, well financed drug lords constantly escalates.³ The human cost is vividly apparent at every level of our society.⁴ The war against illegal importation of narcotics into the United States drains valuable law enforcement and judicial resources, yet yields minimal long-term results. A major current battle concerns money-laundering.⁵ Government authorities hope that if "drug money" cannot find its way back to narcotics producers, then the importation of drugs may decline. While money-laundering devices occasionally are original and diverse,⁶ narco-dollars are frequently exported simply and directly by couriers carrying large amounts of cash out of the country.⁷


⁴. See N.Y. Times, June 27, 1985, at B2, col. 2 (allegations of money laundering by New Jersey casino owner); N.Y. Times, June 13, 1985, at B10, col. 6 (Attorney General Edwin Meese III requests $101 million to hire additional personnel to combat drug traffickers); N.Y. Times, May 2, 1985, at A11, col. 6 (Colombia seizes reported leader of drug trafficking ring as suspect in killing of DEA agent in Mexico).
⁵. See Money Laundering Hearings, supra note 1, at 1-2. A centerpiece of the government's fight against drug trafficking is the statutory requirement that bank cash transactions of more than $10,000 be reported. See Wall St. J., February 12, 1985, at 2, col. 4.
⁶. See Money Laundering Hearings, supra note 1, at 2.
⁷. See United States v. Des Jardins, 747 F.2d 499, 501-02 (9th Cir. 1984),modified on other grounds, 772 F.2d 578 (9th Cir. 1985); United States v. Grotke, 702 F.2d 49, 50-51 (2d Cir. 1983); United States v. Gomez Londono, 553 F.2d 805, 806-07 (2d Cir. 1977).
(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction
at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

(b) the Secretary may designate a domestic financial institution as an agent of the United States Government to receive a report under this section. However, the Secretary may designate a domestic financial institution that is not insured, chartered, examined, or registered as a domestic financial institution only if the institution consents. The Secretary may suspend or revoke a designation for a violation of this subchapter or a regulation under this subchapter (except a violation of section 5315 of this title or a regulation prescribed under section 5315), section 411 of the National Housing Act (12 U.S.C. 1730d), or section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b).

(c)(1) A person (except a domestic financial institution designated under subsection (b) of this section) required to file a report under this section shall file the report—

(A) with the institution involved in the transaction if the institution was designated;  
(B) in the way the Secretary prescribes when the institution was not designated; or  
(C) with the Secretary.

(2) The Secretary shall prescribe—

(A) the filing procedure for a domestic financial institution designated under subsection (b) of this section; and  
(B) the way the institution shall submit reports filed with it.

Id. § 5313. The regulations promulgated under this section require financial institutions to file a Currency Transaction Report with the Treasury Department within 15 days after a customer deposits, withdraws or transfers currency in excess of $10,000. See 31 C.F.R. § 103.25(a) (1985). An individual may be under a duty to file a report if he engages as a business in dealing or exchanging currency. See id. § 103.11(b)(3). The Second Circuit relied on that regulation in finding particular individuals to constitute a financial institution for purposes of the Act. See United States v. Goldberg, 756 F.2d 949, 953-54 (2d Cir.), cert. denied, 105 S. Ct. 2706 (1985).

Section 5316 states:

(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—

(1) transports or has transported monetary instruments of more than $10,000 at one time—

(A) from a place in the United States to or through a place outside the United States; or  
(B) to a place in the United States from or through a place outside the United States; or

(2) receives monetary instruments of more than $5,000 at one time transported into the United States from or through a place outside the United States.

(b) A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. The report shall contain the following information to the extent the Secretary prescribes:

(1) the legal capacity in which the person filing the report is acting.

(2) the origin, destination, and route of the monetary instruments.

(3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both.

(4) the amount and kind of monetary instruments transported.

(5) additional information.
statements statute,\textsuperscript{9} when applied together in money-laundering prosecutions provide law enforcement officers with a powerful investigative tool.\textsuperscript{10} However, the broad discretionary power granted to government authorities may severely impinge on individual freedoms, especially those guaranteed by the fourth and fifth amendments.\textsuperscript{11} This Article will analyze and suggest some basic measures necessary to balance the federal government's interest in fighting illegal narcotics syndicates with the precious fourth and fifth amendment rights of the general public.

This section or a regulation under this section does not apply to a common carrier of passengers when a passenger possesses a monetary instrument, or to a common carrier of goods if the shipper does not declare the instrument.

Section 5317 states:

(a) The Secretary of the Treasury may apply to a court of competent jurisdiction for a search warrant when the Secretary reasonably believes a monetary instrument is being transported and a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement. The Secretary shall include a statement of information in support of the warrant. On a showing of probable cause, the court may issue a search warrant for a designated person or a designated or described place or physical object. This subsection does not affect the authority of the Secretary under another law.

(b) A customs officer may stop and search, without a search warrant, a vehicle, vessel, aircraft, or other conveyance, envelope, or other container, or person entering or departing from the United States with respect to which or whom the officer has reasonable cause to believe there is a monetary instrument being transported in violation of section 5316 of this title.

Id. § 5317.  


Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

10. See Collora & Tillotson, Defense Perspective of Prosecuting Criminal Cases Under Secrecy Act, Nat'l L.J., Feb. 17, 1986, at 30, col. 1. The Supreme Court removed one possible obstacle to the joint application of the statutes in United States v. Woodward, 105 S. Ct. 611 (1985) (per curiam). The Court held that an individual could be convicted under the fraudulent statements statute and the currency reporting statute for the same conduct. See id. at 613.

11. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The fifth amendment provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.
I. Statutory Framework

A. The Currency and Foreign Transactions Reporting Act

Enacted in 1970, the Bank Secrecy Act, which includes the Currency and Foreign Transactions Reporting Act, was intended to enlarge the amount of financial information available to government law enforcement agencies in criminal, tax and regulatory prosecutions. Section 5313 requires financial institutions to report any domestic currency transaction in excess of $10,000 to the Internal Revenue Service. This reporting requirement is known as the Currency Transaction Report (CTR).

Section 5313 received increased attention last year when, on February 7, 1985, federal investigators charged the First National Bank of Boston, a unit of Bank of Boston, Inc., with failure to report illicit cash transactions totalling $1.22 billion. The bank pleaded guilty and was fined $500,000, the largest fine ever imposed for violating the statute. Most of the deposits involved had been made in bills of $50 or less, and the withdrawals were made in bills of $100 or more. Much of the money was shipped to foreign banks in bricks of $100 bills.

Section 5316, the exporting and importing monetary instruments reporting statute, provides that any person transporting, mailing, shipping or causing the transportation, mailing or shipping of currency or monetary instruments worth more than $10,000 must file a report with the United States Customs Service. This report is known as the Report of Transportation of Currency or Monetary Instruments (CMIR). A conviction for violation of section 5316 requires several general factors. The government must prove that the person willfully failed to file a written...
report and that the currency was being transported either into or out of the United States. To satisfy the "out of the United States" element of the crime, a traveler must have manifested a firm commitment to leave the United States.

In order to prove knowing and willful failure to report, defendants must have notice of the filing requirement. However, the government may not have a duty to explain explicitly and directly to the public that the transportation of more than the statutory amount without the requisite report constitutes a crime. For example, the prosecution's burden of proving that the defendant knew of the reporting requirement may be met when it shows that the defendant signed a form that warned of the penalties for false reporting and that indicated an additional form would have to be completed if he were carrying more than the requisite amount either into or out of the country. Although there had been some uncertainty regarding whether an individual's awareness that more than a certain amount of money would be transported in or out of the country would satisfy the statute's knowledge and intent requirements, it is now fairly established that there must be knowledge and specific intent to avoid the statute's reporting requirement.

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24. United States v. Gomez Londono, 553 F.2d 805, 810 (2d Cir. 1977) (appellee had his ticket, had checked his luggage and was "headed toward the departure area"); United States v. Cutaia, 511 F. Supp. 619, 625 (E.D.N.Y. 1981) (passengers had purchased their tickets, checked their luggage and were scheduled to leave in 30 minutes; court held that the passenger had manifested a definite commitment to leave the U.S.).


27. United States v. Rodriguez, 592 F.2d 553, 557 (9th Cir. 1979). The Ninth Circuit distinguished Granda and Schnaiderman on the grounds that the forms given to the passengers in those cases "asked only whether the traveler was carrying into the United States over $5,000 in currency. It did not refer to the reporting requirement or [the additional form]." Id. at 557. The Ninth Circuit underscored the importance of this distinction in United States v. Chen, 605 F.2d 433, 435-36 (9th Cir. 1979). The Rodriguez court remarked in dictum that while it might be "good policy," it is not a legal requirement to inform travelers that importing over the statutory amount in monetary instruments is legal. See Rodriguez, 592 F.2d at 557 (dictum).

28. See United States v. Chen, 605 F.2d 433, 435-36 (9th Cir. 1979); United States v. Rodriguez, 592 F.2d 553, 557 (9th Cir. 1979); United States v. Schnaiderman, 568 F.2d 208, 1213-14 (5th Cir. 1978); United States v. Granda, 565 F.2d 922, 925-26 (5th Cir. 1978). The uncertainty stemmed from a district court case that held in a forfeiture case under 31 U.S.C. § 5317 (1982), the word "knowingly" applied "to the transportation of money and not to specific knowledge about the reporting requirements." See United States v. $4,255,625.39, 528 F. Supp. 969, 972 (S.D. Fla. 1981). The Eleventh Circuit
In section 5317, Congress has provided a framework for searches of individuals suspected of violating section 5316. Section 5317(a) allows an application based on probable cause to be made for a warrant to search a person on his property. This provision does not limit the government's authority to conduct searches under existing law. Section 5317(b), however, is an exception to the statute's warrant requirement and seemingly renders section 5317(a) meaningless. Section 5317(b) authorizes customs officials to stop and search individuals or their property, whether entering or leaving the United States, if the official has "reasonable cause to believe there is a monetary instrument being transported in violation of section 5316." As will be discussed below, this provision is most disturbing because it is ill-conceived and ignores significant fourth amendment jurisprudence to the extent the section applies to persons exiting from the United States.

