

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 UNITED STATES, :

4 Petitioner :

5 v. : No. 02- 1794

6 MANUEL FLORES- MONTANO :

7 - - - - -X

8 Washington, D. C.

9 Wednesday, February 25, 2004

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10: 14 a. m

13 APPEARANCES:

14 LISA S. BLATT, ESQ., Assistant Solicitor General, Department
15 of Justice, Washington, D. C. ; on behalf of the
16 Petitioner.

17 STEVEN F. HUBACHEK, ESQ., San Diego, California; on behalf
18 of the Respondent.

19

20

21

22

23

24

25

1		
2	C O N T E N T S	
3	ORAL ARGUMENT OF	PAGE
4	LISA S. BLATT	
5	On behalf of the Petitioner	3
6	STEVEN F. HUBACHEK	
7	On behalf of the Respondent	28
8	REBUTTAL ARGUMENT OF	
9	LISA S. BLATT	
10	On behalf of the Petitioner	53
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:14 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument now
4 in 02-1794, the United States v. Manuel Flores-Montano.

5 Ms. Blatt.

6 ORAL ARGUMENT OF LISA S. BLATT

7 ON BEHALF OF THE PETITIONER

8 MS. BLATT: Thank you, Mr. Chief Justice, and may
9 it please the Court:

10 Customs officials have the responsibility to
11 protect the Nation's borders against the entry of dangerous
12 or unwanted items. Consistent with that fundamental and
13 sovereign necessity, customs officials have historically had
14 the power to open containers and conduct a thorough search
15 of items without a warrant, probable cause, or any
16 particularized suspicion.

17 QUESTION: Well, now in this case, I suppose the
18 Government did have reasonable suspicion.

19 MS. BLATT: That's correct, but we did not rely on
20 it and the evidence was suppressed on -- based on the Ninth
21 Circuit's rule that a gas tank cannot be removed and opened
22 without reasonable suspicion.

23 QUESTION: Can you make us, i.e., I'm not saying
24 this pejoratively, but can this Court be required to decide
25 what might be a hypothetical question, it seems to me, the

1 dog barked and therefore they had grounds for thinking their
2 were drugs in the gas tank, and he kicked the gas tank and
3 it was hollow, and no one disputes those facts. But you
4 want to decide -- us to decide this case, as does the other
5 side, as if those facts didn't exist. It sounds to me like
6 a hypothetical question, almost in the direction of an
7 advisory opinion. What would we have decided if those facts
8 didn't exist? But they do. So how does that work?

9 MS. BLATT: Well, I don't think it's an advisory
10 opinion in that the evidence has been suppressed. But,
11 Justice Breyer, let me directly answer your question on why
12 the case is here. In 2002, the Ninth Circuit held that the
13 Constitution is violated if customs officials remove and
14 open a gas tank without reasonable suspicion, and in that
15 case there was reasonable suspicion, making the case very
16 difficult to challenge.

17 The Government legitimately wanted to challenge
18 the case in a -- in a -- in a case where the officers
19 actions could not be subject to a potential Bivens liability
20 for violating the clearly established law of the Ninth
21 Circuit. At the same time, customs officials viewed the
22 Ninth Circuit's decision as posing an immediate and present
23 danger to their ability to protect the border, and they
24 thought it imperative to try to challenge a -- bring up a
25 case that challenged that rule as soon as possible.

1 So two weeks after the Ninth Circuit's decision
2 was decided, respondent drove across -- drove across the
3 border with a gas tank full of 80 pounds of marijuana, and
4 the Government, we think legitimately, told the district
5 court, and there was no secret at any time in this case,
6 including at the petition stage, that we were not going to
7 put on evidence that there was reasonable suspicion, even
8 though the dog alerting and the solid-sounding tap of the
9 gas tank, we could have established or presumably could have
10 established that that was reasonable suspicion.

11 And both the district court and the Ninth Circuit
12 summarily affirmed the -- suppressed it and then affirmed
13 the suppression, because there was not reasonable suspicion,
14 and that's why this case is here. The customs officials see
15 this case as a threat to their ability to deter and detect
16 smuggling at a container that is relatively large and that
17 is commonly used -- in fact, it is the most common container
18 used along the Mexican border --

19 QUESTION: Can we go back to your --

20 MS. BLATT: -- to conceal contraband.

21 QUESTION: You gave a Bivens justification for what
22 is extraordinary. I mean, it's not a violation of article 3
23 for us to decide it on your basis, but still, this Court
24 deals with concrete cases with actual facts and not with
25 abstract questions. So is it -- is it your notion -- is it

1 correct that what the Ninth Circuit says becomes clearly
2 established law so that an officer would genuinely be -- be
3 subject to Bivens liability when this Court hasn't addressed
4 the question?

5 MS. BLATT: No, but we didn't want to have to tell
6 the men and women who were in charge of enforcing the border
7 that they should be subject to a potential suit, at least
8 being named in their personal capacity in a lawsuit. It
9 seemed more appropriate from our perspective to try to bring
10 a case as soon as possible where we think we could have
11 proven reasonable suspicion, but it squarely fit within the
12 Ninth Circuit's rule that reasonable suspicion was required.

13 QUESTION: I suppose you could also say it's a
14 question of resources. The Government does not want to have
15 to put on witnesses, get officers up from the border, have
16 them sit in court, go through the motion to suppress, so
17 that you have a very real interest simply in expediting
18 trial procedures by taking the course you did. I don't know
19 if that helps you on this article 3 problem or --

20 MS. BLATT: It -- it helps to explain why we
21 thought there was a paramount interest in getting the case
22 as soon as possible. We didn't want to divert resources
23 away from the border into having to prove our reasonable
24 suspicion. In fact, there's already been serious fallout in
25 terms of trying to prove reasonable suspicion when we search

1 gas tanks, because the Ninth Circuit has said that all of
2 our discovery on how we train our dogs has to be produced,
3 and this is extremely sensitive information.

4 QUESTION: This is a -- I wasn't doubting the
5 Government's motive here. I think you have excellent
6 motive, though maybe Bivens, maybe it was a little
7 overconcerned about the Bivens, maybe it wasn't. But what
8 I'm interested in is the law. That is, this isn't the first
9 case where this has happened, not necessarily involving the
10 Government, and I'm not sure how the law's supposed to work.

11 Parties come in and they say, we would like you to
12 decide this issue. I'm sure they would. But in order to
13 get to that issue, we have to assume out of the case certain
14 facts that everyone agrees are there.

15 MS. BLATT: Well, that --

16 QUESTION: Have you ever looked this up? Are there
17 any -- have you come across this kind of a problem?

18 MS. BLATT: I think it's -- it's clearly an -- as
19 Justice Ginsburg said, it's not an article 3 problem. Let
20 me say, Justice Breyer, there's no finding that there was
21 reasonable suspicion, nor do we put on any evidence that
22 would have permitted that.

23 QUESTION: No, all there is, is there happens to
24 be, I think, in the record, undisputed facts that the dog
25 barked and that they kicked the gas tank and it was hollow.

