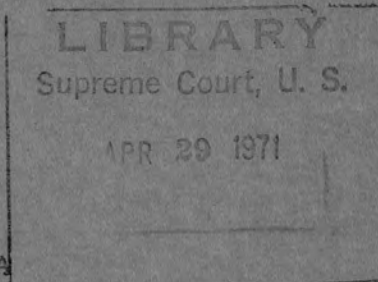


Supreme Court of the United States



In the Matter of:

UNITED STATES OF AMERICA

Petitioner

vs.

SANDRA DENISE JOHNSON

Respondent

70-8

Docket No. ~~577~~

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Place Washington, D.C.

Date April 19, 1971

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM 1970

3 - - - - -
4 THE UNITED STATES OF AMERICA,)

5 Petitioner)

6 vs)

No. 577

7 SANDRA DENISE JOHNSON,)

8 Respondent)
9 - - - - -

10 The above-entitled matter came on for argument at
11 11:05 o'clock a.m. on Monday, April 19, 1971.

12 BEFORE:

13 WARREN E. BURGER, Chief Justice
14 HUGO L. BLACK, Associate Justice
15 WILLIAM O. DOUGLAS, Associate Justice
16 JOHN M. HARLAN, Associate Justice
17 WILLIAM J. BRENNAN, JR., Associate Justice
18 POTTER STEWART, Associate Justice
19 BYRON R. WHITE, Associate Justice
20 THURGOOD MARSHALL, Associate Justice
21 HARRY A. BLACKMUN, Associate Justice

22 APPEARANCES:

23 JUDGE SAMUEL R. PIERCE, JR.,
24 General Counsel
25 Department of the Treasury
Washington, D. C. 20530
On behalf of Petitioner

HOWARD E. BECKLER, ESQ.
6922 Hollywood Boulevard
Suite 201
Hollywood, California 90028
On behalf of Respondent

C O N T E N T S

ARGUMENT OF

PAGE

Samuel R. Pierce Jr. General Counsel,
Treasury Department, Behalf of Petitioner

2

Howard E. Beckler, Esq.
on Behalf of Respondent

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1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We will hear arguments
3 next in Number 577: United States against Johnson.

4 ORAL ARGUMENT BY SAMUEL R. PIERCE, JR.

5 GENERAL COUNSEL, TREASURY DEPARTMENT, ON

6 BEHALF OF PETITIONER

7 MR. CHIEF JUSTICE BURGER: Mr. Pierce you may
8 proceed whenever you are ready now.

9 MR. PIERCE: Thank you very much, Mr. Chief
10 Justice, Associate Justices.

11 This case involves a customs search. The
12 Respondent, Sandra Denise Johnson, whom I shall occasionally
13 refer to as the Defendant, was convicted by the United States
14 District Court for the Southern District of California of
15 illegally concealing and transporting narcotics into the United
16 States.

17 The United States Court of Appeals for the Ninth
18 Circuit, with one judge dissenting, reversed the District
19 Court. The case is here on certiorari. The question presented
20 is whether the judges or customs inspector, based on suspicion,
21 in the light of his experience, without more, is sufficient
22 basis to require an individual seeking to enter the United
23 States to disrobe in private so that his or her clothing may be
24 searched for contraband.

25 Q What were the narcotics that were found?

1 A Heroin, Your Honor; two ounces -- five
2 ounces -- two ounces.

3 The principal constitutional and statutory pro-
4 visions involved are the Fourth Amendment and Sections 482 and
5 1582 of Title XIX of the United States Code. They are set
6 forth in the Government's brief at pages 2 and 3.

7 The facts upon which this appeal is based are
8 these:

9 On Sunday, August 18, 1968 Sandra Denise Johnson
10 and a female traveling companion: one Geraldine Harris, crossed
11 the Mexican-American border on foot at San Ysidro, California.
12 Inspector McCown, who at that time had 27 years experience as
13 a customs inspector at that port of entry: San Ysidro, observed
14 Miss Johnson and her companion and questioned them. He there-
15 upon became suspicious that they were carrying contraband so he
16 arranged for a personal search to be conducted by a female
17 inspector so that their clothes could be thoroughly searched.
18 This type of search is frequently referred to as a "strip
19 search."

20 The search in this case was conducted by Mrs. Netta
21 Lohman. She searched each of the women separately in a second-
22 ary search room which was a completely closed, private room,
23 with no window. Each of the women was asked to please remove
24 all of her clothing and hand them to Mrs. Lohman. Mrs.
25 Lohman's search of the Respondent's clothing disclosed two

1 bundles in the seat of her underpants. One bundle contained
2 two ounces of heroin; the other librium and other unidentified
3 capsules.

4 No contraband was found in Miss Harris's clothes
5 and the women's bodies were neither searched nor touched. In
6 the District Court a motion to suppress the evidence was made
7 on behalf of the Defendant Johnson. Defense Counsel agreed
8 with the District Court that the Defendant had the burden of
9 proving the motion. The Defendant did not produce any witnesses
10 or other evidence in support of the motion.