B. 18 U.S.C. § 1001

Title 18, United States Code section 1001, punishes fraudulent statements made to a federal agency. The statute is designed to deter fraud on government agencies and to help uncover deceptive practices aimed at frustrating or impeding legitimate agency functions.

Federal courts have applied the statute inconsistently. Courts that broadly interpreted the statute reasoned it was violated whenever a person made a materially false statement that had the capacity to prevent, or rejected this view because the statute's purpose, both in its criminal and forfeiture provisions, was to obtain reports of foreign transactions "where such reports would be helpful in investigations of criminal, tax and regulatory violations." United States v. One (1) Lot of $24,900.00 in U.S. Currency, 770 F.2d 1530, 1534 (11th Cir. 1985). The court determined that even if a § 5316 criminal suit could not be brought absent knowledge of the reporting requirement, a forfeiture suit brought against someone who lacked such knowledge would still "fly in the face of Congress' goal of obtaining currency reports." Id. at 1535.

30. See id.
31. See id.
33. Id.
34. See infra notes 168-75 and accompanying text.
38. United States v. Tobon-Builes, 706 F.2d 1092, 1101 (11th Cir. 1983).
39. Compare United States v. Yermian, 708 F.2d 365, 371 (9th Cir. 1983) (defendant must know when making false statement that subject matter was within the federal agency's jurisdiction), rev'd, 104 S. Ct. 2936 (1984) and United States v. Hajecate, 683 F.2d 894, 896-97 (5th Cir. 1982) (legal acts become illegal when they are elements of a scheme to obstruct a government agency), cert. denied, 461 U.S. 927 (1983); with United States v. Fern, 696 F.2d 1269, 1273 (11th Cir. 1983) (defendant's unsolicited false statement, if material, falls within the statute's coverage) and United States v. Richmond, 700 F.2d 1183, 1187 (8th Cir. 1983) (false statement need not have been made directly to federal agency).
merely influence, a governmental function—scienter was not required. Moreover, the statutory phrase "in any matter within the jurisdiction of any department or agency of the United States" was loosely defined as the ability of any agency to exercise its authority. Those courts narrowly construing the statute concluded that, to be punishable, the allegedly fraudulent statements had to be affirmative. In addition, jurisdiction was given a restrictive reading. Finally, actual knowledge by the alleged violators of government involvement was deemed an essential element of the crime.

The Supreme Court resolved some of these conflicts in 1984 in United States v. Rodgers and United States v. Yermian. In Rodgers, the Court held that the term "jurisdiction" in the statute must be interpreted broadly. In reversing the Eighth Circuit's decision that the statute's scope did not reach criminal investigations by the Federal Bureau of Investigation and the Secret Service, the Court relied on the ordinary meaning of the statutory language "in any matter within the jurisdiction of any department or agency of the United States." The Court rejected the court of appeals' definition of jurisdiction because that approach would exclude virtually all departmental and agency activities from the statute's coverage. Justice Rehnquist observed that "[t]he most natural, nontechnical reading of the statutory language is that it covers all

40. See United States v. Richmond, 700 F.2d 1183, 1188 (8th Cir. 1983). Under § 1001, materiality involves only the abstract capability of influencing an agency's governmental function. See United States v. Fern, 696 F.2d 1269, 1274 (11th Cir. 1983); United States v. Carrier, 654 F.2d 559, 561-62 (9th Cir. 1981).
43. See Bryson v. United States, 396 U.S. 64, 70-71 (1969); United States v. Richmond, 700 F.2d 1183, 1187-88 (8th Cir. 1983). The Bryson Court gave § 1001 a broad interpretation, noting that the term jurisdiction in the statute should not be given a narrow or technical meaning. See Bryson, 396 U.S. at 71.
44. See United States v. Anderez, 661 F.2d 404, 409 (5th Cir. 1981); Paternostro v. United States, 311 F.2d 298, 305 (5th Cir. 1962).
50. See United States v. Rodgers, 706 F.2d 854, 856 (8th Cir. 1983), rev'd, 466 U.S. 475 (1984). Although the court acknowledged that two other courts of appeals had reached a different result on this question, id. (citing United States v. Lambert, 501 F.2d 94, 96 (5th Cir. 1974) (en banc) and United States v. Adler, 380 F.2d 917, 921-22 (2d Cir.), cert. denied, 389 U.S. 1006 (1967)), the court preferred the rule it had enunciated in Friedman v. United States, 374 F.2d 363 (8th Cir. 1967); see Rodgers, 706 F.2d at 856.
51. Rodgers, 466 U.S. at 479 (emphasis in original).
52. The Eighth Circuit defined jurisdiction for the purposes of the statute as "the power to make final or binding determinations." See id. at 477 (quoting Friedman v. United States, 374 F.2d 363, 367 (8th Cir. 1967)).
matters confided to the authority of an agency or department."\(^5^3\)

In *Yermian*, the Court held that a conviction under the statute does not require proof that the defendant had actual knowledge of federal agency jurisdiction.\(^5^4\) The Court reasoned that the statute's terms "knowingly and willfully" modified the words "false, fictitious or fraudulent statements" and not the requirement that the matter be within the jurisdiction of a federal department or agency.\(^5^5\) Thus, *Rodgers* and *Yermian* are significant additions to law enforcement's arsenal against drug trafficking.

II. FOURTH AMENDMENT RIGHTS OF DEFENDANTS

The fourth amendment protects an individual's reasonable expectation of privacy.\(^5^6\) In the absence of a warrant based on probable cause,\(^5^7\) any governmental intrusion of constitutionally protected areas is presumptively unreasonable.\(^5^8\) Legitimate needs of law enforcement, however, have created exceptions to the warrant and probable cause requirements.\(^5^9\) The most relevant in the use of the Currency and Foreign Transactions Reporting Act and the fraudulent statements statute are the "stop and frisk,"\(^6^0\) the border search,\(^6^1\) and reverse border search exceptions,\(^6^2\) and the statutory exception contained in section 5317(b).\(^6^3\)

A. The Stop and Frisk Exception

The stop and frisk exception to the probable cause and warrant requirements of the fourth amendment originated in *Terry v. Ohio*.\(^6^4\) In

\(^5^3\) See *id.* at 479.


\(^5^5\) See *id.* at 2940. Interestingly, Justice Rehnquist dissented, noting that an earlier version of the statute placed the words "knowingly and willfully" before the jurisdictional requirement. See *Yermian*, 104 S. Ct. at 2945 (Rehnquist, J., dissenting) (citing Act of June 18, 1934, ch. 587, 48 Stat. 996). Justice Rehnquist observed that the 1948 revision of the statute was not designated to make any substantive changes. See *id.* (Rehnquist, J., dissenting).


\(^5^7\) In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court adopted a common sense, or "totality-of-the-circumstances" approach to determinations of probable cause. See *id.* at 238.


\(^6^0\) See *infra* notes 64-98 and accompanying text.

\(^6^1\) See *infra* notes 99-114 and accompanying text.

\(^6^2\) See *infra* notes 120-37 and accompanying text.

\(^6^3\) See *infra* notes 138-49 and accompanying text.

\(^6^4\) 392 U.S. 1 (1968). One commentator suggested that the "low profile" of the stop and frisk practice explains why it had been able to avoid earlier judicial scrutiny. See
Terry, an experienced police officer who suspected criminal activity stopped and frisked the defendant. The Court held that in order to achieve effective crime prevention, law enforcement agents should be allowed to “stop and frisk” suspects absent probable cause to arrest that suspect. Nevertheless, such an investigative device had to be governed by the dictates of the fourth amendment. Basing its decision on the independence of the reasonableness clause of the fourth amendment, the Court held that a police officer could stop and search a suspect for weapons if the officer had a reasonable suspicion of criminal activity and reasonably believed he was dealing with an armed and dangerous individual.

In Terry, the Court distinguished police-citizen interactions. An “encounter,” which is not governed by the fourth amendment, involves the voluntary cooperation of the individual. The stop or seizure of a person, however, involves detention. This kind of police officer-public contact is governed by the fourth amendment and must be based on a reasonable inference that the suspect is armed.

Until United States v. Mendenhall, the demarcation between stops and encounters was fairly clear. Encounters involved polite questioning by a police officer and stops entailed a showing of authority by the law enforcement agent. Mendenhall, however, blurred the demarcation. In Mendenhall, the defendant, who satisfied the drug courier profile, was approached by Drug Enforcement Administration (DEA) agents as she disembarked from a plane. The agents requested her plane ticket and


65. See Terry, 392 U.S. at 5-7.
66. See id. at 30-31.
67. See id. at 20.
68. See id.
69. See id. at 27. The Court did not want to prevent an officer from finding out whether the suspicious individual was armed with a potentially lethal weapon, see id. at 23, regardless of any probable cause for arrest. Justice Harlan asserted that this notion of an officer’s right to protect himself was the only acceptable rationale for the Court’s decision. See id. at 32 (Harlan, J., concurring). The importance of this safety rationale is seen in Sibron v. New York, 392 U.S. 40 (1968), where an officer’s search of a suspect was unlawful because the officer was seeking narcotics, and not acting out of concern for his own safety. See id. at 63-66. The Court in Terry did not address the propriety of investigative seizures for detention and/or interrogation on less than probable cause. See Terry, 392 U.S. at 19 n.16.
70. See Terry, 352 U.S. at 19 n.16.
71. See id.
72. See id. at 16-17.
73. 446 U.S. 544 (1980).
74. See Terry, 392 U.S. at 13.
75. See id. at 19 n.16.
76. Mendenhall, 446 U.S. at 547 & n.1.
driver's license, which bore different names. The defendant could not explain the discrepancy. Subsequently, the agents asked her to follow them to their office and she agreed. Once inside the DEA office, the defendant allegedly consented to a strip search.