1 QUESTION: Well, I -- wait a minute --

2 QUESTION: Anyway --

3 QUESTION: I think the kick of the gas tank or the
4 tapping showed it was full, not hollow.

5 QUESTION: Full, whatever, whatever, whatever --

6 QUESTION: Am I right?

7 MS. BLATT: Yes, it was --

8 QUESTION: Showed -- showed whatever it wasn't
9 supposed to show.

10 QUESTION: Exactly. And I think the dog doesn't
11 bark, he just alerts. Is that right?

12 QUESTION: All right.

13 MS. BLATT: That's right. But let me just say as a
14 --

15 QUESTION: I know we have an agreement on that.

16 MS. BLATT: -- as a prudential matter --

17 QUESTION: Are we sure that there was reasonable
18 suspicion?

19 MS. BLATT: No, there's no --

20 QUESTION: Or is it just possible that there was --
21 that there reasonable suspicion?

22 MS. BLATT: There's no finding, Justice Scalia. It
23 is our position that we could have put on proof that this
24 constituted reasonable suspicion by putting the dog's
25 handler on and the agent explaining what a -- what a solid-

1 sounding tap means. We didn't do that, so there's no
2 finding, but let me just say --

3 QUESTION: But the Ninth Circuit would require
4 evidence of the training of the particular dog and so forth?

5 MS. BLATT: Well, at least that the defense is
6 titled to discovery on that so that the -- the handler. But
7 let me just say, Justice Breyer, as a prudential matter, I
8 think that that is a legitimate concern at the petition
9 stage when we petitioned, and there was no secret that we
10 intentionally brought this case for the purpose of having it
11 reviewed. But the case has been briefed, there's no
12 question about standing, and we think it's appropriate to
13 reach the issue. Twenty-five percent of all drug seizures
14 along the Mexican border are hidden in gas tanks, that we've
15 not only found marijuana, cocaine, heroin, currency,
16 methamphetamine, there have weapons and ammunition --

17 QUESTION: Does it matter how -- how much you have
18 to take apart of a car to make a search? Does that enter
19 into the ultimate resolution in the Government's view or do
20 we look at how easy it is to remove a gas tank and look at
21 it? Does that matter?

22 MS. BLATT: Well, it might matter, but it certainly
23 doesn't matter where the -- the compartment or container in
24 question is designed to be removed and put back together by
25 mechanics. A gas tank removal is something that can be done

1 within a reasonable time and that --

2 QUESTION: How much time does it take?

3 MS. BLATT: Well, in this case, once the --

4 QUESTION: To take it off and put it back?

5 MS. BLATT: Well, in this case it took under a half
6 an hour, but, Justice O'Connor, I want to stress that in
7 other cases, depending on the type of car, it might take an
8 hour or two hours, and the last thing we want is our customs
9 official to be on a Fourth Amendment stopwatch and telling
10 the mechanic to rush. So they need --

11 QUESTION: On the 25 percent figure, you say 25
12 percent of all seizures from vehicles? Does that include 25
13 percent of seizures where you search the person or?

14 MS. BLATT: No, it's 20 --

15 QUESTION: What's -- the 25 percent is a percentage
16 of what?

17 MS. BLATT: Twenty-five percent of narcotics
18 seizures in terms of amount of seizures along land borders.
19 That doesn't include seaports --

20 QUESTION: Oh, 25 percent in terms of quantity?

21 MS. BLATT: In terms of number of seizures. It
22 doesn't necessarily mean how much volume, but it's a lot,
23 given that the gas tank is one of the largest containers.

24 QUESTION: But included in that base is seizures
25 from the person where somebody has it in their pocket and so

1 forth?

2 MS. BLATT: Yes, that's correct, but --

3 QUESTION: Well, the gas tank here had 80 pounds in
4 it, didn't it?

5 MS. BLATT: Eighty pounds of marijuana with five
6 gallons of gas, and that's an enormous amount, and this
7 could have been another -- another -- other dangerous items,
8 it doesn't have to be just marijuana. And they have seen it
9 all. At the same time, someone does not store personal
10 effects in their gas tank. It's just a repository for fuel.
11 And this involved far less of an intrusion on privacy
12 interest than the type of searches that can happen and do
13 happen at the border, such as the traveler's baggage and the
14 passenger compartments in the vehicle.

15 QUESTION: May I ask of you if the Government has
16 procedures in place for the cases in which inadvertently
17 they damage the car or -- or maybe the thing might blow up
18 on some occasion or something like that? What -- what's
19 remedy does the citizen or the maybe an alien or the citizen
20 have in that situation?

21 MS. BLATT: Any time there's damage to any types of
22 property at the border, the person is handed a claims form,
23 which is processed through customs, first under the Federal
24 Tort Claims Act. Now, there's an exemption for claims
25 arising out of the tension of properties by customs under 28

1 U.S.C. 2680(c), but assuming that happens, customs can pay,
2 and does pay, up to \$1,000 under the Small Claims Act, under
3 31 U.S.C. 3723. And Justice Stevens, there's another
4 statute, a customs-specific statute, 19 U.S.C. 1630, that
5 would permit customs to pay up to \$50,000, but the
6 restriction is for -- it has to be for non-commercial
7 properties, so that would be personal property that customs
8 damage. So there's --

9 QUESTION: I would think there are a lot of cases,
10 repair bills are getting pretty expensive now, where \$1,000
11 wouldn't cover it, the damage to a car.

12 MS. BLATT: Well, that may be, Your Honor, but this
13 case doesn't involve claim of damage and --

14 QUESTION: No, I just -- but it's -- it's sort of
15 in the background as we're asking whether it's reasonable in
16 the -- in the -- in an ultimate sense, and I just -- that's
17 one of the things that I'm concerned about is --

18 MS. BLATT: Well, sure, a gas tank is about \$100,
19 \$200 item, and it's conceivable that any search can result
20 in damage. Now, respondent has never claimed --

21 QUESTION: You mean to repair it or to replace it?

22 MS. BLATT: Well, you're right. You could have --
23 you could have --

24 QUESTION: When you say \$100, to reconnect it,
25 it's about \$100?

1 MS. BLATT: That's right. You would -- no, the
2 item itself probably costs under \$200, but you would have
3 labor costs.

4 QUESTION: Well, that's not true. I recently had
5 to get one, and it's quite expensive, I can tell you.

6 (Laughter.)

7 MS. BLATT: Well, depending on the car, the ones
8 I've seen have been under \$200, but you would have
9 associated labor costs and maybe other parts. But the basic
10 point is that this is a container, it's a paradigmatic type
11 of item that can be opened up by the -- at the border
12 without any particularized suspicion. And --

13 QUESTION: Ms. -- Ms. Blatt, may I just go back
14 before you go on with your argument to follow up on Justice
15 Stevens' question? You spoke of the \$50,000 limit as being
16 for damage or, I guess, destruction of non-commercial
17 property. Does -- does the non-commercial mean, as I would
18 assume it would mean, that a truck or lorry that is driven
19 as a -- as a carrier would not be covered, damage to that
20 would not be covered by the \$50,000 coverage?

21 MS. BLATT: That's right. And property is --

22 QUESTION: So if the -- if the -- if the truck, I
23 mean, if the commercial truck catches fire as a result
24 because there's a spark in the gas tank and everything goes
25 up in flames, in effect there's no redress?

1 MS. BLATT: Well, I don't know too many commercial
2 importers that don't have insurance that would cover damage
3 by customs, but the important thing is --

4 QUESTION: No, but the customs isn't going to pay
5 for it.

6 MS. BLATT: Customs is not going to pay for that.

7 QUESTION: But this would happen in a --

8 MS. BLATT: But --

9 QUESTION: -- reasonable search too, wouldn't it?

10 MS. BLATT: Excuse me?

11 QUESTION: I'm -- this would happen in a search
12 where there is probable cause as well, it could happen,
13 couldn't it? When there's -- when there's reasonable
14 suspicion, the same thing could happen, couldn't it? And
15 you also wouldn't have to pay for the truck?