11 At the hearing the Government Attorney called
12 Inspectors McCown and Lohman as witnesses. Inspector McCowan
13 testified that after he saw and talked with the Defendant and
14 her traveling companion he became suspicious and arranged for
15 them to be personally searched. He was not asked and he did
16 not state any other reasons as to why he became suspicious.

17 Mrs. Lohman testified as to the method and condi-
18 tions of the search and what it revealed.

19 Q Was the entry over the border or the port
20 of entry --

21 A At the port of entry; yes, sir.

22 Q At the customs office?

23 A At the customs.

24 Defense Counsel cross-examined Mrs. Lohman but
25 did not cross-examine Inspector McCown, stating by way of

1 explanation that the Government had to prove something more
2 than mere suspicion and he said, and I quote: "He wasn't about
3 to put his foot into it."

4 Defense Counsel, in essence, argued that a strip
5 search was invalid under the Fourth Amendment, in the absence
6 of an affirmative showing of objective grounds for real
7 suspicion. The Government Attorney relied on the Ninth Circuit
8 case of Witt v. United States, where a strip search revealed
9 narcotics concealed in Defendant's brassiere and it was upheld
10 on that basis on the basis that mere suspicion was enough to
11 justify such a search.

12 The trial court denied the motion to suppress and
13 rejected the defense claim that it was the Government's burden
14 to establish on a motion to suppress reason for Inspector
15 McCown's suspicions. The case was tried without a jury on the
16 basis of the testimony of the two inspectors and certain
17 stipulations. The court found for the Defendant -- found the
18 Defendant guilty and the Court of Appeals reversed, holding that
19 the trial court's ruling on the motion was erroneous in the
20 light of that court -- that's the Ninth Circuit Court decision
21 in United States v. Guadalupe-Garza.

22 And, although the Guadalupe-Garza case involved a
23 cavity as opposed to a strip search, the Ninth Circuit did
24 define for the first time in that opinion the requirements, and
25 I put in quotes: "Real suspicion." The court said that a strip

1 search cannot be conducted on mere suspicion, that something
2 more was necessary, and this amounts to real suspicion.

3 It defined the term "real suspicion" as follows:

4 "Real suspicion justifying the initiation of a strip search is
5 subjective suspicion supported by objective, articulable facts
6 which reasonably lead an experienced, prudent customs officer
7 to suspect that a particular person seeking to cross our border
8 is concealing something on his body for the purpose of trans-
9 porting it into the United States, contrary to law.

10 The Court of Appeals held that the search in the
11 instant case did not meet this standard since the Government
12 could not prove that there were objective, articulable facts
13 to support the inspector's suspicion.

14 The dissenting judge was of the view that Garza
15 was distinguishable, since it dealt with a cavity search, which
16 required a more stringent standard than a simple inspection of
17 clothing. In his view the case was "on all fours" with Witt v.
18 the United States, which had approved a personal search.

19 Parenthetically, the Garza case was decided on
20 February 2, 1970, which was more than nine months after the
21 District Court had decided the instant case.

22 We believe that the Court of Appeals should be
23 reversed for at least three reasons. First, the statutory
24 authority for a customs inspector to conduct a personal search
25 on the basis of suspicion is clear and unequivocal. Second,

1 the great public need to stop the huge inflow of contraband,
2 particularly narcotics, into this country, demands that the
3 balancing of the governmental interest in inspection against
4 the traveler's interest in minimizing inconvenience and em-
5 barrassment be resolved in favor of the government.

6 And third, that the Ninth Circuit's objective,
7 articulable facts test is an impractical and unworkable one.

8 Now, the statute in question: 19 USC 482 clearly
9 states that the customs officer may search any person on whom
10 he shall suspect thereis contraband. Congress used a simple
11 word "suspect." They do not qualify it; they did not use "real
12 suspicion, "actual suspicion." There is every reason to
13 believe what it meant simply that a personal search may be
14 conducted solely on suspicion and if they had meant otherwise
15 we think they would have stated it because in this statute,
16 this very statute: 482, they set up two different standards of
17 suspicion. One, the suspicion that we have been talking about
18 with respect to the person and then another standard that
19 relates to trunks or envelopes.

20 In that statute it says that a customs inspector
21 may search any trunk or envelope wherever found in which he may
22 have a reasonable cause to suspect there was merchandise which
23 was imported contrary to law, which means that the Congress was
24 well aware of the words that it was using.

25 Now, this statute is a very old one, over 150 years

1 in age. It dates back to 1815 when it was first enacted, and
2 at that time they had the mere suspicion test in the statute;
3 in fact it was an extension of an even older statute, going
4 back to the First Congress of the United States.

5 Q Could I ask you: search of baggage, is
6 there an unrestricted, absolute right to inspect baggage?

7 A As it comes over the border; yes, sir, but
8 you will notice that this part of the statute says "wherever
9 found," which means that it would go beyond the borders and if
10 they could trace the baggage into the interior and therefore
11 I think they wanted a higher standard once the baggage got into
12 the interior.