The *Mendenhall* holding is unclear. Two justices found that the respondent had not been seized. Three justices assumed that the respondent had been seized, but because reasonable suspicion existed, the seizure was lawful. All five justices in the plurality agreed that the search was consensual. The Court thereby avoided characterizing Mendenhall’s confrontation with the authorities as either a stop or an encounter. This enabled the Court to circumvent the question of whether *Terry* should be expanded to include a search for evidence other than weapons.

This question may have been resolved in *Florida v. Royer.* Like *Mendenhall*, *Royer* was an airport “stop for questioning” case. The defendant satisfied the drug courier profile and drug enforcement agents

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77. Id. at 548.
78. Id.
79. Id.
80. Id. at 548-49.
81. The Court was sharply divided in *Mendenhall.* Justice Stewart announced the judgment of the Court and wrote an opinion that Justice Rehnquist joined. See id. at 546. Chief Justice Burger, Justice Blackmun and Justice Powell joined in all of the Stewart opinion except the section addressing the seizure issue. See id. at 560. Justice White’s dissent was joined by Justices Brennan, Marshall and Stevens. See id. at 566.

Justices Stewart and Rehnquist concluded that a fourth amendment seizure occurs when “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” See id. at 554 (Stewart, J.) (footnote omitted). Thus, a seizure could occur even when an individual did not try to leave if an officer displayed a weapon, made a threatening presence with other officers, physically touched the suspect or indicated through words or tone of voice that “compliance with the officer’s request might be compelled.” Id. (citations omitted). The two Justices concluded that Mendenhall had not been seized. See id. at 555 (Stewart, J.).

Because the lower courts did not consider that issue, Justice Powell’s concurring opinion did not discuss whether a seizure occurred. Id. at 560 (Powell, J., concurring). This omission by the district court and the court of appeals was due to the government’s earlier posture that a seizure took place but was justified by reasonable suspicion. See id. at 567-68 (White, J., dissenting). In a footnote, however, Justice Powell stated that the question of whether Mendenhall could have reasonably believed she was free to walk away from the agents was “extremely close.” See id. at 560 n.1 (Powell, J., concurring).

The dissenters objected to Justice Stewart’s discussion of the seizure issue for three reasons. See id. at 570-71 (White, J., dissenting). First, Justice White remarked that the Court usually does not reverse judgments on grounds not raised below. See id. at 570-71 & n.6 (White, J., dissenting). Second, the seizure issue raises factual questions that should be determined by the trial court. Id. at 570-71 (White, J., dissenting). The third objection is an outgrowth of the first two—the factual record before the Court might be inadequate because the seizure question had not been litigated previously. See id. at 570 (White, J., dissenting). Thus, it is unclear whether facts similar to those in *Mendenhall* would constitute a seizure for fourth amendment purposes.

82. The three Justices based this finding on all of the circumstances and not just on the “drug courier profile.” See id. at 565 & n.6 (Powell, J., concurring).
83. See id. at 558-59.
stopped him shortly after he had paid cash for a one-way plane ticket from Miami to New York City. The agents identified themselves, requested the defendant's ticket and driver's license, and then checked the name tags on his luggage. The officers observed discrepancies that the defendant could not adequately explain and Royer became visibly nervous. After the agents expressed their suspicion about his conduct, they asked him to follow them to a large storage room. Without verbally expressing his consent, Royer followed. Meanwhile, the government officers had retrieved the defendant's luggage without his approval. They asked Royer for permission to open his luggage. Royer handed the officers the keys to one suitcase, but could not remember the combination to the other suitcase. The agents forced open the suitcase, discovered drugs, and arrested the defendant.

In reversing the defendant's conviction, Justice White's plurality opinion noted that his detention exceeded the bounds of an investigative stop. Moreover, since the officers lacked probable cause, the detention and subsequent search were unlawful. Although the plurality opinion quoted Terry in its analysis of the scope of a warrantless search, it endorsed a "least intrusive means" test to evaluate the reasonableness of an investigative stop. Justice White wrote that "the investigative methods employed should be the least intrusive means reasonably available to ver-

85. Royer, 460 U.S. at 493-94 & n.1 (plurality opinion of White, J.).
86. Id. at 494 (plurality opinion of White, J.).
87. Id. (plurality opinion of White, J.).
88. Id. (plurality opinion of White, J.).
89. Id. (plurality opinion of White, J.).
90. Id. (plurality opinion of White, J.).
91. Id. (plurality opinion of White, J.).
92. Id. (plurality opinion of White, J.).
93. Id. at 494-95 (plurality opinion of White, J.).
94. See id. at 501 (plurality opinion of White, J.). Justice White, whose opinion was joined by Justices Marshall, Powell and Stevens, see id. at 491 (plurality opinion of White, J.), focused on several aspects of the confrontation in determining that Royer had been subjected to an impermissible "intrusion on his personal liberty" by the time he produced the key to his luggage, see id. at 502-03 (plurality opinion of White, J.). Royer went to a small room where the police accused him of carrying narcotics. Id. (plurality opinion of White, J.) The officers had retrieved Royer's checked luggage without his consent and held his plane ticket and identification. Id. at 503. (plurality opinion of White, J.) These facts served to distinguish Royer from Mendenhall. Id. at 503 n.9. (plurality opinion of White, J.) Justice Rehnquist, however, did not find the officers' conduct unreasonable, see id. at 520 (Rehnquist, J., dissenting), and characterized the plurality's opinion as "meandering," see id. at 519 (Rehnquist, J., dissenting); see also id. at 520 (Rehnquist, J., dissenting) ("The opinion ... betrays a mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on, than to those who are seeking to administer a system of justice whose twin purposes are the conviction of the guilty and the vindication of the innocent.").
95. See id. at 507-08 (plurality opinion of White, J.).
96. "The scope of a search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible." Id. at 500 (plurality opinion of White, J.) (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968) (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring))).
ify or dispel the officer's suspicion in a short period of time." Thus, Royer's "least intrusive means" test arguably expands Terry stops by permitting a limited search for evidence other than weapons.98

B. Border and Reverse Border Search Exceptions

The border search exception is actually an exception to the fourth amendment itself and not to the amendment's probable cause or warrant requirements.99 Created by the First Congress when it gave the government the right to stop and search anyone or anything entering the country,100 the exception is based on the United States' right as a sovereign to protect itself.101 One conducting the search, however, must "proceed in a reasonable manner."102 The reasonableness of the search depends on

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97. Royer, 460 U.S. at 500 (plurality opinion of White, J.). Justice White also stated: The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Id. (plurality opinion of White, J.)

98. Justice White acknowledged that there could be no clear test for determining when the limits of an investigative stop have been exceeded. Id. at 506 (plurality opinion of White, J.). He did, however, observe that the officers could have "investigate[d] the contents of Royer's bags in a more expeditious way." Id. at 505 (plurality opinion of White, J.). It was suggested that the use of trained dogs to detect the presence of drugs in Royer's luggage would have been acceptable. See id. at 505-06 (plurality opinion of White, J.). This might be seen as an expansion beyond the weapons search upheld in Terry. In addition, the plurality hinted that "temporary detention for questioning on less than probable cause" would be permitted "where the public interest involved is the suppression of illegal transactions in drugs. . . ." See id. at 498-99 (plurality opinion of White, J.); see also United States v. Brigoni-Ponce, 422 U.S. 873, 881-82 (1975) (temporary detention for limited questioning was constitutional where the government's interest was in upholding the immigration laws). Further support for a broad reading of Terry can be found in United States v. Place, 462 U.S. 696, 709 & n.9 (1983), where the Court noted that an investigative seizure of personal property could be justified under Terry.

99. This broad view of the exception is historically justified. Two months before proposing the Bill of Rights, the First Congress enacted this country's first customs statute. United States v. Ramsey, 431 U.S. 606, 616 (1977); see Act of July 31, 1789, ch. 5, § 24 (1789). Based on the language contained in § 24, the Court determined that border searches were not considered unreasonable by the First Congress and "not embraced within the prohibition of the amendment." See Ramsey, 431 U.S. at 617 (emphasis in original) (quoting Boyd v. United States, 116 U.S. 616, 623 (1886)).


101. Carroll v. United States, 267 U.S. 132, 154 (1925) ("national self protection reasonably requir[es] one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in").

102. United States v. Des Jardins, 747 F.2d 499, 504 (9th Cir. 1984), modified on other
the type of search involved and on the government's conduct. As the degree of intrusion increases so does the quantum of proof needed to justify the search.

Customs searches involve different degrees of intrusiveness, ranging from routine searches of luggage and patdown searches to strip searches and body cavity searches. In considering the reasonableness of a search on any of these levels, various circuit courts have ruled that the more intrusive the search, the more suspicion that must be demonstrated for its justification.

A routine border search does not require any suspicion and may include inspecting luggage and emptying pockets. Here, the balance of interests between law enforcement and individual rights tips decidedly in favor of the government, whose "interest in controlling 'who and what may enter the country' outweighs the privacy interests of those who choose to travel to the United States." Patdown searches generally are considered more intrusive than routine searches and require what is often described as mere or minimal suspicion. Strip searches require

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1. United States v. Guadalupe-Garza, 421 F.2d 876, 878-79 (9th Cir. 1970) (strip search of person entering the United States unreasonable absent "real suspicion").

2. See United States v. Des Jardins, 747 F.2d 499, 504 (9th Cir. 1984), modified on other grounds, 772 F.2d 578 (9th Cir. 1985); United States v. Himmelwright, 551 F.2d 991, 994 (5th Cir.), cert. denied, 434 U.S. 902 (1977); United States v. Guadalupe-Garza, 421 F.2d 876, 878-79 (9th Cir. 1970).

3. See supra note 103, infra note 114 and accompanying text.

4. See United States v. Des Jardins, 747 F.2d 499, 504-05 (9th Cir. 1984), modified on other grounds, 772 F.2d 578 (9th Cir. 1985).


6. United States v. Des Jardins, 747 F.2d 499, 504 (9th Cir. 1984), modified on other grounds, 772 F.2d 578 (9th Cir. 1985); United States v. Sandler, 644 F.2d 1163, 1169 (5th Cir. 1981) (en banc); United States v. Nieves, 609 F.2d 642, 646 (2d Cir. 1979), cert. denied, 444 U.S. 875 (1979); United States v. Asbury, 586 F.2d 973, 975 (2d Cir. 1978).