16 MS. BLATT: Well, that -- that's absolutely true,
17 but --

18 QUESTION: Right, and you would also --

19 QUESTION: And that would -- and that would not
20 render what was otherwise a reasonable search unreasonable,
21 would it?

22 MS. BLATT: It would depend. As long -- assuming
23 they're acting reasonably in carrying out the search, it's
24 still reasonable and --

25 QUESTION: The mere fact that there's no

1 compensation for actual damage, accidental damage to -- to
2 the truck would not render the reasonable search
3 unreasonable if there were suspicion, right?

4 MS. BLATT: That's correct.

5 QUESTION: And the reason --

6 QUESTION: So why should it do it here?

7 MS. BLATT: There have been thousands of
8 disassemblies at the border --

9 QUESTION: But isn't -- isn't the point that in --
10 in the -- in the hypothetical that Justice Scalia puts, with
11 the probable cause, we start with the assumption that the
12 offices are in there acting reasonably. The question in
13 this case is posed by Justice Stevens' question. Would the
14 potential for damage -- is it reasonable to go in there in
15 the first place without probable cause? So that is a
16 different issue, isn't it?

17 MS. BLATT: Well, no, I think it's reasonable to
18 search property at the border by virtue of the fact it's at
19 the border, and given the Government's overriding interest
20 and the person's reduced expectations. But Justice Souter,
21 there has been no known or reported instance of this
22 hypothetical risk materializing at the border with respect
23 to a customs search.

24 QUESTION: Ms. Blatt, you mentioned, you started to
25 give a number, 1,000 searches, fuel tank searches, and then

1 you gave a number earlier about how many gas tanks turned
2 out to have contraband or something. Do you know what
3 percentage of those gas tanks were -- was there disassembly
4 and what percentage were done by a less intrusive means by
5 the dog and the tapping on the fuel tank?

6 MS. BLATT: Well, all gas tank seizures, which
7 there have been thousands, have to be done by removal and
8 disassembly of the tank. There are, you could call them
9 searches, because that's what they are, of gas tanks that
10 don't involve removal and disassembly, if you use
11 sophisticated equipment such as density busters and X-rays.
12 But all these seizures that are occurring at the border, in
13 order to get to the drugs, you have to unscrew the bolts
14 that are holding the tank to the undercarriage of the
15 vehicle and remove the tank and open it up.

16 QUESTION: Is the practice then to just go straight
17 to that procedure and skip the dog and the tapping, or do
18 they go through the whole thing?

19 MS. BLATT: Well, they have dogs at all the major
20 ports of entry, but the dogs don't always alert, so I
21 wouldn't say it's necessarily skipping, but the dog may not
22 alert. They also at some of the facilities have what are
23 known as fiber optic scopes, which are extremely
24 sophisticated and effective equipment. Unfortunately, 75
25 percent or higher of all tanks have, in the filler tube,

1 have an anti-siphoning valve that blocks the entry of the
2 scope into the tank, but they will try that if they have it.
3 It's not always available. It's an extremely expensive
4 piece of equipment. It costs \$16,000 per unit. But if they
5 have that, presumably they try that first, and if it's
6 blocked, then they put the car up on a lift and unscrew the
7 metal bolts that are holding them that -- to the metal
8 straps that are holding the tank and they'll remove the
9 tank. And then from there on it's pretty straightforward on
10 how to open up the tank.

11 QUESTION: But if we -- if you prevail in this case
12 and they don't have to do that, they can just say it's good
13 enough to go right to the disassembly and we don't have to
14 bother with dogs and maintaining dogs and anything else?

15 MS. BLATT: Yeah, that's right. Our position is
16 where the procedure imposes only a modest intrusion on
17 interests protected by the Fourth Amendment, the officers
18 don't have to exhaust every least intrusive method.

19 QUESTION: Obviously that would be the result if we
20 were to support the Government's view here, and I think
21 we're interested in knowing how often people's gas tanks
22 would be disassembled if the Government's view prevails
23 here. How many times percentage-wise would people crossing
24 a land border expect to have their gas tank removed if the
25 Government prevails here?

1 MS. BLATT: It's -- it's --

2 QUESTION: I mean, let's say 1,000 cars cross the
3 border point in an hour. What percentage of those will have
4 their gas tanks removed?

5 MS. BLATT: Not very many, Justice O'Connor. Let
6 me give you these statistics. There have been 120 million
7 vehicles that passed through this country's borders last
8 year, and over the last four years, four years, there have
9 been 8,000 gas tank disassemblies.

10 QUESTION: Yeah, but you didn't have this rule
11 established that you didn't need reasonable suspicion. What
12 we're asking you to speculate on is if the Government
13 prevails and we say, fine, you can take the gas tank off,
14 you don't have to have any degree of reasonable suspicion.
15 Then how many will there be?

16 MS. BLATT: Exactly the same. It has always been
17 the rule up until the Ninth Circuit that we could take apart
18 a gas tank without reasonable suspicion. Customs officials
19 --

20 QUESTION: Have any of the other circuits followed
21 the Ninth Circuit's -- other circuits have that -- which
22 have land borders?

23 MS. BLATT: No, no, they've always been able to
24 take apart a gas tank on something less than reasonable
25 suspicion. But Justice O'Connor, it is true that as a

1 practical matter customs does not take the time or energy to
2 take -- to call the mechanic, pay for the mechanic to take
3 apart the gas tank unless their suspicions are focused on
4 the gas tank, and it will usually be because of the dog
5 alerts, or the more common situation is it -- that they're
6 just not sure whether that gas tank has been altered. Maybe
7 a bolt looks different than another bolt or it looks like
8 it's been unscrewed, and it may be the person had their gas
9 tank worked on, but they're just not sure, they have some
10 concern about the person's travel plan story and so they --
11 they want to go ahead and make sure the gas tank's not
12 containing contraband.

13 QUESTION: Suppose -- suppose you prevail. Are
14 there any regulations or -- or procedures under which you'll
15 keep statistics and data, so that say over -- suppose you
16 prevail, then over the next five years we can -- we can look
17 back and see that there have been 10,000 searches and
18 contraband has been discovered only 5 percent of the time or
19 something?

20 MS. BLATT: Yes, they keep statistics on seizures
21 of narcotics and what are known as positive and negative
22 seizures. And in the last four years of the 8,000 gas tank
23 seizures that have happened, 85 to 90 percent of those have
24 been what are known as positive hits or there's been a
25 presence of contraband, and so 10 to 15 percent of those

1 have been so-called negative searches where the tank is
2 reassembled and the motorist sent on their way, and I -- we
3 would expect that those statistics to continue, that they
4 have limited resources and they conduct a search when they
5 think it's appropriate and necessary.

6 QUESTION: But you don't know of the 8,000 what
7 percent were without any suspicion?

8 MS. BLATT: No, but there's never been any kind of
9 requirement. I -- I think we can --

10 QUESTION: All right. So --

11 MS. BLATT: -- confidently say their suspicions
12 were focused on the gas tank, whether or not that that would
13 have convinced a court that it was reasonable under --

14 QUESTION: Yeah, I see.

15 MS. BLATT: -- this Court's definition I think is
16 unclear.

17 QUESTION: Are there any rules or administrative
18 procedures in the customs that would say -- that would apply
19 in respect to suspicionless searches of gas tanks? For
20 example, random searches, do it once a month or here's -- we
21 have a random program or we check up to see how it's going
22 or -- are there -- are -- is it just each customs agent for
23 himself when -- if you win, is it each customs agent for
24 himself with no check whatsoever?