13 Q Is there anything that deals with the
14 border inspections of baggage?

15 A No, this is the only one. As a matter of
16 fact, Judge, I think the courts have said that not even
17 suspicion is necessary because people come through a baggage
18 line and just one after another is taken and you search it, but
19 there is --

20 Q There is no statute on it?

21 A There is no statute that says --

22 Q Except this one?

23 A Except this one.

24 Q This one requires reasonable cause to
25 suspect.

1 A That's right. That's what it says.

2 Now, in the -- in 1815 when this statute was first
3 enacted, and it contains this provision, I believe that,
4 because of the kind of contraband that existed at that time,
5 Congress must have thought that occasions could arise when a
6 person would have to be stripped in order to search their
7 clothing for contraband, but if there is any question about
8 that, Congress laid it to rest in 1866 because Congress reen-
9 acted this law in 1866 and added a provision, a provision which
10 provided that the Secretary of the Treasury would employ female
11 inspectors for the purpose of examining and searching persons
12 of their own sex, which means that they anticipated that there
13 would be these kinds of personal searches.

14 Now, at this point I would like to draw a dis-
15 tinction between the strip search that I have been talking about
16 and the cavity search. We well realize that people may argue
17 that this statute would not apply for a cavity search, because
18 the last time that the Congress enacted this law was in 1866
19 and at that time carrying contraband in the cavities of the body
20 body certainly were not in vogue, and furthermore, medical
21 science did not develop to the extent that somebody could take
22 some contraband, put it in the stomach, later regurgitate it
23 and still use it --

24 Q And there were no narcotic laws in 1866;
25 were there?

1 A I don't believe so.

2 Q I think there were none.

3 A So, we distinguish between the two, a strip
4 search on the one hand and a cavity search on the other. We
5 certainly believe that as far as a strip search is concerned,
6 certainly the law goes that far and does intend to include the
7 strip search.

8 Q You are putting the strip search then in
9 the same category as the search of baggage, I take it?

10 A I am putting it in the same category as the
11 statute says, that a person is able to be searched upon
12 suspicion. Those are the literal words of the statute and I'm
13 saying that that statute means exactly what it says.

14 Q Well, the question between you is the
15 constitutionality of all this; isn't it? There is no doubt as
16 to the authority of the -- statutory authority to make this
17 search, is there?

18 A Well, it's -- some of the courts seem to
19 extend, seem to think there is. They seem to point out that
20 Congress doesn't mean suspicion in the ordinary sense; they
21 mean real suspicion and then it goes on -- that's the Ninth
22 Circuit -- goes on to define what they think real suspicion is.
23 I say that Congress, by its history of the statute means just
24 exactly what it says. It's a simple word, meaning that if the
25 officer has suspicion he has the right to make a personal search

1 and --

2 Q What's your idea of suspicion?

3 A Suspicion means an uncertainty about
4 something, or I should say -- I could tell you exactly what it
5 is because I happen to have written it down, but I don't have
6 it right handy. But, to me it means that a person believes
7 that there is something wrong on the basis of little or no
8 evidence.

9 Q Such as the person has shifty eyes?

10 A It could be one of many things; anything.
11 It could be shifty eyes; it could be nervousness; it could be
12 the way they sweat; it could be almost anything. Suspicion,
13 to me is a -- means simply that you do not have proof that
14 something is wrong but you believe something is wrong.

15 Q I thought you said you didn't believe; you
16 just weren't sure.

17 A Well, that's true; there is uncertainty in
18 that because you are not sure. You believe that there is some-
19 thing wrong but you are not absolutely certain because you
20 don't have absolute proof. You have little or no proof. I
21 believe that's the way the dictionary defines it.

22 Q I suppose you would include mental tele-
23 pathy?

24 A Well, I don't know how far mental telepathy
25 goes, Judge, but I would think that the suspicion that we are

1 talking about with respect to these customs agents is the
2 suspicion that they get through their experience, long exper-
3 ience of having looked at thousands and thousands of people
4 come through that line --

5 Q Well, have the Appellate opinions defined
6 it that way, that -- I recall some language to the effect --
7 perhaps in this Court, among others, that it is not as it may
8 be claimed, in the privacy of a library that, as seen through
9 the eyes of a trained officer on duty in which he brings his
10 experience to bear. Is not that the standard --

11 A Well, that is the standard that has been
12 used and is exactly what is meant when you apply the term
13 "suspicion" to a customs officer as opposed to just a word
14 "suspicion."

15 Q It can be mere intuition, based on
16 experience?

17 A Yes.

18 Q Now, could it be this much -- somewhere, I
19 think in this record, or maybe I read it elsewhere outside the
20 record, that this particular port of entry, San Ysidro, if I'm
21 pronouncing it correctly, is a port of entry where there
22 evidently a great deal of illegal narcotics are smuggled across
23 the border. Maybe to that extent that's assumed, to the
24 extent that one out of every 15 people who come across the
25 border at that particular point is smuggling narcotics. Could

1 the service just decide arbitrarily at random to have a
2 personal search of every 15th person who comes across?