9. See United States v. Des Jardins, 747 F.2d 499, 504 (9th Cir. 1984), modified on other grounds, 772 F.2d 578 (9th Cir. 1985); United States v. Sandler, 644 F.2d 1163, 1166 (5th Cir. 1981) (en banc); United States v. Grayson, 597 F.2d 1225, 1228 (9th Cir.), cert. denied, 444 U.S. 875 (1979); United States v. Carter, 563 F.2d 1360, 1361 (9th Cir. 1977).

Sitting en banc in Sandler, the Fifth Circuit lumped together a patdown search and removal of outer garments, hat or shoe, as all part of a "routine examination" of a person's effects. See Sandler, 644 F.2d at 1169. The Fifth Circuit reasoned that all of these would require "mere" or "unsupported" suspicion. Id. at 1167. This approach implies that an examination of a person—a patdown—and his effects are equally intrusive. The dissent properly noted that the holding, which "confuses the search of things with the search of the person," serves to diminish "the rights of human beings . . . to those of luggage." Id. at 1170 (Hatchett, J., dissenting). Even a special concurrence disagreed
reasonable or real suspicion. Finally, body cavity searches, which involve the highest degree of intrusion, require a "clear indication" of smuggling. A recent Supreme Court decision, however, indicates that reasonable suspicion might be the sufficient standard of proof in any nonroutine border search.

Traditionally, the border search exception applied only to individuals entering the United States. In recent years, however, a "reverse border search" exception has been judicially created and upheld as a variant

with extending the standard of "no justification necessary" to include a patdown. See id. at 1169-70 (Anderson, J., concurring); see also United States v. Dorsey, 641 F.2d 1213, 1218 (7th Cir. 1981) (while declining to label the amount of suspicion required to justify a patdown search, court noted that "the intrusions on privacy and indignities involved in a patdown search exceed those of a search of the contents of a purse or wallet or of a request to empty pockets").


112. The "real suspicion" test was more explicitly stated by the Ninth Circuit in United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970):

'Real suspicion' justifying the initiation of a strip search is subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law.

The objective, articulable facts must bear some reasonable relationship to suspicion that something is concealed on the body of the person to be searched; otherwise, the scope of the search is not related to the justification for its initiation, as it must be to meet the reasonableness standard of the Fourth Amendment.

Simple good faith on the part of a customs official in entertaining subjective suspicion unsupported by objective facts does not convert "mere suspicion" into real suspicion.

Id. at 879 (citations omitted). This definition appears to draw on the wording of another fourth amendment "exception" case—Terry v. Ohio, 392 U.S. 1 (1968)—which requires "specific and articulable facts" to justify a warrantless "stop and frisk." See id. at 21. The Court rejected a standard based on the mere good faith of the police, and instead required an objective standard. See id. at 21-22.

113. United States v. Castle, 409 F.2d 1347, 1348 (9th Cir.) (per curiam), cert. denied, 396 U.S. 975 (1969); Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967). The facts need not be the "equivalent of 'probable cause' necessary for an arrest and search at a place other than a border." Rivas, 368 F.2d at 710. See generally 3 W. LaFave, supra note 64, § 10.5(c), at 286-95 (discussing application of the clear indication test in various factual settings).

114. In United States v. Montoya de Hernandez, 105 S. Ct. 3304 (1985), 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." See id. at 3311. Although the Court stressed that it was not deciding what level of suspicion would be needed for any other type of nonroutine border search, see id. at 3311 n.4, the Court appeared reluctant to create any "third verbal standard in addition to 'reasonable suspicion' and 'probable cause.'" See id. at 3311.

border search. The basis for such decisions, however, is suspect. This new exception originated in California Bankers Association v. Shultz, where the issue before the Supreme Court was the constitutionality of the Bank Secrecy Act. In California Bankers the Court stressed the government's strong interest in commercial transactions "across national boundaries." It observed that "if those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment, we see no reason to invalidate the [regulation at issue] here." Although the Court in California Bankers cited no case or statute in support of that proposition and engaged in no analysis of the policies behind the border search exception, this dictum has been quoted in support of the reverse border search exception and is sometimes quoted as a direct statement, without the hypothetical "if."

It was not until 1976 that a circuit court actually wrestled with the validity of the reverse border search exception. United States v. Stanley involved the search of a boat suspected of carrying marijuana out of the United States. The Ninth Circuit reversed the district court and upheld the search by drawing an analogy to the traditional border search exception. The court concluded that the governmental interests in export and import searches were similar. The court noted that both incoming and outgoing border-crossing searches have several features in common: the government's interest in restricting illicit international drug trade; the likelihood that drugs will be smuggled at the border; the difficulty in detecting drug smuggling; individuals crossing the border are on notice that their privacy may be invaded, and people searched at the border belong to a morally neutral class.

The first three common features address the government's interest in

116. See infra notes 123-30 and accompanying text.
119. See California Bankers, 416 U.S. at 62.
120. See id. at 63 (emphasis added).
121. See id.
122. See, e.g., United States v. Udofot, 711 F.2d 831, 840 (8th Cir.), cert. denied, 464 U.S. 896 (1983); United States v. Ajlouny, 629 F.2d 830, 834 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981); see also United States v. Swarovski, 592 F.2d 131, 133 (2d Cir. 1979) (citing, but not quoting, California Bankers). Ironically, the first court to extend the border search exception to those exiting the country did so without mentioning California Bankers. See United States v. Stanley, 545 F.2d 661, 665-67 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978).
123. 545 F.2d 661 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978).
124. See id. at 663-64.
125. See id. at 667.
126. See id.
127. See id.
128. See id.
129. See id.
130. See id.
controlling illicit drug trafficking. The fourth feature, notice, is equally valid as to those entering or leaving the country. The fifth feature, that a person will be searched only as a member of a morally neutral class, is questionable. Although one could argue that individuals entering the country belong to a morally neutral class, those actually searched on departure are frequently those who satisfy a predetermined "drug courier profile."

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

C. 31 U.S.C. § 5317

Possibly aware of the broad discretion customs agents possess under

131. Congress had, in fact, made controlled substances illegal. See 21 U.S.C. § 955 (1982). It is unlawful for any person to bring or possess on board any vessel . . . arriving in or departing from the United States or the customs territory of the United States, a controlled substance . . . unless such substance or drug is a part of the cargo entered in the manifest or part of the official supplies of the vessel, aircraft or vehicle.

Id.


133. See United States v. Mendenhall, 446 U.S. 544, 547 & n.1 (1980); United States v. Saperstein, 723 F.2d 1221, 1224 (6th Cir. 1983).

134. See Beyond the Border, supra note 100, at 763-77. In United States v. Des Jardins, 747 F.2d 499, 503-04 (9th Cir. 1984), modified on other grounds, 772 F.2d 578 (9th Cir. 1985), a panel of the Ninth Circuit sharply criticized the reverse border search exception, but still upheld its application due to the precedents established in Stanley and United States v. Duncan, 693 F.2d 971, 977 (9th Cir. 1982), cert. denied, 461 U.S. 961 (1983). The Des Jardins panel noted that suspicionless searches of exiting individuals lacked historical justification because neither the first customs statute nor its legislative history discussed exit searches. See Des Jardins, 747 F.2d at 503. The court found that exits from the United States did not affect the government's interest in preventing narcotics smuggling. See id. at 503-04. In addition, exit searches were considered stigmatizing, unlike entrance searches. See id. Application of the reverse border search exception has not been limited to the Ninth Circuit. See United States v. Udofot, 711 F.2d 831, 839-40 (8th Cir.), cert. denied, 464 U.S. 896 (1983); United States v. Ajlouny, 629 F.2d 830, 834 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981); United States v. Swarovski, 592 F.2d 131, 133 (2d Cir. 1979).

135. See supra note 134.


137. See supra note 107.
the border search and reverse border search exceptions, Congress incorporated a warrant requirement into the Currency and Foreign Transactions Reporting Act.138 A warrant to search an individual entering or leaving the country suspected of violating section 5316 could only be obtained on a showing of probable cause.139 However, the statute purportedly did not affect the government's authority to conduct searches under existing law.140 This raised the question of whether the border search and reverse border search exceptions constituted other authority to conduct searches of travelers.

In United States v. Chemaly, the Eleventh Circuit held that the border search exceptions would not relieve the government of the obligation to obtain a search warrant based on probable cause.141 Chemaly, the only case to address this issue, was based on a reading of both the legislative history143 and the statute,144 and provided a reasonable restraint on law enforcement officials.

Less than one month after the Chemaly decision, Congress amended the statute and effectively emasculated the warrant requirement.145 Customs officials now have the broad authority to stop and search travelers without a warrant if there is only "reasonable cause" to believe that section 5316 is being violated.146 Although this standard provides somewhat greater protection for travelers than the border search and reverse border search exceptions,147 it makes invalid assumptions about those exceptions148 and cannot be justified under Terry.149

139. See id.
140. See id.
141. See United States v. Chemaly, 741 F.2d 1346, 1352 (11th Cir.), rehe'g granted, 741 F.2d 1363 (11th Cir. 1984) (en banc), order granting rehe'g vacated and panel opinion reinstated, 764 F.2d 747 (11th Cir. 1985) (en banc).
142. See Chemaly, 741 F.2d at 1351.
143. See id. at 1350. The Senate Report stated that the warrant's purpose "is to avoid an excessive burden on persons entering or leaving the country." S. Rep. No. 1139, 91st Cong., 2d Sess. 7 (1970). The supplemental statements of Senators Bennett, Tower, Goodell and Packwood underscore this view. See id. at 19.
144. See Chemaly, 741 F.2d at 1351 ("To construe the statute as suggested by the government would render it meaningless.").
145. Chemaly was decided on September 20, 1984, see Chemaly, 741 F.2d at 1346, and § 5317(b) was adopted on October 12, 1984, see Pub. L. No. 98-473, § 901(a), 98 Stat. 2135 (1984) (codified as amended at 31 U.S.C.A. § 5317(b) (West Supp. 1985).
147. It should be remembered that routine border searches, and routine reverse border searches in those courts that recognize that exception, do not require any suspicion. See supra notes 107-08, 136-37 and accompanying text. Section 5317(b) requires "reasonable cause" before the government may conduct a search. See 31 U.S.C.A. § 5317(b) (West Supp. 1985).
148. See infra notes 169-72 and accompanying text.
149. See infra notes 173-75 and accompanying text.
III. FOURTH AMENDMENT REPERCUSSIONS

A. The Currency and Foreign Transactions Reporting Act

1. 31 U.S.C. §§ 5316 and 5317

Because of the fourth amendment jurisprudence described above, courts can markedly favor the government in section 5316 prosecutions. To illustrate the statute's use, consider a typical money-laundering investigation. A passenger checks his luggage and gets a boarding pass. As he is about to leave the country, a customs service agent approaches him. The agent asks the passenger if he is carrying $10,000 or more of currency and whether the individual has filed a report pursuant to 31 U.S.C. § 5316.