25 MS. BLATT: No, well --

1 QUESTION: Or are there internal administrative
2 checks that would be a kind of substitute for a judicial
3 check?

4 MS. BLATT: There are extensive training of customs
5 officials --

6 QUESTION: But what does it say --

7 MS. BLATT: -- about how to go about searching a
8 car, where to look, where -- where smugglers typically hide
9 their drugs, and what type of evidence they may leave
10 behind, and that's what the agent is looking for. The
11 agents are also trained though, Justice Breyer, to rely on
12 their experience and intuition and hunches, and over time
13 border officials gather extensive experience about what
14 they're looking for.

15 QUESTION: When --

16 MS. BLATT: They also can consult with a supervisor
17 if they have a question about whether a search should
18 actually be done.

19 QUESTION: So, for example, you have a customs
20 agent whose experience leads him to believe that parents
21 with small children are more likely to be smuggling heroin.
22 Now, this would be an odd customs agent. Is there anything
23 in the system that would discover that this is the person
24 who's doing all the suspicionless checks and something's
25 gone wrong here, so there's -- do you see what I'm looking

1 for?

2 MS. BLATT: Well, his --

3 QUESTION: I'm looking for some way of --

4 MS. BLATT: -- supervisor would be aware of the
5 search, but with a 85 to 90 percent success rate, that
6 possibility seems rather remote.

7 QUESTION: But then you have the suspicion searches
8 in that 85 percent. I'm trying to figure out if we have
9 each customs agent for himself to conduct whatever
10 suspicionless searches he wants, and you have a few of the,
11 perhaps in every organization there are a few unusual ones
12 who cause some problems, are there any internal checks
13 within the system, because you're going to not have a
14 judicial check? I wonder if there are any administrative
15 ways.

16 MS. BLATT: There may be checks where people can
17 file complaints, I don't know. But the same officer could
18 be instructing that the spare tire compartment be taken
19 apart or that a tire be taken out or that every scrap of
20 luggage can be taken off or that the person could empty
21 their wallets, their shoes, their purses, their clothing,
22 and put the person to a considerable inconvenience.

23 But a gas tank is not a container, Your Honor,
24 that there's some sort of heightened expectation of privacy.
25 It stores fuel.

1 QUESTION: So assume that if there's any de facto
2 check, there's more likely a check on the gas tank than
3 there is on emptying your wallet and taking your shoes off
4 and everything else, namely the expense that it causes to
5 the customs service in time -- in terms of the time of its
6 agents, and I suppose you have to pay these mechanics that
7 come and do it.

8 MS. BLATT: Yeah, it's about -- cost runs about a
9 cost of \$90 to \$140 per visit, but Justice Scalia, there are
10 also, very consistent with your point, hundreds of cars in a
11 lane that this inspector has to get through, and they always
12 are concerned about moving through the legitimate traffic
13 and legitimate trade. They want to get people in, they want
14 to get people past the border. At the same time, they're
15 extremely concerned about what's in -- what people might be
16 concealing in their vehicles, and a vehicle is an extremely
17 large container and a gas tank is a relatively large
18 container, and given that it is 25 percent of all drug
19 seizures have been hidden in the gas tank, they have an
20 essential interest in being able to not only detect it when
21 they think it might be there, but also deter it.

22 It has been customs' experience over many, many
23 years that smugglers are looking to exploit any weakness
24 along our border security efforts, and they will readily
25 place their drugs where they're least likely to be detected.

1 QUESTION: Does that mean, for example, that you
2 could rip out all the upholstery because you can hide drugs
3 inside the upholstery?

4 MS. BLATT: Well, ripping out the upholstery would
5 first present a question of what kind of intrusion there is
6 on -- under the Fourth Amendment or an interest protected on
7 the Fourth Amendment, and there may be a significant
8 deprivation of a property interest. Now, we would probably
9 contend that we could rip whatever upholstery was reasonably
10 necessary to conduct the search.

11 QUESTION: I thought -- I thought you would, and
12 maybe I'm recalling your brief incorrectly, but I thought
13 you -- you made a distinction between the kind of intrusive
14 bodily search like a strip search and said that's the only
15 one where you would need reasonable suspicion. All others,
16 all that involve only property and not the person, the rule
17 should be at the border, anything goes, no reasonable
18 suspicion required. Is that the position the Government is
19 taking?

20 MS. BLATT: There's a small nuanced caveat to that.
21 We think we can search property without suspicion and use
22 whatever force is reasonably necessary. At the same time,
23 Justice Ginsburg, the Constitution still applies with
24 respect to the property and the search has to be carried out
25 in a reasonable manner, and if someone took a giant axe and

1 starting whacking away at leather upholstery, that would
2 very well constitute an unreasonable search.

3 But this case doesn't involve a claim of damage
4 and respondent has never said that he was deprived of a
5 significant possessory interest in his gas tank. Rather,
6 what happened, it was taken apart and it could have been
7 easily put back together.

8 QUESTION: But your -- your answer to my question
9 about property is, as long as you're not wantonly
10 destructive, you can -- any -- anything that's in the car as
11 distinguished from a person?

12 MS. BLATT: That's our -- that would be our
13 position, but I'm saying it also involves a very distinct
14 factor, and that is that there's a deprivation of a
15 significant property interest if the item is going to be
16 obliterated or its value going to be destroyed, and that's
17 not the contention made in this case or the type of
18 deprivation of a privacy -- of property interests you would
19 have with a gas tank. But sure, if you took a vase and
20 smashed it when you could have looked in it, or let me just
21 say if you wanted to open up the trunk --

22 QUESTION: Well, but not just on the -- the -- if
23 you smash it unnecessarily, but suppose the only way to get
24 behind the fabric in say a seat cushion or something like
25 that is to cut it open. It -- does your policy apply to

1 that situation too?

2 MS. BLATT: Well --

3 QUESTION: Because I don't suppose you have a
4 seamstress who sews up the seat right away.

5 MS. BLATT: Right. Well, we would look at first
6 what the type of deprivation is, and if it's a teeny little
7 tear that can be easily repaired, maybe there's not a
8 significant deprivation.

9 QUESTION: But suppose it's something that cannot
10 be repaired.

11 MS. BLATT: Let's --

12 QUESTION: You have to cut up a seat -- a seat
13 cushion. What -- what do you do?

14 MS. BLATT: Let's suppose that there's a
15 significant deprivation. It would at least be reasonable
16 for the court to look at what kinds of alternatives were
17 available to the Government. As a practical matter, Justice
18 Stevens, we -- customs officials have long, skinny metal
19 probes which are like needles that they use to search
20 upholstery, so if it's fabric you wouldn't even see it going
21 in and out. If it's leather, you probably are going to get
22 a tiny hole. Now, whether that would constitute a
23 significant deprivation --

24 QUESTION: I see.

25 MS. BLATT: -- might turn on the facts and

1 circumstances, but these are wonderful pieces of equipment
2 that customs officials use all the time to look inside
3 places that are hard to see, and they use them exactly on
4 seats.

5 But to be sure, Justice Stevens, customs gets
6 complaints about upholstery. They let a dog into a car and
7 the dog scratches the upholstery or the agent's going in
8 there and searching and he steps on something.

9 These kinds of things happen at the border and
10 customs have to -- have a job to do and they've got to use
11 whatever force is reasonably necessary. But I think these
12 cases are separate because they involve some arguably
13 significant deprivation of the owner's possessory interest
14 in that piece of property. If it's a leather seat and it's
15 torn, the value's gone down.

16 But the Ninth Circuit applies a rule that doesn't
17 let customs officials open up a container even where they
18 can put it back without damaging the tank, and so we think
19 that case is quite distinct.