3 A I don't believe the service -- would do
4 that, but I do think that the Congress --

5 Q But if my hypothesized facts are correct
6 there is one chance in 15 that as to each person that comes
7 across the border, that he's smuggling narcotics and that's
8 enough for a suspicion, I suppose; isn't it?

9 A Well, you could argue that but I rather
10 think that it would be better for the Congress to review the
11 entire situation and set some rules that one out of every 15
12 people can be searched.

13 Q Well, if there is one chance out of every
14 15, statistically, then isn't that a ground for suspicion with
15 respect to each person who comes across the border?

16 A It would be a ground; in fact it's the
17 ground I imagine that is used with respect to baggage; that's
18 why they search every single person's baggage.

19 Q Well, with respect to checking on income
20 tax returns, and so on. These are arbitrary random samplings,
21 so I understand.

22 A But that's not so much suspicion as it is a
23 random sampling.

24 Q Well, if it's known that one out of every
25 50 persons is likely to either cheat or make serious mistakes

1 in his income tax returns, one way to get at it when you can't
2 look at all the returns, is to randomly check one out of every
3 50, with the suspicion that you will perhaps find either fraud
4 or gross error.

5 A But I think that the statute here relates
6 to a customs officer. He must have the suspicion. Infact
7 there have been cases where the customs officer himself did
8 not have the suspicion; the court ruled that the search was not
9 proper.

10 Q Well, I would think, I would just merely
11 suggest that it could be argued that if the customs officer has
12 knowledge statistically, based on his experience at that par-
13 port of entry that one out of every 15 people were smuggling,
14 then isn't there one chance out of 16 enough to suspect each
15 person who comes in there?

16 A It could be argued; yes.

17 Q Do you think that Congress has the con-
18 stitutional power to pass a statute saying that everybody com-
19 ing back to this country from abroad must submit to a body
20 search?

21 A I would think that if Congress looked into
22 the matter, held hearings and found out that the incidence of
23 smuggling was so great that they could pass such a statute,
24 because they have the basic responsibility for controlling
25 foreign commerce and what is imported into the United States.

1 I think if they could make a case for this, that that could
2 be allowed if one would pass such legislation.

3 Q That would be a national finding of pro-
4 bable cause, rather than a judicial finding of probable cause?

5 A Well, I think, frankly, Mr. Justice, that
6 the Congress could probably be in a better position by holding
7 hearings and being able to get so much more information than a
8 court can get in a case-by-case basis that it would be a better
9 way of doing it --

10 Q I'm not talking about whether it's better
11 or not; I'm just thinking in terms of the Fourth Amendment.

12 A Well, I would think that the Fourth Amend-
13 ment is grounded in reasonableness and I think if it could be
14 shown that we are in such a difficult position -- it is highly
15 theoretical, because I don't think it would ever happen, but
16 if it were such -- if the Congress were able to show that al-
17 most every person were smuggling something into this country
18 then I think they could go as far as passing alaw to that
19 effect.

20 Q Well, as far as examination of baggage is
21 concerned, apparently the routine custom inspection, which all
22 of us have gone through, is beyond the statutory authority,
23 from what you said.

24 A That is true.

25 Q Did anybody ever challenge it?

1 A Nope.

2 Q Getting back to this particular case, if
3 the officer had been a brand new officer of three days on duty,
4 would your argument be the same?

5 A Would the argument be the same? No, sir --

6 Q Because, as I read the statute I don't
7 think that the statute says that he has to have any other --

8 A It doesn't say you have to have any ex-
9 perience at all. But, I would think that if it happened with
10 somebody with three days on duty -- first of all, I don't think
11 it could possibly happen, Mr. Justice, because you see he would
12 probably go to his superior, who would then not allow it to be
13 done. But --

14 Q The statute doesn't require that.

15 A No; the statute does not require that.

16 Q Is there any regulation of the Treasury or
17 Immigration which defines suspicion?

18 A No.

19 Q Well, how does the agent know what is
20 suspicion? What he thinks is suspicion --

21 A Yes, he's told that -- we have a manual,
22 sir.

23 Q Well, does it say what suspicion is in it?

24 A It does not say precisely what suspicion
25 is; no.

1 Q Does it say anything about it?

2 A Oh, yes.

3 Q What does it say?

4 A It says that the agent has a very signi-
5 ficant power, and that's the power to have personal searches
6 made upon suspicion, and that he should use that power very
7 wisely and it gives various illustrations that would show him
8 how to use the power but it's not a completely comprehensive --
9 it doesn't cover every possible circumstance. He also goes to
10 school and he's taught further there and he also has very close
11 supervision in the Customs Service.

12 Q And he never is told what suspicion is?

13 A Well, he's told in classes as to what the
14 nature of suspicion is; yes.

15 Q But, on the basis of what he suddenly
16 thinks in his mind, he has the right to stop me, hold me under
17 guard and have somebody search me, on his theory of suspicion?