Under the stop and frisk exception enunciated in *Terry v. Ohio*, the agent can approach a passenger politely and question him. This consensual police-public interaction is classified as an encounter. An "encounter," it must be remembered, falls outside the fourth amendment and does not require that the agent satisfy any standard of proof. The "encounter" may rise to a "stop" if the passenger stirs reasonable suspicion in the mind of the agent that criminal activity is afoot and that the traveler is armed. For example, reasonable suspicion could arise if the person approached becomes nervous or gives an evasive answer to the agent's questions. Once reasonable suspicion is present, the agent can momentarily detain the passenger and conduct a limited search for weapons if the agent reasonably believes he or others are in danger. Should reasonable suspicion escalate to probable cause, the agent can arrest the passenger and conduct a search incident to a lawful arrest. If reasonable suspicion does not rise to the level of probable cause, the agent must release the person because there would be no basis for a prolonged detention.

In the scenario outlined, no reason exists for the agent to believe that his safety is threatened. The passenger would probably be in the departure lounge. Ordinarily, he would have had to pass through an airport magnetometer and security check and is unlikely to be armed. Arguably, the passenger should not be searched. However, assuming that despite airport security the agent reasonably believes his safety is endangered,
then Terry would permit the agent to pat down the suspect for weapons.\textsuperscript{158} Although one might argue that the Royer plurality,\textsuperscript{159} and the three concurring justices in Mendenhall,\textsuperscript{160} would allow the agent to search the suspect for money, a proper reading of Terry forecloses this option. Terry rests on the notion that an officer should be allowed to protect himself during an investigative stop.\textsuperscript{161} Clearly, a search for money would be merely a search for evidence and thus beyond the policy of officer safety.

The scenario just described may also be analyzed under the reverse border search exception to the fourth amendment.\textsuperscript{162} Under that exception, law enforcement officers have wide discretion to search a departing passenger.\textsuperscript{163} Therefore, a customs service agent could routinely search the luggage of anyone leaving the country. Under the reverse border search exception, no standard of proof is required for an ordinary search\textsuperscript{164} and only minimal suspicion is necessary to permit a patdown search.\textsuperscript{165} Only reasonable suspicion is required for a full strip search.\textsuperscript{166} Hence, the standard of proof necessary to permit the minimal intrusion of a stop and frisk on the street would enable a law enforcement officer to strip search an individual about to leave the country.\textsuperscript{167}

Section 5317, however, provides the Currency and Foreign Transactions Reporting Act with its own search and seizure provisions. Prior to the addition of section 5317(b), the fourth amendment rights of travelers were adequately protected by the warrant and probable cause requirements of section 5317(a). Section 5317(b) signals a willingness on the part of Congress to retreat from meaningful fourth amendment protections.

The Senate Report justifies section 5317(b) by observing that

[i]t is the on the spot authority of the Customs Service would significantly enhance the effectiveness in monitoring and apprehending persons reasonably believed to be violating the currency reporting provisions of the law. The Committee is fully convinced that such authority is not only needed, but constitutional, under the line of cases holding that warrantless "border searches" are reasonable even without probable cause under the Fourth Amendment.\textsuperscript{168}

\begin{footnotes}
\item[158] See id. at 27.
\item[161] See Terry v. Ohio, 392 U.S. 1, 30 (1968).
\item[162] See supra notes 99-137 and accompanying text.
\item[163] See supra notes 99-113 and accompanying text.
\item[164] See supra note 107.
\item[165] See supra note 110.
\item[166] See supra notes 111, 114 and accompanying text.
\item[167] See supra notes 64-72, 99-137 and accompanying text.
\end{footnotes}
The statute expressly includes reverse border searches. Yet the Senate Report did not address a critical difference between the border search and reverse border search exceptions. Congress relied on the questionable dictum in California Bankers and ignored the fact that the border search exception is based on the sovereign’s right to control who or what may enter the country—not who or what may leave the country. Thus, although section 5317(b) provides greater fourth amendment protections to those entering the country, it validates a judicial creation—the reverse border search exception—marked by questionable underpinnings.

Of even greater concern is that section 5317(b) ignores the clear policy behind the Supreme Court’s holding in Terry v. Ohio. Terry permits an officer to stop and frisk individuals based on less than probable cause in order to ensure the officer’s safety while he conducts an investigation. In addition, Terry has never been expanded to include a search for evidence. Yet this is precisely what Congress has done by allowing customs officers to stop and search individuals for money as they leave the country. Thus, while section 5317(b) is a significant addition to the drug enforcement arsenal, it brushes aside fourth amendment protections.

2. 31 U.S.C. § 5313

In California Bankers the plaintiffs challenged the constitutionality of 31 U.S.C. § 5313. One argument advanced was that the domestic reporting requirements violate the fourth amendment rights of both the banks and the depositors. The Court addressed the issue by analyzing

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171. See supra notes 100-01 and accompanying text.
172. See supra note 147.
174. See id. at 30-31.
176. 416 U.S. 21, 41-43 (1974). The plaintiffs, the California Bankers Association, the Security National Bank and the American Civil Liberties Union, raised several constitutional objections, all of which the Court rejected. The statute’s recordkeeping requirements did not violate the bank plaintiffs’ rights to due process. See id. at 45-49. Nor did the recordkeeping provisions violate the fourth amendment rights of any plaintiff. Id. at 52. The Court further found no violation of the right against compulsory self-incrimination in the recordkeeping provisions. See id. at 55.
177. The Court noted that the domestic reporting provisions only applied to banks and financial institutions to the extent the provisions were implemented by the regulations. See id. at 58. The depositor plaintiffs nonetheless alleged that their fourth amendment rights were implicated. See id. at 67. See infra note 180 and accompanying text.
178. The plaintiffs also argued that the foreign reporting requirements violated their fourth amendment rights. See id. at 59. Observing that “reporting requirements are by no means per se violations of the Fourth Amendment,” id. at 59-60, the Court analogized the requirements at issue with the tax collection process, see id. at 60. The Court upheld the regulations as being “sufficiently tailored” to require reporting of only those transac-
the broad language of section 5313 as limited by the strict requirements of the statute's regulation. Although the Court held that the reporting of domestic transactions by financial institutions did not violate a bank's fourth amendment rights, the rights of the depositors were not discussed. This issue was dismissed for lack of standing because no individual depositor could show that he or she had actually transacted more than $10,000—the threshold amount for the reporting requirements pursuant to the regulations.

Subsequently, in United States v. Miller, the Court, addressing the question expressly reserved in California Bankers, held that there was no expectation of privacy in deposited checks. The Court remarked that checks are negotiable instruments used in commercial transactions and not confidential communications. The Court concluded that the depositors lacked a fourth amendment interest. In addition, the Court enunciated an “assumption of risk” theory which was later employed in Smith v. Maryland. Thus, a depositor who transacts more than $10,000 with a financial institution cannot challenge 31 U.S.C. § 5313 under the fourth amendment because he lacks a legitimate expectation of privacy in a check.

In Smith v. Maryland, the Court addressed the question of “whether...
the installation and use of a pen register constitutes a 'search' for fourth amendment purposes.\textsuperscript{189} The Court held that there was no legitimate expectation of privacy in phone numbers.\textsuperscript{190} The Court placed the telephone user in the same category as the bank depositor in \textit{Miller} and relied on an "assumption of risk" theory.\textsuperscript{191} In essence, the theory provides that where an individual uses a bank or a telephone, he voluntarily turns over information to third parties and therefore assumes the risk that such information will be turned over to the government.\textsuperscript{192} \textit{Smith}, therefore, gives the government tremendous access to personal and financial data.\textsuperscript{193}

This decision and its assumption of risk theory have been criticized. Professor Yale Kamisar has observed:

[I]t is beginning to look as if the only way someone living in our society can avoid 'assuming the risk' that various intermediary institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline characteristic of life under totalitarian regimes. . . . We do not have a free society if a citizen is put to the choice, to cite but three examples, of, one, foregoing use of the phone or having the police record all the numbers he dials, or, two, foregoing use of the postal service or having the police collect the names and addresses of all his correspondents, or, three, foregoing use of banks or providing the police with access to an enormous quantity of highly personal data. . . . The sky is the limit, aside from whatever 'self-discipline' the police or other agency may choose to exercise.\textsuperscript{194}

Justice Marshall's dissent in \textit{Smith} is no less powerful than the critique by Professor Kamisar. Justice Marshall attacked the assumption of risk theory for compelling those who disclose certain facts to banks or telephone companies for limited purposes to assume that the information will be released to others for virtually any other purpose.\textsuperscript{195} He concluded: "[W]hether privacy expectations are legitimate within the meaning of \textit{Katz} depends not on the risks an individual can be presumed to

\begin{itemize}
  \item \textsuperscript{189} \textit{Id.} at 736 (footnote omitted). A pen register is a device that mechanically records numbers dialed on a telephone. \textit{Id.} at 736 n.1.
  \item \textsuperscript{190} \textit{See id.} at 742. The Court followed the approach of \textit{Katz} v. United States, 389 U.S. 347, 351-53 (1967), to determine whether an individual may invoke the protection of the fourth amendment. \textit{See Smith}, 442 U.S. at 739-41.
  \item \textsuperscript{191} \textit{See Smith}, 442 U.S. at 744.
  \item \textsuperscript{192} \textit{Id.}
  \item \textsuperscript{194} \textit{Id.}
  \item \textsuperscript{195} \textit{Smith}, 442 U.S. at 749 (Marshall, J., dissenting); \textit{see also} Note, \textit{Reasonable Expectations of Privacy in Bank Records: A Reappraisal of United States v. Miller and Bank Depositor Privacy Rights}, 72 J. Crim. L. & Criminology 243, 256 (1981) ("Depositors should not be forced to assume the risk of record disclosure because the danger in using risk analysis is its unlimited scope. Only a narrow assumption of the risk exception to fourth amendment coverage will adequately protect defendants in phone booths, office areas, and common areas of dwellings.").
\end{itemize}
accept when imparting information to third parties, but on the risks he
should be forced to assume in a free and open society."\textsuperscript{196}

To protect an individual's privacy in his domestic banking transactions
and to redress the balance between government interests and individual
rights, courts should give standing to individuals to challenge the consti-
tutionality of 31 U.S.C. § 5313 under the fourth amendment. However,
to accomplish such a result, the assumption of risk theory must be re-
jected and \textit{Miller} must be overruled.