20 Mr. Chief Justice, I'd like to reserve the balance
21 of my time.

22 QUESTION: Very well, Ms. Blatt.

23 Mr. Hubachek. Am I pronouncing your name
24 correctly?

25 MR. HUBACHEK: Yes, Mr. Chief Justice.

1 ORAL ARGUMENT OF STEVEN F. HUBACHEK

2 ON BEHALF OF THE RESPONDENT

3 MR. HUBACHEK: Mr. Chief Justice, and may it please
4 the Court:

5 The Court's decision in Montoya established that
6 for a search other than the routine border search,
7 reasonable suspicion was required.

8 QUESTION: Well, Mr. -- Mr. Hubachek, Montoya
9 discussed that in the context of a search of the person. It
10 -- it said we reserve judgment on whether a strip search of
11 his body --- it was talking about people, not gas tanks.

12 MR. HUBACHEK: Absolutely, Mr. Chief Justice, but
13 four courts of appeals have unanimously applied the analysis
14 in Montoya to searches of property or effects under the
15 Fourth Amendment. The Ninth Circuit's decision in Molina-
16 Tarazon is consistent with those cases in that it applied
17 the Montoya paradigm to the search of the gas tank and the
18 seizure of the gas tank.

19 QUESTION: Well, would you say that a ship coming
20 in at a port in our country from elsewhere cannot be
21 searched thoroughly without reasonable suspicion?

22 MR. HUBACHEK: A ship could be searched thoroughly
23 without reasonable suspicion. I -- but --

24 QUESTION: But a land vehicle coming from, for
25 example, Mexico at the land border crossing cannot be?

1 MR. HUBACHEK: Well, I -- the distinction that I
2 would draw would be the point --

3 QUESTION: What is the difference?

4 MR. HUBACHEK: -- of disassembly. I don't think
5 that you can disassemble conveyances that come to the
6 border.

7 QUESTION: You think that if the ship came in that
8 the gas tank could be removed and examined for presence of
9 illegal goods?

10 MR. HUBACHEK: I -- I don't think that it would be
11 reasonable to disassemble a ship either, particularly in
12 light of all of the various methods that are available. I
13 don't think it's supported historically either. You know,
14 the initial statutes that the Solicitor General cited in the
15 brief don't support any sort of disassembly of conveyances,
16 the -- particularly the 1790 statute. What it talks about
17 is allowing customs officials on board to look around, to
18 mark items, to take records and so on and so forth, and then
19 when items are being passed through customs, then the
20 customs officer --

21 QUESTION: But in today's world, the figures, the
22 statistics are staggering about how many narcotics are
23 brought into our country by way of the use of gas tanks. I
24 mean, that's an incredibly large figure.

25 MR. HUBACHEK: And I certainly would --

1 QUESTION: And -- and what are we supposed to do
2 about that?

3 MR. HUBACHEK: Well, Justice O'Connor, I think that
4 what we're supposed to do about it is to use the methods
5 that are tried and true by the customs service itself. If
6 the customs service itself wants to move away from
7 dismantling-type searches into searches that involve the use
8 of the -- their technology --

9 QUESTION: Well, they have to dismantle to get into
10 a gas tank where it -- the opening will not permit the entry
11 of a -- the little looking device.

12 MR. HUBACHEK: Well, sometimes -- maybe in the
13 brief I was too excited by all this technology that's
14 available, but I think that sometimes it's important to
15 start back at the initial things. Molina-Tarazon, for
16 instance, the case that developed this rule, found
17 reasonable suspicion based upon mud splatterings on the
18 bottom of the tank. Carreon, the Tenth Circuit decision,
19 found reasonable suspicion in large part based upon the fact
20 that certain bolts were shiny. So --

21 QUESTION: Mr. Hubachek, now you say, you give the
22 impression that all courts of appeals have agreed with the
23 Ninth Circuit. Ms. Blatt gave the impression, at least to
24 me, that the Ninth Circuit was alone on this. What is the
25 state of decisions, say in the Fifth Circuit, which has so

1 much land border like the Ninth Circuit?

2 MR. HUBACHEK: Mr. Chief Justice, no court but the
3 Ninth Circuit has addressed this specific issue here, the
4 dismantling of gas tanks. The Fifth Circuit, though, has
5 held --

6 QUESTION: Is it not done along the Texas border?

7 MR. HUBACHEK: I'm sure it is done, but there just
8 hasn't been a case that has arisen.

9 QUESTION: But there hasn't been a reported case
10 where it was challenged?

11 MR. HUBACHEK: That's correct. But however, the
12 Fifth Circuit has decided that intrusive searches of
13 property are subject to the Montoya analysis and that
14 reasonable suspicion is required in a drilling case called
15 Rivas. And in that case, you know, they used a drill to
16 drill into the vehicle.

17 QUESTION: Is -- is it the -- you -- you described
18 the search as intrusive, but as I understand it, your
19 objection is not to the intrusion, your objection is to the
20 disassembly.

21 MR. HUBACHEK: Yeah, yes, that's correct.

22 QUESTION: So -- so the -- the -- I -- I assume
23 your objection rests on either or both of these grounds,
24 either the value of the property, which is either lessened
25 or placed at risk, or the inconvenience to the driver and

1 passenger while the -- while the intrusion or the
2 disassembly goes on. Which is it?

3 MR. HUBACHEK: I would say it's both of those and I
4 think that the -- of course, the Court's Soldal decision
5 establishes that a meaningful interference, even if there's
6 no privacy interest at all, still implicates the Fourth
7 Amendment. But certainly there are issues with respect to
8 value. If my gas tank has been dis --

9 QUESTION: All right, you know, what is the issue
10 on value? They'll put it back together again, there's
11 apparently no record that -- that these things blow up all
12 the time.

13 MR. HUBACHEK: Well --

14 QUESTION: So -- so what is the -- the property
15 concern?

16 MR. HUBACHEK: Well, I think that there a number of
17 concerns. Number one, do -- if I resell the car, do I have
18 to disclose that the gas -- the fuel system was
19 disassembled? I mean, what if I have a warranty? Does that
20 exclude things from a repair by the warranty because it's
21 been worked on by someone who's not authorized by Ford or
22 whatever company owns the car? Are there issues with
23 emissions? You know, this is a 1987 vehicle that we're
24 talking about and the systems are much more complicated now.
25 I just read yesterday a regulation indicating if you have a

1 .04 gap, you have to have a sensor that can determine if you
2 have that much leakage, .04 inches, that you have to have a
3 sensor that determines that kind of leakage. Would it
4 violate the terms of your lease to have some unauthorized
5 person or some person you don't know about to go ahead and
6 disassemble --

7 QUESTION: Your -- your clients weren't worried
8 about all that apparently. I mean, I don't think 60 pounds
9 of cocaine was good for the gas tank either, was it?

10 (Laughter.)

11 MR. HUBACHEK: No, I'm sure that it's not, and
12 certainly you'd have to --

13 QUESTION: Is that -- is that the only kind of -- I
14 mean, I take it you concede there's no privacy interest
15 here?

16 MR. HUBACHEK: Well, I --

17 QUESTION: And -- is that right?

18 MR. HUBACHEK: It -- it certainly is -- is not a
19 tremendous privacy interest.

20 QUESTION: Well, is there any?

21 QUESTION: Well, all right. So there's no privacy
22 interest and all there is is an interest that you don't want
23 the Government hurting your property, which is conceivable
24 in an interest. But on the other hand, they say no privacy
25 interest, conceivable the Government will hurt your

1 property. Every day of the week we deal with government
2 people might hurt our property. And on the other side, 25
3 percent of all the drugs that come into the United States
4 outside -- by land, come in in gas tanks, so this is an
5 overwhelming interest for letting you do it. After all,
6 they search your suitcases, they search my pockets, they
7 search every piece of luggage, they -- they search anything
8 you're bringing in, and it's not an unusual thing at a
9 border.