18 A Yes; on his suspicion.

19 Q And that applies to anybody, any American
20 citizen that comes back into this country?

21 A Any person from anywhere.

22 Q I'm only interested in American citizens
23 right now.

24 A American citizens; yes, sir.

25 Q Counsel, I wonder if there isn't a question

1 about a little bit more than the Fourth Amendment here, a
2 matter of condition. For example: every person entering this
3 building must open every piece of baggage he has or he doesn't
4 get in. Now, that's a condition. It doesn't require any
5 suspicion; it doesn't require any showing of reasonable grounds
6 for probable cause. Is there not possibly some parallel to
7 that in terms of putting a condition on every person who wants
8 to cross our borders, that they meet the standards of the
9 statute?

10 A Well, the courts have said that for a long
11 time; they say that the border search is different from other
12 kinds of search because a country has the right to set the
13 terms and conditions for people entering the country and,
14 though it's not the same as a search in the interior.

15 Q Do you know any country in the world that
16 does not exercise the right to search the baggage of people who
17 come into it if they want to?

18 A No, I do not know of any.

19 Q I suppose they haven't got written
20 constitutions, do they? Do they ever have Fourth Amendments
21 to their constitutions?

22 Q Some of them may have Fourth Amendments that
23 read like they were originally read --

24 A Yes, sir.

25 Well, to continue, sirs: until recently the Ninth

1 Circuit -- until a recent Ninth Circuit case the courts have
2 generally agreed that a personal search could be made on mere
3 suspicion at the border without violating the Fourth Amendment.
4 In short, they followed the clear language of the statute.
5 And this was true, even in the Ninth Circuit, and I call the
6 Court's attention to the case particularly of Bible v. United
7 States, which is not in our brief, but which I came across
8 during the time I was preparing for argument: 314 Fed. 2d, 106,
9 decided in 1963. There, a person appeared to be nervous and
10 this led to a strip search and a discovery of heroin and the
11 court held that mere suspicion was enough to justify such a
12 search.

13 Q 314 Fed. 2d?

14 A Yes; 106.

15 Q 106?

16 A Yes, sir.

17 And cert was denied by this Court and in that
18 case they cited the Witt versus United States case. It had
19 reached a similar conclusion.

20 Q Do you go so far as to contend that the
21 Fourth Amendment doesn't apply to border searches at all?

22 A No, sir; the Fourth Amendment does apply to
23 border searches. It definitely does, but Congress, as far back
24 as 1789 made a distinction between this search and other kinds
25 of searches and they passed a law allowing vessels to be

1 searched totally on the basis of suspicion. And this statute
2 is really an extension of that statute.

3 Q I know this isn't before us, but what would
4 you say as to the Court of Appeals test with respect to so-
5 called "cavity searches?"

6 A The clear indication test of the Court of
7 Appeals? I would say that there should be something more for a
8 cavity search. I think that what we are talking about is a
9 balancing of things --

10 Q A matter of degree.

11 A That's a matter of degree. There should be
12 more for a cavity search. This kind of search just requires
13 somebody to take off his clothes, hand the clothes to somebody
14 so the clothes can be searched and they are given back.

15 A cavity search touches the body, intrudes upon
16 the body and I think a higher standard is necessary. As I
17 explained before, I don't think that Congress considered this,
18 because the last time it enacted the statute was 1866.

19 MR. CHIEF JUSTICE BURGER: You are into your
20 rebuttal time now, Mr. Pierce.

21 MR. PIERCE: Okay.

22 MR. CHIEF JUSTICE BURGER: Mr. Beckler, you may
23 proceed whenever you are ready.

24 ORAL ARGUMENT BY HOWARD E. BECKLER, ESQ.

25 ON BEHALF OF RESPONDENT

1 MR. BECKLER: Mr. Chief Justice, and if it may
2 please the Court:

3 I have had an extremely difficult last few
4 moments in beginning my argument, because I heard some of the
5 inquiries presented by this Honorable Court to my opponent:
6 the Petitioner, and rather than reply directly to any of
7 the Petitioner's argument, I think I have elected, and will do
8 and proceed to what I believe to be the gravamen of this case;
9 I believe to be the critical issue here. It's been raised by
10 Your Honorable Court already this morning, and go on to some
11 concluding remarks.

12 The first and foremost way Congress enacted the
13 laws, border search law about vessels and travelers, it cannot
14 be imagined they had in those days even a remote thought that a
15 party coming into this country might be made naked at port of
16 entry so the body could be even looked at.

17 The Government here enframes the issue that the
18 reason a person is told to get nude is to look at their cloth-
19 ing. That's true. That is incidental to their remaining naked
20 in a room as appears in the Government's brief, perhaps 15
21 minutes, while a customs inspector looks over his clothes.