In his \textit{Smith} dissent, Justice Marshall presents a common sense and
compelling rationale for rejecting the assumption of the risk theory. The
theory implies that freedom of choice is present.\textsuperscript{197} In modern society,
however, the use of telephones and negotiable instruments are a virtual
necessity.\textsuperscript{198} In addition, the assumption of the risk approach theoreti-
cally enables the government to determine the fourth amendment's
scope.\textsuperscript{199} As Justice Marshall observed, the government could announce
that it would randomly open mail or listen to telephone
\textsuperscript{200} The public would then be on notice of the risk one would take in using
the mail or the telephone\textsuperscript{201} and significant fourth amendment protec-
tions would be emasculated.

B. 18 U.S.C. § 1001

Section 1001, the fraudulent statements statute, does not directly raise
fourth amendment issues. Indirectly, however, it plays a role in creating
reasonable suspicion or probable cause in the minds of law enforcement
officers. If a customs service agent has a reliable tip that a passenger is
carrying more than $10,000, he would likely approach that passenger
and ask whether he is transporting such amounts. Should the passenger
answer "no," the law enforcement officer still may find that he has rea-
sonable suspicion to believe that the individual has, or is about to engage
in criminal activity. Even if the officer merely had reasonable suspicion
regarding the particular passenger before the questions were asked, a
negative answer by the passenger still might create probable cause. Here,
reasonable suspicion becomes probable cause despite the individual's be-
behavior. In essence, reasonable suspicion is the basis of probable cause,

\textsuperscript{196} \textit{Smith}, 442 U.S. at 750.
\textsuperscript{197} \textit{See id.} at 749.
\textsuperscript{198} \textit{See id.} at 750.
\textsuperscript{199} \textit{Id.}
\textsuperscript{200} \textit{See id.}
\textsuperscript{201} \textit{Id. The Smith majority acknowledged these dangers and indicated that "where
an individual's subjective expectation had been 'conditioned' by influences alien to well-
recognized Fourth Amendment freedoms, those subjective expectations obviously could
play no meaningful role in ascertaining what the scope of Fourth Amendment protection
was." \textit{Id.} at 741 n.5. Although the Court stated that in such circumstances, a "norma-
tive inquiry" could be made into the existence of a "legitimate expectation of privacy," it
is unclear how extreme the government's conduct would have to be to trigger this exami-
nation. \textit{See id.} at 740-41 n.5. This point was noted by Justice Marshall. \textit{Id.} at 750
(Marshall, J., dissenting).
eliminating the distinctions necessary to protect fourth amendment rights of the public and potential defendants.

IV. FIFTH AMENDMENT RIGHTS OF DEFENDANTS

The fifth amendment provides that "no person shall be compelled in any criminal case to be a witness against himself."\textsuperscript{202} It protects both the innocent and the guilty\textsuperscript{203} and is designed to preserve our adversarial system of justice.\textsuperscript{204}

The general rule is that the fifth amendment privilege is not self-executing.\textsuperscript{205} Thus, the privilege must be asserted when self-incrimination is threatened.\textsuperscript{206} If a person freely chooses to answer, the statement is not compelled and is deemed voluntary.\textsuperscript{207} There are three exceptions to the general rule of a timely assertion of the fifth amendment privilege: when an individual is subject to custodial interrogation;\textsuperscript{208} when a person is threatened with a penalty if he asserts the privilege;\textsuperscript{209} and in the context of certain self-reporting statutes, where claiming the privilege is self-incriminating in and of itself.\textsuperscript{210} Based on two Supreme Court decisions,\textsuperscript{211} an individual's silence in the face of a self-reporting statute is a valid fifth amendment claim if: the statute requires disclosure of information that may create a real and substantial risk of self-incrimination;\textsuperscript{212} the statute is aimed at an area permeated with criminal activity and at a highly suspect group;\textsuperscript{213} and the intent of the legislature in enacting the statute was prosecutorial, not regulatory.\textsuperscript{214}

\textsuperscript{202} U.S. Const. amend. V.
\textsuperscript{203} Marchetti v. United States, 390 U.S. 39, 51 (1968).
\textsuperscript{206} See id.
\textsuperscript{207} See United States v. Monia, 317 U.S. 424, 427 (1943).
\textsuperscript{208} Minnesota v. Murphy, 465 U.S. 420, 429 (1984). Two reasons have been advanced by the Court to justify this exception. Officers conducting custodial interrogation usually are "acutely aware of the potentially incriminatory nature of the disclosure sought." See Garner v. United States, 424 U.S. 648, 657 (1976). In addition, a custodial situation involves "inherently compelling pressures" that whittle away at one's resistance and induce one to speak when he otherwise would not do so. Miranda v. Arizona, 384 U.S. 436, 467 (1966).
\textsuperscript{209} Minnesota v. Murphy, 465 U.S. 420, 434 (1984); see, e.g., Lefkowitz v. Turley, 414 U.S. 70, 82-83 (1973) (state demanded that individuals waive immunity and testify under threat of being removed as public contractors); Uniformed Sanitation Men v. Commissioner of Sanitation, 392 U.S. 280, 283-84 (1968) (employees told that failure to sign waiver of immunity would lead to dismissal); Gardner v. Broderick, 392 U.S. 273, 278-79 (1968) (police officer who refused to waive his right against self-incrimination discharged for not testifying before a grand jury); Garrity v. New Jersey, 385 U.S. 493, 497-98 (1967) (privilege not waived when individual responds to questions after being threatened with discharge from employment if he exercised the privilege).
\textsuperscript{211} See infra notes 215-16 and accompanying text.
\textsuperscript{212} Marchetti v. United States, 390 U.S. 39, 53-54 (1968).
\textsuperscript{214} Marchetti, 390 U.S. at 58-59. This third prong of the Marchetti-Grosso test had its genesis in the required records doctrine. In essence, that doctrine provided that the
The self-reporting statute exception has its roots in *Marchetti v. United States* and *Grosso v. United States*. In those cases, petitioners were gamblers who refused to comply with federal tax statutes that imposed excise and occupational taxes on wagering activities and required the petitioners to supply the Internal Revenue Service with detailed information about their gambling activities. Although petitioners did not claim the fifth amendment privilege, they failed to comply with the statutes. The Court held that the petitioners could not be prosecuted for failure to comply with the statute. The Court found that the statute was aimed at an area permeated by crime and at an inherently suspect group. Moreover, the information sought by the IRS was used to fight illegal gambling. Either reporting or claiming the privilege would identify the petitioners as gamblers, thus creating a significant risk of self-incrimination. As a result, petitioners were foreclosed from any possibility of free choice between answering or claiming the privilege. Although there was precedent that the petitioners had a choice—the choice not to gamble—the Court rejected that argument and stated: "The question is not whether the petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence..."

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220. *See Grosso*, 390 U.S. at 64; *Marchetti*, 390 U.S. at 47.
221. *Grosso*, 390 U.S. at 66; *Marchetti*, 390 U.S. at 47. The Court noted that the IRS had indicated it makes the names and addresses of those who have paid the wagering taxes available to law enforcement authorities. *See Marchetti*, 390 U.S. at 48. It is possible that the prosecutions would have been constitutional had "Congress imposed explicit restrictions upon the use of information obtained as a consequence of paying the tax." *Grosso*, 390 U.S. at 66.
222. *See Grosso*, 390 U.S. at 66-67; *Marchetti*, 390 U.S. at 48-49, 53. The standard used for determining whether the privilege will apply is whether the claimant faces a real and substantial chance of incrimination. *See Marchetti*, 390 U.S. at 53. The Court was unambiguous in its view of the gambling statute's impact on the petitioners. Incrimination was an "unmistakable consequence," *see Marchetti*, 390 U.S. at 49, and an "unavoidable[.]" result, *see Grosso*, 390 U.S. at 67, of complying with the statute.
223. In *Lewis v. United States*, 348 U.S. 419 (1955), the Court held that the fifth amendment was not violated by registration and occupational tax requirements because a gambler may freely choose between gambling and his constitutional rights. *See id.* at 422-23. The *Marchetti* Court rejected that rationale. *See Marchetti*, 390 U.S. at 51.
against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted."

In *Haynes v. United States*, the Court reversed the petitioner's conviction for violating a federal statute that required the registration of unlawful firearms. Adhering to the analysis in *Marchetti and Grosso*, the Court held that the petitioner could not be prosecuted for failure to comply with the statute. Because the statute was directed at an inherently suspect group and did not address an area that was essentially regulatory and non-criminal, then either reporting, or claiming, the privilege would create a substantial risk of prosecution. Consequently, the petitioner did not possess a free choice between answering and claiming the privilege.