10 So -- so, how -- how do you respond to this strong
11 interest on their side and no privacy interest and very
12 little property damage risk on the other side?

13 MR. HUBACHEK: Well, I don't agree that there's
14 very little property damage risk based on the -- the other
15 things that I've just mentioned. Plus there's also the
16 issue of the security of the individual, which was focused
17 on in Molina-Tarazon, you know, what confidence do you have
18 that this crucial system in your vehicle is going to be
19 reliable when it's been taken apart --

20 QUESTION: Well, presumably the person filling the
21 gas tank with drugs had to disassemble the tank to put the
22 drugs in there, so apparently willing to take that risk --

23 MR. HUBACHEK: But --

24 QUESTION: -- but not willing to let the customs
25 service do the same thing?

1 MR. HUBACHEK: Right. Well, people who smuggle
2 drugs in gas tanks are willing to take a lot of risks, but
3 the average traveler who comes to the border and is faced
4 with the possibility of random disassembly of their gas tank
5 is not going to be willing to take those risks.

6 QUESTION: Well, how -- how often does that happen
7 that an innocent person has his gas tank person random --
8 randomly disassembled?

9 MR. HUBACHEK: Well, there's -- one of the
10 weaknesses of this record is -- is that although the customs
11 service claims that it's important for them to be able to do
12 random disassemblies, they haven't established any sort of
13 program under which they do random disassemblies, but there
14 were several hundred gas tank disassemblies in which there
15 were no drugs found.

16 QUESTION: Well, we were told that 15 percent or 20
17 percent of the time nothing is found, 80 or 85 percent
18 something is. That -- that's my understanding of the
19 Government's submission.

20 MR. HUBACHEK: Right. And I think that that
21 supports the notion that when they act upon suspicion and
22 their experiences, we've heard detail this morning that they
23 can be effective. That doesn't mean though that it's
24 essential to have the ability randomly to disassemble based
25 upon those suspicions.

1 QUESTION: They're not talking about randomly.
2 They're -- they're talking about -- I -- I think -- I think
3 Ms. Blatt said hunches. I mean, there, you know, there --
4 there are just some intuitions that agents get that may not
5 rise to the level of what a court may acknowledge is an
6 articulable suspicion, and they shouldn't -- they shouldn't
7 have to worry about whether they have to prove that or not.
8 I -- do you really think they're going to do it when -- when
9 there's no reason whatever to do it?

10 MR. HUBACHEK: Well, that -- that's the problem
11 with absolute discretion. Any -- any officer across the
12 United States can make the rules for that particular day.
13 But I think that it's important to bear in mind that these
14 hunches have, you know, there are many --

15 QUESTION: But we're talking about border searches
16 with customs officials who are trained and they have limited
17 budgets. Why do they want to pay the cost of having a
18 mechanic disassemble an engine unless they have a good
19 reason for doing it? I mean, it's inconceivable to me that
20 they try to run up the number just to run up the number.
21 It's too expensive. They don't have that kind of money.

22 MR. HUBACHEK: Well, I think that any seizures that
23 the Court has required there actually be founded suspicion
24 are troublesome for the officers. I mean, if they pull
25 people over randomly, that's time that's taken away from

1 other activities that they could be undertaking, so there's
2 always a natural disinclination to do that. But that
3 doesn't change the fact that this Court has repeatedly in --

4 QUESTION: But -- but not as easily observed and
5 not as easily recorded by supervisors. I mean, it seems to
6 me if you have an agent who repeatedly has a -- cars backing
7 up at the -- at the gate that -- that he's controlling, and
8 who repeatedly comes up empty on -- on gas tank searches,
9 that fellow's not going to be there very long. I mean, it,
10 it's easy to observe somebody who's abusing the system, it
11 seems to me.

12 MR. HUBACHEK: Well, again, I think that it's
13 important though that officers not be able to act
14 arbitrarily across the United States. It's not -- it's not
15 necessarily going to be limited to one officer so that we'll
16 always be able to weed them out.

17 QUESTION: In -- in your answer to Justice Souter's
18 question a few minutes ago, you said that not only was the
19 property interest important, but the inconvenience was a --
20 was a factor, and I don't know that we've ever said much
21 about that that would -- would support it. Certainly
22 there's going to be some inconvenience any time you cross a
23 border, and this thing, if it takes half an hour, is that
24 really a Fourth Amendment factor?

25 MR. HUBACHEK: Well, I -- I think it's a factor,

1 but I don't think it's as important as the other factors
2 we've talked about, the potential diminution in value, the
3 lack of security upon the -- the individual who's driving
4 away in a vehicle that's been altered by unknown
5 individuals, and the fact that, you know, that --

6 QUESTION: When you -- when you -- once you -- you
7 -- the -- the trunk is fair game, any luggage is fair game,
8 fancy Gucci shoes might be fair game, it seems to me that
9 the fuel tank, if we're looking at it from the point of view
10 of the -- the -- how much damage there might be or the cost,
11 is -- is a lesser thing than personal items, and also that
12 the privacy interest is much stronger in what we already say
13 can be done without suspicion.

14 MR. HUBACHEK: I -- I agree that the suspicion --
15 that the privacy interest in the gas tank is not as high as
16 the other items that you've mentioned. However, it still is
17 true that when you put your Gucci shoes on, you're planning
18 to take them off, so if an officer takes them off to look at
19 them, that's not a problem. If they open up your luggage,
20 your luggage is expected to be opened, and in fact, 1461
21 requires that you furnish an opportunity to open up that
22 luggage. But no one expects that their gas tank when they
23 buy a new car to a tremendous expense that they put their
24 family in, no one expects that that part of their vehicle is
25 going to be open like they know that their luggage is.

1 QUESTION: One other question is whether it is
2 unreasonable to -- to require them to expect it if they're
3 running their car back and forth across the border? I mean
4 --

5 MR. HUBACHEK: Well, I -- don't think that it's --

6 QUESTION: What -- why is it wrong? What -- what
7 test do you -- do you urge as to -- as to when -- when a
8 search by border agents cannot be done? What -- what is the
9 criteria?

10 MR. HUBACHEK: I think when it involves disassembly
11 of property and --

12 QUESTION: Anything that involves disassembly. So
13 -- so what about taking the cap off of a -- off of a bottle
14 that's there. Is that -- is that disassembly?

15 MR. HUBACHEK: Well, I think the cap off the bottle
16 is similar to the luggage. You would just open up the cap
17 and that -- that's what's expected to happen, but no one --

18 QUESTION: What if the bottle's sealed? I mean,
19 you know, it's -- it's -- it's a sealed bottle?

20 MR. HUBACHEK: I -- I guess --

21 QUESTION: You have to break the seal.

22 MR. HUBACHEK: That could result, I mean, that may
23 be necessary --

24 QUESTION: That can't be done?

25 MR. HUBACHEK: That may -- it may be situations

1 where that shouldn't be done without --

2 QUESTION: Suppose it's the same as a -- suppose
3 there's a terrorism problem and --

4 QUESTION: Wow.

5 QUESTION: -- they say that we want to search every
6 fifteenth truck that comes in, there might be anthrax or
7 bombs or whatever and we want to give the agents the power
8 to look thoroughly into these big trucks even without
9 suspicion. Now were you saying the Fourth Amendment would
10 stop that?