22 In this day and age when every travel agency, when
23 every port and every hotel suggest that our country travel;
24 when travel is permeated to even the poor, the modest people to
25 visit Canada or a trip shopping in Nogales, Arizona, or as is

1 correct, San Ysidro, California, it cannot be in the reasonable
2 expectation of the public, it cannot be understandable to the
3 public in terms that they can know that by crossing this border
4 upon returning to this country or as an associate in the office
5 says: "Coming home," will be told that on the mere suspicion of
6 an officer, albeit it 27 years or one year, to go into a
7 private room and remove your clothing --

8 Q Well, what about the requirement for you to
9 leave this country, before you can get a passport, that you
10 have to submit to having a smallpox inoculation, among others?

11 A Yes.

12 Q And depending on where you are going, a
13 great many other things. Now, these are frequently, to some
14 people, less agreeable, more painful, more an invasion of
15 privacy than simply disrobing, as a great many people do on the
16 beach and in doctors' offices and other places.

17 Now, do you say that challenging, too, the right
18 to protect our health in communicable disease matters, either
19 in outgoing or incoming?

20 A No, I do not. I --

21 Q Well, what's the difference on a constitu-
22 tional basis?

23 A I think the difference is twofold: one, in
24 balancing the interest, as Your Honor, Mr. Chief Justice, made
25 this morning, as to the search of the briefcase. In this day

1 and age when there are things to be concerned with, it's a
2 minor intrusion that I open my attache case this morning; it's
3 a minor intrusion in the courts of Los Angeles -- it's the same
4 intrusion, and to enjoy the practice of my profession, I will
5 submit to that.

6 But, to balance coming back in this country after
7 a day, to be told to get naked, I don't think is a formality.
8 The privacy that Your Honor refers to in the doctor's office
9 shall not be equated, and I might add: there are many people
10 in this day and age that may not be considered puritanical, but
11 do object to removing all of their clothing in a doctor's
12 office. Teenagers, for example; even old women who have had
13 their first illness, don't like to get naked in the doctor's
14 office, but, if they had anticipated that one stranger: a
15 customs officer, albeit it, of experience, has that power on
16 an _____ hunch or a guess, as Mr. Justice Marshall
17 mentioned this morning: what is it? Can it be mental tele-
18 pathy? Can it be skittish behavior and selected that person,
19 and say: You go in and remove your clothing for a search.

20 Q What weight do you give to what is almost
21 a matter of judicial notice -- at least we see it coming across
22 our desks in these records all the time -- that one of the ways
23 in which substantial amounts of narcotics are brought into this
24 country are by a young woman, or women, particularly, concealed,
25 as these narcotics were?

1 A I have two answers. I think both of them
2 are cogent. One appears in the Government's brief that they
3 concede that only a small amount of narcotics comes into the
4 country through the body cavity, or carried on the person.
5 Second of all --

6 Q I'm not talking about the body cavities at
7 the moment.

8 A No; I'm talking in underwear. There is an
9 article that appears in the March 29, 1971, Newsweek issue, and
10 in this article they talk about the Government's fight against
11 the white death, referring, of course, to heroin. In the
12 article they refer to a port off of Marseilles, where 750
13 pounds of morphine base, the ultimate substance that is used to
14 make heroin, was found by a fisherman accidentally. They waited
15 for someone to pick up this contraband and lo and behold, they
16 captured a man named Tudeon(ph), a notorious narcotics smug-
17 gler.

18 Further in the article in Newsweek they reflect
19 that from the Capital of Laos: Vientianne, through the United
20 States mails to Saigon, 20 pounds of pure heroin was received
21 by a suspect there.

22 But, the point is this: that we will not stop the
23 major amount of smuggling in the country if we were to search
24 arbitrarily 15 out of 15 and if a few ounces -- and I agree
25 it's insipid; it's a hideous ailment, and I am a criminal

1 practitioner of thirteen and a half years and have dealt with
2 it -- we still will find two ounces; we will find three ounces.
3 The major amount of contraband in the country --

4 Q Suppose you found 50 here in a money belt
5 around the torso of an apparently overweight man. What's the
6 difference whether it's two, 20 or 200.

7 A I would say we have to balance the in-
8 terests here.

9 Q As between two, 20 and 200?

10 A No; between the initiation of the search,
11 and not the result. I think that if, by fortuitous -- a
12 customs agent got lucky and found 50 ounces I would not change
13 my argument to say that if his search, if it was based on mere
14 suspicion, as this one was, was any better at the outset. I
15 would feel chagrined that 50 ounces of heroin came into the
16 country.

17 Q Well, I have seen records of cases,
18 Counsel, where there was expert testimony undisputed, that a
19 single person could carry \$50,000 worth of raw heroin on his
20 person without having it be noticeable to any but the most
21 alert and astute, trained observer and not even always then.

22 A If that right to search that person is
23 given it should be based on an articulable, objective statement
24 that the officer can explain to the trier of the fact, why he
25 wanted that person stopped. Now, the customs agents themselves,

1 it was asked this morning of Counsel for the Government what
2 rules the Customs had to go by and in the brief for the Govern-
3 ment, on page 35, there begins numerous of the Customs rules
4 they have propagated themselves..