The Supreme Court and circuit courts, however, have apparently been unwilling to expand or even maintain the scope of the self-reporting statute exception. For example, in *California v. Byers*, a divided Supreme Court upheld a California statute that required drivers involved in accidents to report their names and addresses to the police. The plurality held that the statute was directed at the general public and that the purpose of the statute was essentially regulatory.

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226. See id. at 100-01.
227. See supra notes 215-24 and accompanying text.
228. See *Haynes*, 390 U.S. at 100-01.
229. Id. at 96.
230. Id. at 98-99. Interestingly, the Court did not employ the legislative intent factor used in *Marchetti* and *Grosso*. See supra note 214 and accompanying text.
231. Id. at 97.
233. Justice Burger's plurality opinion was joined by Justices Stewart, White and Blackmun. See id. at 425. Justice Harlan issued an opinion concurring in the judgment. See id. at 434. Justice Black's dissent was joined by Justices Douglas and Brennan. Id. at 459. Justice Brennan wrote his own dissent as well, in which Justices Douglas and Marshall joined. Id. at 464.
234. Id. at 426 (plurality opinion of Burger, C.J.). This case was particularly important because statutes similar to the one at issue were in effect in the other 49 states and in the District of Columbia. See id. at 425 (plurality opinion of Burger, C.J.).
235. See id. at 430-31 (plurality opinion of Burger, C.J.). Chief Justice Burger noted that being involved in a traffic accident did not usually lead to criminal liability. See id. at 431 (plurality opinion of Burger, C.J.). In *Byers*, Justice Harlan read *Marchetti* and *Grosso* very narrowly, stating that those cases provided a one prong test for the self-reporting statute exception. See id. at 437 (Harlan, J., concurring in judgment). Harlan's view was that under *Marchetti* and *Grosso*, the privilege's applicability turned exclusively on the individual's belief that a real risk of self-incrimination existed. See id. (Harlan, J., concurring in judgment) He asserted, however, that the presence of this risk is not a "sufficient predicate" for extending the privilege to regulatory enactments. See id. at 439 (Harlan, J., concurring in judgment).

Thus, under Harlan's approach, the self-reporting statute exception is not limited to statutes that are prosecutorial. When a regulatory scheme is involved, Harlan would balance "the assertedly non-criminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures required." See id. at 454. When these factors were considered in *Byers*,
States, the Court affirmed the petitioner's conviction for conspiring to "fix" sporting contests and to assist in the placing of bets and the distribution of the illegal proceeds. The government had introduced into evidence the petitioner's federal tax return where he described himself as a professional gambler. In distinguishing this case from Marchetti, the Court found that unlike the tax forms in Marchetti, federal income tax returns are not directed at an inherently suspect group. In addition, the Court observed that Garner had the free choice to refuse to answer the relevant question on the tax form. Thus, Garner's tax return could have been offered as evidence at trial without violating the petitioner's fifth amendment privilege.

In Selective Service System v. Minnesota Public Interest Research Group, the Court upheld section 1113 of the Department of Defense Authorization Act of 1983, which denies federal financial aid, under Title IV of the Higher Education Act of 1965, to male students between 18 and 26 who fail to register for the draft. However, the regulations issued pursuant to section 1113 allowed late registrants to receive Title IV benefits. Those required to register were obligated to do so within thirty days of their eighteenth birthday. A willful failure to register within that period is a criminal offense under 50 U.S.C. § 462(a).

The petitioners argued that section 1113 "violates the Fifth Amendment by compelling nonregistrants to acknowledge that they have failed to register timely when confronted with certifying to their schools that they have complied with the registration law." The Court, however, held that there was no compulsion because petitioners had a choice—the choice not to seek financial aid. This is similar to the rationale that Marchetti explicitly had rejected. However, the Court was able to avoid engag-

use of the privilege was not permitted. See id. at 458. Justice Black rejected any balancing test because it would "inevitably [lead to] . . . the dilution of constitutional guarantees." Id. at 463 (Black, J., dissenting).

Byers is also significant because three Justices indicated that the self-reporting statute exception could be applied even when the challenged statute was not directed at an inherently suspect group. See id. at 469 (Brennan, J., dissenting).

237. See id. at 649-50.
238. Id.
241. See id. at 657.
242. Id. at 665.
250. See id. at 3358-59.
ing in a meaningful Marchetti-Grosso analysis because the petitioners never attempted to register for the draft.252

Other self-reporting statutes have been upheld despite fifth amendment challenges.253 In Alcaraz v. Block,254 the challenged statute required the petitioner to give his social security number when he applied to get his children enrolled in the school food program.255 Petitioner, an illegal alien, challenged the statute as a violation of his fifth amendment rights because failure to include his social security number on the application could alert the authorities to his status as an illegal alien.256 The court held that there was no fifth amendment violation because the plaintiff was not legally compelled to provide the Department of Agriculture with any information concerning whether he had a social security number.257 Although the court was unclear on this point, it appeared to determine that there was no legal compulsion because the plaintiff was free not to apply for benefits under the school food program.258 In United States v. Flores,259 the Ninth Circuit considered the fifth amendment issues of 18 U.S.C. § 922(e), a statute requiring individuals shipping firearms to give prior notice to the common carrier.260 The court held that there was neither self-incrimination nor compulsion because the defendant was not forced to transport firearms.261 The court was able to distinguish

252. In a footnote, the Court distinguished Marchetti and Grosso as cases where the “very filing necessarily admitted illegal ... activity.” See Minnesota Pub. Interest Research Group, 104 S. Ct. at 3359 n.16. In Minnesota Pub. Interest Research Group, the Court was not confronted with a true Marchetti-Grosso problem. When students applied for financial aid, they were required to certify that they had registered for the draft. See id. at 3351. However, they were under no obligation to disclose when they registered. See id. at 3358. Thus, by applying for financial aid, the student was not subjecting himself to possible criminal prosecution for registering late. See id. The student would, however, be in a Marchetti-Grosso situation when he was actually registering late because the draft registration card must be dated and contain the registrant’s date of birth. See id. Because the petitioners had never attempted to register, this more difficult question was not at issue. See id. at 3359.

Justice Marshall viewed this issue as sufficiently ripe because of the economic coercion effectively placed on the petitioners. See id. at 3365, 3367 (Marshall, J., dissenting). Although not discussing the prosecutorial or regulatory nature of the challenged statute, Justice Marshall did find that the other two prongs of the self-reporting statute exception were met—that the statute is aimed at a “group inherently suspect of criminal activity,” see id. at 3367 (Marshall, J., dissenting), and that the law coerces the petitioners into a substantial risk of prosecution, see id. at 3368 (Marshall, J., dissenting).

253. The Bank Secrecy Act has similarly been upheld against a fifth amendment challenge. See infra notes 267-71 and accompanying text.

254. 746 F.2d 593 (9th Cir. 1984).
256. Alcaraz, 746 F.2d at 603.
257. Id. at 603-04. The court found that Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 104 S. Ct. 3348 (1984), disposed of the plaintiff’s claim because there, just as in Alcaraz, any compulsion present was merely economic. See Alcaraz, 746 F.2d at 603-04.
258. See id.
259. 753 F.2d 1499 (9th Cir. 1985) (en banc).
261. See Flores, 753 F.2d at 1503.
Marchetti because the statute in Flores was not directed at an inherently suspect group but at the general public. Moreover, the court found that the non-prosecutorial purpose of the statute was substantial and that there was no real hazard of self-incrimination in the notice requirement.

V. FIFTH AMENDMENT REPERCUSSIONS

Having reviewed the relevant fifth amendment issues, the question to be resolved is whether using the Currency and Foreign Transactions Reporting Act, more specifically 31 U.S.C. §§ 5313 and 5316, and the fraudulent statements statute contained in 18 U.S.C. § 1001, seriously threatens the fifth amendment rights of the banking and traveling public.

A. The Currency and Foreign Transactions Reporting Act

1. 31 U.S.C. § 5316

Section 5316, which requires persons transporting $10,000 or more out of the United States to file a report, unquestionably provides customs service agents and other law enforcement personnel with considerable leeway to investigate money-laundering. Failure to report can lead to prosecution. Thus far, the statute has withstood challenges based on the self-reporting statute exception. The Second Circuit confronted this question in United States v. Dichne. The statute was upheld because it was not directed at an inherently suspect group, and because there was no “direct linkage between the required disclosure and the potential criminal activity.” Similarly, the Ninth Circuit rejected a defendant’s argument that the statute violated her right against self-incrimination. Employing a variation on the three part test described in this Article,

262. See id. at 1501-02.
263. See id.
264. See id. at 1503.
266. 31 U.S.C. § 5322 (1982) provides that willful failure to report under § 5316 can lead to criminal prosecution.
268. Id. at 641. The court correctly observed that the statute is directed at all individuals crossing the border with more than $5000 in monetary instruments. See id. at 639. However, this ignores the possibility that federal agents could direct enforcement at a group highly suspect in appearance. Although this might prevent some money-laundering, other money-launderers could still circumvent the statute. Moreover, such selective enforcement could make the statute vulnerable to a fifth amendment challenge if a court gave the highly suspect group requirement an overly expansive reading.
269. See United States v. Des Jardins, 747 F.2d 499, 507-09 (9th Cir. 1984), modified on other grounds, 772 F.2d 578 (9th Cir. 1985).
270. See supra notes 211-14 and accompanying text. The court employed a balancing approach that weighed the public interest in disclosure against the individual’s claim for constitutional protection. See United States v. Des Jardins, 747 F.2d 499, 508 (9th Cir. 1984) (citing California v. Byers, 402 U.S. 424, 427 (1971)), modified on other grounds, 772 F.2d 578 (9th Cir. 1985). The first step in the analysis was an evaluation of the “individual claim to constitutional protections.” See Des Jardins, 747 F.2d at 508. This
the court found that the statute did not create a real danger of self-incrimination. However, if the statute were to become widely used in the fight against the laundering of "narco-dollars," then the nature of the information sought would no longer be deemed unrelated to criminal prosecutions. The regulatory nature of the statute might then be called into question. The statute could be increasingly aimed at a highly suspicious group—money-launderers. In addition, although affirmatively answering that one is transporting more than $10,000 would not automatically lead to prosecution, it could place a traveler at a much greater risk of investigation, and possibly prosecution. Such an interpretation might make section 5316 vulnerable to a Marchetti-Grosso analysis. Thus, silence or not reporting could become a valid claim of the fifth amendment privilege. Such an alternative would eviscerate the substantial benefits section 5316 provides in combating the country's drug problem.