11 MR. HUBACHEK: If we're talking about a specific
12 threat, where there is, you know, a specific --

13 QUESTION: No, no, non-specific threat, it's the
14 present situation. The Government simply says, we're
15 worried about our borders, they're not secure, and we want
16 to look at the trucks, that we want the -- the customs
17 agents to be able to look at trucks that are coming in.
18 They may have dangerous items on -- in -- on board, and we
19 want them to look whenever they want. It's at the border,
20 just like your purse, just like your valise, just like your
21 bag. Now, what -- what's your view of -- is your case the
22 same, different, or what do you think of that case?

23 MR. HUBACHEK: I -- I think -- I don't think that -
24 - that suspicionless searches under those circumstances
25 would be reasonable because there's not been any showing

1 that random searches or disassemblies of gas tanks would be
2 at all effective. In Delaware v. Prouse, this Court
3 disapproved the process of pulling over people randomly to
4 check registrations, both because it was not demonstrated to
5 be effective, but also because it was not demonstrated to
6 have any sort of deterrent effect.

7 QUESTION: All right, so in your view,
8 suspicionless searches of trucks, whether for bombs,
9 anthrax, weapons, or drugs all stand or fall together?

10 MR. HUBACHEK: Well, I think that -- I think that
11 there -- at least with the every 15 cars, there would be
12 more of a deterrent because then they would know that every
13 fifteenth car is being searched, but there is no program in
14 place now, there was nothing offered below, in fact, there
15 was no evidence offered below --

16 QUESTION: That's a different question. My
17 question was, do they stand or fall together?

18 MR. HUBACHEK: Right. I -- I think that the --
19 that our case is stronger than your hypothetical.

20 QUESTION: Delaware against Prouse had nothing to
21 do with the border. I mean, that was on a highway -- inland
22 highway in Delaware. The Fourth Amendment has always been
23 much relaxed at the border.

24 MR. HUBACHEK: No, I -- I agree with that, Mr.
25 Chief Justice, but my point from Delaware v. Prouse is that

1 in -- in examining a random program, the Court looked to two
2 things. It looked to whether or not it was demonstrated to
3 be effective. It's not demonstrated to be effective here.
4 And it also looked to whether or not there was going to be a
5 deterrent effect from it, and there was no --

6 QUESTION: But -- but you just can't transplant a
7 case involving a car on a highway inland to the border.

8 MR. HUBACHEK: No, I understand. My point is -- is
9 that the empirical evidence was important in the Delaware v.
10 Prouse case, and that's how this Court distinguished it in
11 Sitz, which is a case that the Solicitor General cited in
12 support of the notion that the Court shouldn't look to other
13 alternatives.

14 QUESTION: What -- what do you do about United
15 States v. Ross when -- when you're urging your -- your --
16 your disassembly point?

17 MR. HUBACHEK: Well --

18 QUESTION: Now that -- that was a case involving a
19 border search statute, not -- not the one at issue here, to
20 be sure, but nonetheless what we said, to quote it, is
21 certainly Congress intended custom officers to open shipping
22 containers when necessary and not merely to examine the
23 exterior of cartons or boxes in which smuggled goods might
24 be concealed. During virtually the entire history of our
25 country, whether contraband was transported in a horse-drawn

1 carriage, a 1921 roadster, or a modern automobile, it was
2 been assumed that a lawful search of a vehicle would include
3 search of any container that might include the object of the
4 -- of the search.

5 MR. HUBACHEK: Well, I -- I think that --

6 QUESTION: Now, why isn't that applicable here?

7 MR. HUBACHEK: I think that it -- actually, it's
8 consistent with our position, because the statutes that Ross
9 was talking about were the statutes from 1789 and 1790 that
10 I was referring to earlier, and what they allowed was the
11 customs officers to go on board the ships to mark things and
12 to make their records and so on and so forth, and then the
13 packages would then be opened by the customs officer, and
14 the first Congress thought this was a very significant act,
15 because not only did they require the customs officer to
16 open up the packages, but they had to have two reputable
17 witnesses, merchants outside the customs service, to observe
18 those. So that was a very significant event.

19 But nothing in those statutes allowed disassembly
20 of vessels. It, in fact, it did authorize --

21 QUESTION: Well, now, your -- your -- your position
22 is -- is -- is any container, you're not just talking about
23 gas tank, you say nothing can be disassembled. So if I have
24 some gizmo that is assembled and is not meant to be opened
25 again, you say if I bring that across the border the customs

1 agent can't look into it.

2 MR. HUBACHEK: Well, they can look into it with all
3 of the -- the various abilities that they have. If they
4 have --

5 QUESTION: They can't open it.

6 MR. HUBACHEK: If they have reasonable --

7 QUESTION: They can't -- they can't open it.

8 MR. HUBACHEK: If they have reasonable suspicion,
9 they can.

10 QUESTION: No, but without reasonable suspicion.
11 I'm --

12 MR. HUBACHEK: No, I don't think they can open up
13 the gizmo without reasonable suspicion, but they still have
14 all of the abilities they have to bring to bear on that, all
15 the -- the experience, all of their technology, all of their
16 ability to examine things.

17 QUESTION: I think I -- I -- I lost what you were
18 saying when you started referring to the gizmo. If -- if I
19 bring in -- if I buy a valuable statue in Europe and I have
20 it elaborately crated so it won't be hurt in transport, when
21 it gets to New York, can they open the crate to see what's
22 inside?

23 MR. HUBACHEK: Yes, they can, and that would be
24 consistent with the 1790 statute, which said that you could
25 open up the packages.

1 QUESTION: All right. So the difference between
2 the crate and the gas tank is, I take it, your concern that
3 after they've put the gas tank back together, there may be
4 some risk that it won't function or that the emissions
5 system will be affected? I mean, is that where you draw the
6 line between the crate and the tank?

7 MR. HUBACHEK: Well, I think that the -- the line
8 that I'm drawing is -- is the line that was drawn by the
9 first Congress when they said that you can open up packages
10 and they didn't provide any additional authority on board
11 the vessels --

12 QUESTION: Well --

13 MR. HUBACHEK: -- to disassemble --

14 QUESTION: Yeah, but you're -- you're arguing a
15 constitutional restriction here. Your -- your argument is
16 not that Congress has not provided the authority. Your
17 argument is Congress can't provide the authority. So what,
18 it seems to me what Justice Souter is asking is, if Congress
19 can provide the authority to uncrate the statue, what
20 constitutional prohibition is there to uncrating the gas
21 tank?

22 MR. HUBACHEK: Well, of course, in their brief, the
23 Solicitor Generals argued that that statute is -- does go
24 along with the constitutional protection, so I think that
25 the fact that the same Congress that passed the Fourth

1 Amendment had this narrow view of what you can open,
2 packages with the two witnesses there. And they were also
3 obligated if there was --

4 QUESTION: No, but, I mean, we -- we didn't have
5 this problem in 1790 or 1799, and the question is, what is
6 the difference in principle for constitutional purposes
7 between opening up, disassembling my crate, and
8 disassembling the gas tank? And the only thing that I can
9 think of is, based on what you've said so far, is the
10 concern that maybe the gas tank won't work or I'll have to
11 disclose it to a subsequent purchaser, or the emissions
12 system will be hurt. Do you have anything else to
13 distinguish in principle between the -- the uncrating and
14 the opening of the tank?

15 MR. HUBACHEK: Well -- well, yes. There's also the
16 notion of the -- that was relied upon in Molina-Tarazon, the
17 security of the individual who's in the vehicle, and there's
18 also the --

19 QUESTION: Well, the security is -- is the -- is
20 the concern that maybe the tank won't work or -- or are you
21 saying maybe -- maybe the -- it'll blow up? Is that what
22 you mean by the security?