5 Q What's a soundex list, do you know?

6 A Yes, that's like a make sheet, Mr. Justice,
7 where they have had a history of experience with that person
8 before. It is referred to as one of the circumstances ob-
9 jectively to stop a person, whether or not they appear in the
10 soundex and that's an easy reference spindle, where they find
11 a person has been there once before, who has had contraband and
12 has been arrested as a suspect.

13 Some of the other things indicated in the Customs
14 Manual, which was not followed in the case at bar, are:
15 hypodermic outfits found in the baggage, which I concede,
16 should be searched carte blanc; eyes glassy or under the in-
17 fluence. Numerous things like that that indicate an objective
18 standard rather than the uncanny feeling that a customs
19 officer may have about a person.

20 In my brief I raise that a person can manifest
21 numerous reasons for even being nervous: a later babysitter,
22 a tragic accident they may have seen in Mexico, personal
23 problems of their own. Nervousness cannot be articulated by a
24 Government official.

25 Q Mr. Beckler, what if, instead of one in 15,

1 what if the hard statistical facts were, c the basis of a
2 long period of training that one out of every two travelers
3 who crossed the border at this particular point was a smug-
4 gler?

5 A I would probably not be arguing; I would
6 concede to Your Honor that that would be fair enough.

7 Q Then everybody could be given a personal
8 search.

9 A The batting average there is 500. The
10 batting average in this case as appears by the Government's
11 own brief on page 25, 4,811 people were searched in 1969. Of
12 that 3,500 were proved negative. Thirty-five-hundred citizens
13 of this country came into the port of entry at San Ysidro,
14 were told to get naked, absolutely naked in a room alone with
15 a stranger and their clothing was searched --

16 Q And one out of every four they found
17 contraband.

18 A That is correct, and in my opinion that is
19 not --

20 Q Now, where do you find in the constitutional
21 that one out of four is not constitutional, but one out of
22 two is constitutional?

23 A I don't find that. I would then relate to
24 the balancing of the interest. I think that if such an in-
25 cidence of 50 percent of the people coming into the country

1 at San Ysidro, were carriers of contraband, then I would have
2 to yield and say that there is exception engrafted on the
3 Fourth Amendment as to border searches in this day and age
4 when such a thing wasn't possible, or a hundred years ago and
5 I would concede that this is an evil that must be stopped,
6 the Fourth Amendment notwithstanding.

7 But now, I urge the reasonableness of the amend-
8 ment. I can't help but think of the Terry Court where you
9 talked about something of a hip-slap, as referred to, where a
10 gun was obtained and it was approved, but there, Officer
11 McFadden walking the streets of Cleveland, Ohio, articulated
12 trips to a men's store window, a suspicious conduct of some
13 several hours. Whereas in Seberon(?) plain talking to a bunch
14 of narcotics addicts did not meet the standard, again arguing
15 a case-by-case method, a case-by-case basis for argument. I
16 can remember trying this case in the District Court and I can
17 remember trying the genesis of U.S.A. versus Henderson where
18 District Judge Kunzel(?), now deceased, made a footnote and he
19 said in his many years at San Ysidro he has come to believe
20 that there must be something that the officer can tell why he
21 wants that woman searched.

22 It must be noted in this case that co-companion,
23 Geraldine Harris, was without contraband and I note four or
24 five times in this case it has been suggested that counsel
25 didn't cross-examine the officer. I can answer that with the

1 footnote that appears in Seabron that the moment counsel there
2 began talking about the weapon he swiftly retreated from that
3 kind of cross-examination and I did say I wouldn't put my foot
4 into it at that time and I believed it was the Government's
5 burden, as I do now.

6 It is my argument --

7 Q Is it a fact that 180 years ago could any
8 vessel enter any port in the United States, or the 13 Colonies
9 then, without being searched from stem to stern?

10 A I doubt very much. I don't think it should
11 be that way today. A vessel is a carrier of notoriously large
12 objects. Major narcotics is brought in in vessels and ships
13 like this. I think that the law as to vessels and things,
14 rather than a person, must receive a different treatment.

15 Here the Government concedes, in talking about the
16 second of a tri-part search as enunciated by the Ninth Circuit:
17 the baggage search, one; the cavity search, three; and the
18 skin search, two. And this is really the issue, and only the
19 issue, as to what, if anything is needed to compel a woman or
20 a man, as the case may be, to remove her clothing and get
21 naked.

22 Q Would you think that the constitutional
23 problem would be cured if a physician or a registered nurse
24 made the examination?

25 A No, I don't, not if the inception of it was

1 based on nothing more than we have in Sandra Denise Johnson's
2 case I do not, which leads me to an argument I wish to raise
3 quickly. Agent McCown has had 27 years experience on that
4 border and I recall in Justice Jackson's dissent in
5 Brenner(?) how then Justice Jackson referred to the record
6 of an officer, that as always he wants to protect that. He's
7 in the business, the competitive business of ferreting out
8 crime and he indicates in all of these that he has no pre-
9 judices, that he has no cause for alarm about race or age or
10 anything.