2. 31 U.S.C. § 5313

In California Bankers the Supreme Court held that the record keeping provision of the Bank Secrecy Act did not violate the fifth amendment rights of banks because incorporated banks, like other corporations, have no privilege against compulsory self-incrimination. The Court found the depositor plaintiff's argument that the reporting requirements violate the fifth amendment to be premature. Subsequently, the Tenth Circuit upheld the statute's validity against a fifth amendment challenge because the depositor was under no compulsion to enter into financial transactions with the bank. In that case, the currency transaction report was completed by the bank. The regulations, however, provide that individuals involved in a transaction may be required to file a report if the individual falls within the definition of "financial institution."
that circumstance, section 5313 becomes more susceptible to the
Marchetti-Grosso attack outlined above.277

B. 18 U.S.C. § 1001

Section 1001 does not raise a per se fifth amendment issue because a
false statement is not protected by the fifth amendment.278 Even when
an individual believes that a truthful answer may be self-incriminating,
the fifth amendment does not create a right to lie.279 A person may hon-
estly decline to answer, but cannot knowingly and wilfully answer with a
falsehood.280 Thus, a false answer to a federal official will seemingly
violate section 1001 without fifth amendment consequences. Neverthe-
less, broad application of the statute has been considered "uncomfortably
close" to self-incrimination.281 Thus, the scope of the section has been
narrowed by some courts through the use of the "exculpatory no" doc-
trine in the context of questions by federal investigators.282 According
to this doctrine, a violation of section 1001 requires a statement, and for
the purpose of the statute, a statement requires more than a denial of
guilt.283 It mandates that the person make an affirmative statement calculated to
prevent the legitimate functions of the government.284

CONCLUSION

The thesis of this Article is straightforward: the fight against narcotics
must be balanced with the constitutional rights of the traveling public. If
narco-dollars cannot be laundered, the amount of narcotics imported and
distributed will be substantially lessened. Because the influx of drugs has
not been stopped by traditional investigatory means, recourse to sections
5313 and 5316 and 18 U.S.C. § 1001 is warranted. Concomitantly,
fourth and fifth amendment protections cannot be sacrificed. However,

277. See supra notes 215-71 and accompanying text.
279. See id. at 180.
280. See id.; United States v. Mandujano, 425 U.S. 564, 577 (1976); Bryson v. United
281. See United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974) (en banc).
282. See United States v. Hajecate, 683 F.2d 894, 899-900 (5th Cir. 1982), cert. denied,
461 U.S. 927 (1983); United States v. Schnaiderman, 568 F.2d 1208, 1213 (5th Cir. 1978);
United States v. Bedore, 455 F.2d 1109, 1111 (9th Cir. 1972); Paternostro v. United
States, 311 F.2d 298, 309 (5th Cir. 1962). See generally Note, Judicial Reluctance to
Enforce the Federal False Statement Statute in Investigatory Situations, 51 Fordham L.
Rev. 515, 515-18 (1982) (discussing court rationales for giving a narrow reading to the
statute) [hereinafter cited as Judicial Reluctance].
283. United States v. Palzer, 745 F.2d 1350, 1355 (11th Cir. 1984); United States v.
Anderez, 661 F.2d 404, 409 (5th Cir. 1981); United States v. Schnaiderman, 568 F.2d
1208, 1212 (5th Cir. 1978); Paternostro v. United States, 311 F.2d 298, 305 (5th Cir.
Duncan, 693 F.2d 971, 976 (9th Cir. 1982), cert. denied, 461 U.S. 961 (1983).
284. See United States v. Schnaiderman, 568 F.2d 1208, 1212 (5th Cir. 1978).
effective use of these statutes need not diminish the constitutional rights guaranteed by the fourth and fifth amendments.

As to the public's fourth amendment rights, the consequences of the broad power section 5317(b) provides government agents to search and question departing passengers are alarming. An individual leaving the United States essentially abdicates all fourth amendment rights. The threat of official oppression cannot be overlooked. While any individual, businessperson or drug dealer leaving the United States can be searched, law enforcement officers will search only passengers they believe to be suspicious. Since government law enforcement agents are in the business of ferreting out crime, their judgment may be slightly prejudiced against putative defendants. Can a society that prides itself on fairness and individual freedoms grant law enforcement officers such wide discretion? Should passengers be searched merely on the basis of their nationality or ties with so-called drug trafficking countries like Pakistan or Colombia?

Rational safeguards are necessary to permit aggressive prosecution of money-launderers under 31 U.S.C. § 5316 without jeopardizing fourth amendment individual rights. Congress should repeal section 5317(b) because of the significant fourth amendment concerns it presents to those departing the country. Section 5317 is based in part on the criticized reverse border search exception. The border search exception, in turn, is based on the United States' right as a sovereign to protect itself. Its rationale therefore should not extend to individuals leaving the United States. The often ill-quoted dictum of California Bankers, that "those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment," should be accurately referred to as the bare hypothesis it was and not be used as the basis for a statutory exception to the fourth amendment's probable cause and warrant requirements.

In the absence of section 5317(b) and the ill-conceived reverse border search exception, law enforcement officers would have to abide by the dictates of Terry, when engaging in a warrantless stop. Thus, a departing passenger could be stopped and searched only if the law enforcement officer reasonably believes that his safety, or the safety of others, were endangered. This search would be limited to a search for weapons. Although one might argue that Mendenhall and Royer leave open the possibility that the agent could conduct a limited search for

285. See supra notes 99-137 and accompanying text.
286. See supra notes 116-37 and accompanying text.
287. See supra note 101 and accompanying text.
288. See supra note 122 and accompanying text.
289. See supra note 120.
290. See supra note 64.
292. See supra note 81.
293. See supra note 97.
A proper reading of Terry forecloses this possibility. Indeed, the Supreme Court has stated that "[t]he purpose of [a Terry stop] is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence."295

Fourth amendment concerns are also implicated by the use of section 5313 to combat money-laundering. The Supreme Court has held that individuals lack a legitimate expectation of privacy in checks.296 This rule, based on the problematic assumption of the risk theory,297 should be abandoned because of its potential to obliterate fourth amendment protections.298 Instead, the use of section 5313 should be subject to the fourth amendment's reasonableness clause.

In addition to the fourth amendment problems previously outlined, fifth amendment concerns are raised when the fraudulent statement statute is used in conjunction with sections 5313 and 5316. Although not necessary, generally a customs service agent or other government agent will approach a departing passenger on the basis of a "tip." The "tip" may come from an informant, the Internal Revenue Service or both. A person transporting $10,000 or more of currency out of the United States then has three alternatives: to report the amount transported, to report nothing or to make a valid claim of fifth amendment privilege. If an ordinary person carrying more than $10,000 is about to leave the country without having reported the amount pursuant to 31 U.S.C. § 5316, he may become unnerved by the questioning of customs authorities. Assuming that during the initial questioning the government agent has notified the traveler of the filing requirement, it is not unlikely that the uninformed traveler, having failed to file the required report, might simply deny he is carrying $10,000 or more out of the country. The mere "no" response is a willful lie to a federal agent and a direct violation of 18 U.S.C. § 1001.299 Unless the traveler is in an "exculpatory no" doctrinal jurisdiction,300 he has virtually no defense to a section 1001 prosecution. Moreover, because the traveler has failed to report the money he is transporting, he has also violated 31 U.S.C. § 5316.301

To protect fifth amendment rights and to avoid making a mockery of the privilege, government officials enforcing 31 U.S.C. § 5316 and 18 U.S.C. § 1001 should be required to inform all passengers of their right to claim the privilege,302 thus enabling them to make a timely claim of

294. See supra notes 96-98 and accompanying text.
297. See id. at 443. See supra notes 185-201 and accompanying text.
298. See supra notes 194-201 and accompanying text.
299. See supra note 9.
300. See supra notes 282-84.
301. See supra note 8.
the privilege.\footnote{303} Moreover, the dictates of 18 U.S.C. § 1001 should be
narrowed to prevent any uncomfortable closeness to self-incrimina-
tion.\footnote{304} A general application of the "exculpatory no" doctrine would
adjust the balance between the government's interest in curtailing
money-laundering, while concomitantly affording individuals their con-
stitutional right against self-incrimination.\footnote{305} This approach remains vi-
able after the decisions in \textit{United States v. Rodgers}\footnote{306} and \textit{United States v. Yermian}\footnote{307} because in neither case did the Court address the "exculpa-
tory no" limitation on the statute.\footnote{308}

Prosecuting the sale and use of illegal narcotics properly remains a
paramount concern of law enforcement officials. Curbing money-laun-
dering may be the best and only way to decrease the illegal flow of drugs
into the United States. Individual rights, however, must not be sub-
sumed to the societal interest in fighting the country's drug problem.
Presently, the use of the Currency and Foreign Transactions Recording
Act together with the fraudulent statements statute raises significant
fourth and fifth amendment concerns. The proposals advanced in this
Article seek to reconcile the goal of eliminating the drug trade with the
constitutional rights that are the bedrock of our society.

\footnote{303. See Minnesota v. Murphy, 465 U.S. 420, 429 (1984).}
\footnote{304. See United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974).}
\footnote{305. See supra notes 278-84 and accompanying text. \textit{But see Judicial Reluctance},
\textit{supra note} 282, at 532 ("exculpatory no" statements not protected by the fifth
amendment).}
\footnote{306. 466 U.S. 475 (1984).}
\footnote{307. 104 S. Ct. 2936 (1984).}
\footnote{308. See \textit{supra} notes 47-55 and accompanying text.}