11 I only wish to suggest and I note that my opponent
12 today has the title of Judge and I presume that that's because
13 Mr. Pierce is probably retired, but -- from the bench -- but,
14 as a criminal lawyer for 13 years, in asking maybe 50 or 60
15 veniremen a question I used to ask, representing Mexican-
16 Americans and Blacks; I asked 600 or more: do you have a pre-
17 judice against the defendant because of his race or religion?
18 And I never once got an affirmative answer and I quit asking
19 that question because it was inconceivable to me that 700 or
20 800 veniremen wouldn't hold a prejudice.

21 So, when the customs agent indicates, as he is
22 supposed to on cross-examination that he has no such feelings,
23 may I suggest that all of us carry something with us as a police
24 officer. I rent space to an ex police officer and I have had
25 the occasion to eavesdrop on his conversations with fellow

1 policemen and they are appalling and they are startling and I
2 could imagine some of the conversations that take place here and
3 though they will never appear in the record and perhaps I'm
4 arguing d'hors(?) the record, but these are considerations
5 on what goes into an incoherent hunch when a customs officer
6 compels a lady on nothing he can tell us. His answer in the
7 companion case here in Guarassi-Saville was: "I had an un-
8 canny feeling; that's all I can tell you."

9 Q Well, again, that could be based on ex-
10 perience quite apart from any -- from any personal prejudices,
11 if, for example there were statistical, empirical objective
12 evidence that among young men whose hair is down to their
13 shoulders one out of every two is a smuggler and among those
14 who had crew cuts, only one out of every 100 is a smuggler,
15 wouldn't a customs officer doing his duty, be a little more
16 careful when he searched the person whose hair was down to his
17 shoulders, and it might not represent any personal prejudice
18 on his part whatsoever.

19 A I concur totally; that's empirical, objec-
20 tive, base facts, but the Government concedes here that they
21 do not know what other symptoms, if any, whether it was more
22 than mere suspicion that caused 4,811 citizens in 1969 to be
23 made naked. And until we know that balance sheet, until we can
24 see that batting average I think my point is well-taken.

25 Q On how many of those did they find something?

1 A 1,311.

2 Q 1,311 had some narcotics or some other
3 contraband?

4 A Something; yes.

5 Q And that figure doesn't suggest anything to
6 you apparently?

7 A I suggests that we have a problem in this
8 country. It suggests an insipid amount of smuggling of
9 heroin. It does not, however, permit me to allow myself the
10 imprimatur of the Fourth Amendment to condone this kind of
11 conduct.

12 Q Mr. Beckler, going back over some ground
13 that you have already covered, I did understand correctly, did
14 I not, that you have no concern about indiscriminate search of
15 luggage?

16 A I do not, Your Honor; I do not.

17 Q And you draw the distinction then only by
18 a balancing of interest, even though the Fourth Amendment
19 reads as to effects, as well as to one's person?

20 A Yes, I do, Your Honor. I feel that, as Mr.
21 Chief Justice suggested, that when one brings in objects he
22 should well anticipate, if he wants to enjoy the freedom of our
23 soil that that should be looked at.

24 Q Well, sometimes people don't bring in ob-
25 jects; underclothing can be in luggage as well as on the person.

1 A It can be; yes. I appreciate that; I
2 appreciate that problem, but I think in the effects of the
3 person, the effects indicated in the Fourth Amendment, that
4 does have a different status, rather than the person. I think
5 that at no time in the history of our country, was it imagined
6 or expected when the Fourth Amendment was enacted or through
7 all this Court's great history that it was thought the people
8 would ever have to be made naked and now we find that such a
9 right can exist and should exist with the advent of personal
10 carrying of narcotics, but the Fourth Amendment is the overseer
11 of that right and it should be, as the Ninth Circuit said in
12 "suppressing" the evidence in the District Court on an objec-
13 tive, articulable basis, a real suspicion directed at this
14 person, something that adds scope to the search.

15 My final argument is simply that there was a piece
16 of literature by Maxwell Anderson not too many years ago, and
17 there was a character in there called Judge Gaunt, who ran
18 around, after making a very bad rule, testing his own rules. I
19 played devil's advocate in this case and I have tested the
20 proposition on district attorneys and U. S. Attorneys, on ladies,
21 men and fellow citizens alike, and the overwhelming reaction
22 that I have received is that before a citizen should be made
23 naked it should be on an objective basis.

24 I ask that the Court of Appeals' decision be
25 affirmed in suppressing the evidence.

1 Thank you very much.

2 MR. CHIEF JUSTICE BURGER: Thank you. The case is
3 submitted.

4 We will not call the next case until after the
5 noon recess.

6 (Whereupon, at 12:00 o'clock p.m. the argument in
7 the above-entitled matter was concluded)
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