23 MR. HUBACHEK: Right, yeah.

24 QUESTION: Okay. Well, the individual, I assume,
25 is not in the car when they take the tank out, so we're

1 talking simply about property damage. When they uncrate the
2 statue, they might knock the hand off, but they can still
3 uncrate the statue. What -- anything else in principle
4 between the two situations?

5 MR. HUBACHEK: Well, I think that crates are
6 intended to be open. If, you know, you packed it carefully
7 and ultimately you intend to unpack it, so you intend to
8 pack the -- the crate. I don't think it's reasonable though
9 to disassemble a valuable piece of property that has safety
10 implications --

11 QUESTION: So it depends on my intention?

12 MR. HUBACHEK: Well, I think what --

13 QUESTION: I intend the crate to be opened, but
14 when I buy a gas tank I don't intend it to be opened?

15 MR. HUBACHEK: Right. I think that that's --
16 that's -- if there's --

17 QUESTION: But that's not the expectation of
18 privacy test.

19 MR. HUBACHEK: No, I think it's -- it's the
20 property --

21 QUESTION: So this is a new test, I take it?

22 MR. HUBACHEK: No. Soldal establishes that even if
23 there is no invasion of privacy, there is still a Fourth
24 Amendment intrusion if there's a seizure of property. This
25 is a meaningful interference with the -- your enjoyment of

1 the possession of your property.

2 QUESTION: No, but the distinction between the two
3 cases, I take it, now is the intent of the owner of the
4 property that is disassembled. In the one case, the owner
5 ultimately intends the crate to be opened up. In the other
6 case, he does not intend the gas tank to be opened up. Is,
7 is that it?

8 MR. HUBACHEK: Well, I don't think it's a
9 subjective test. I think it would be -- we're talking about
10 reasonableness under the Fourth Amendment and --

11 QUESTION: Well, if that -- it can't be that he
12 doesn't -- well, expected to be opened up. If it's -- if
13 it's a container where things can be carried, one of the
14 things that the Government said in its brief is that if
15 luggage is free and then this will become the container of
16 choice, and we know that in a very high percentage there
17 have found drugs there. So it is a container, we know it's
18 been used as a container. Why should it not be treated like
19 any other container?

20 MR. HUBACHEK: Well, I think it's different from
21 any other container because it's part of a vehicle that was
22 never expected or intended by its designers to be taken
23 apart in this manner. But I would also say that there's
24 been 15 years of history in which, you know, courts of
25 appeals have applied *Montoya* to searches of property. If

1 smugglers were changing their patterns in response to those
2 decisions, this -- the Tenth Circuit rendered its decision
3 15 years ago, the Fifth Circuit rendered its decision 5
4 years ago. The Government offered no evidence below that
5 there have been changes in smuggling patterns based upon
6 those courts' decisions applying a reasonable suspicion
7 standard.

8 QUESTION: Yeah, but those -- those cases it didn't
9 involve gas tanks, if I understand correctly.

10 MR. HUBACHEK: That's -- that's correct. They
11 didn't involve gas tanks, but they involved vehicles, and
12 basically the theory was is that if smugglers --

13 QUESTION: May I -- may I ask you a hypothetical?
14 Supposing Congress passed a statute specifically authorizing
15 gas tank searches and providing in the statute that after
16 the search shall be conducted, the -- there will be two
17 people on hand, one, Mr. Goodwrench, and one Mr. Value
18 Appraiser, and they would have to give a good certificate,
19 both of them have to give a certificate that the value of
20 the car has not been impaired by what has been happened, and
21 if it has, the amount of value will be reimbursed
22 immediately by the Government to the owner. Would that be a
23 constitutional statute?

24 MR. HUBACHEK: Well, I think that, you know, since
25 ultimately we're talking about reasonableness, that would

1 address some of the objections that I've made today, but I
2 still think --

3 QUESTION: Would it -- would it cure enough of them
4 to be constitutional is the question?

5 MR. HUBACHEK: I don't -- I don't think that it
6 would, because I still think that that's beyond what the
7 First Congress envisioned and that's a -- our best guide to
8 what the Fourth Amendment was intended to mean. They didn't
9 authorize the disassembly of the ships that were coming into
10 port. They didn't say that, you know, if you took two ship
11 builders on board. What they said was, you can take apart
12 the packages, things that are intended to be opened, but you
13 have to have two witnesses, and if it turns out that there's
14 nothing in there, you have to -- the customs officer would
15 have to pay --

16 QUESTION: My hypo gave you your two witnesses.

17 MR. HUBACHEK: I -- I understand, Your Honor.

18 QUESTION: If 85 percent of the people with the gas
19 tanks that were searched have the contraband, what you're
20 asking us to do is to protect the expectation of the other
21 15 percent. I -- I suppose that's the rule, but it -- when
22 the percentages get these high, it -- it seems to me to put
23 the exclusionary rule somewhat into question with reference
24 to the border. Suppose it was 95 percent. Do we still have
25 to protect the 5 percent of the people? I mean, I guess

1 that's the law.

2 MR. HUBACHEK: Well, Justice Kennedy, there's no
3 showing that adopting the rule that we're asking for would
4 have any effect on the effect -- effectiveness of the border
5 searches. There's no evidence offered below that, you know,
6 the -- if you deprive them of the ability to do random
7 searches that there will be even one more person who would
8 get through. So I think that if they --

9 QUESTION: Well, that works the other way around as
10 well.

11 MR. HUBACHEK: Well, that's true, but it would
12 still vest the absolute discretion across the border for any
13 customs inspector for no reason at all to disassemble
14 valuable property. That's inconsistent with the history of
15 the Fourth Amendment, it's inconsistent with the Nation's
16 earliest statutes, it's even inconsistent with section 1461,
17 which applies directly to entries from contiguous countries,
18 and that --

19 QUESTION: Well, for -- for no reason at all they
20 can -- they can conduct searches of -- of the person, right,
21 without any suspicion? That's okay.

22 MR. HUBACHEK: That's correct.

23 QUESTION: The Gucci shoes and everything else.
24 But somehow when you -- when you reach this -- this magical,
25 what, disassembly of a vehicle, that that has some special

1 constitutional status. I -- I find that quite implausible.

2 MR. HUBACHEK: Well, Justice Scalia, I think that
3 the importance is, is that it is very -- we're asking for a
4 standard that's -- comports with what was adopted in 1789
5 and 1790, and the 1461 statute that's currently applicable
6 talks about allowing the customs inspectors to look inside
7 the vehicle by providing a key, not by providing a lift or
8 providing tools, but by providing a key. That's what's
9 reasonable, that's what's routine, that's what's should be
10 protected by the Fourth Amendment.

11 QUESTION: Do you -- do you question the -- the
12 Government gave an example, I think from fiscal year 2003.
13 They said 300 fuel tanks were disassembled and put back
14 along the southern border without incident, that is, no
15 explosion and no malfunction in the vehicles for the
16 travels.

17 MR. HUBACHEK: I don't have any additional
18 information about those. I mean, I don't know if that
19 violated those individuals' leases, whether they felt a lack
20 of security as was discussed in the Molina-Tarazon case,
21 whether their warranties were any way affected, they simply
22 don't have any information.

23 QUESTION: But it would be a graver concern than a
24 warranty if the vehicle might blow up after. And -- but
25 there doesn't seem to be any evidence of that, that there's

1 a high risk that that would occur.

2 MR. HUBACHEK: Well, there's no risk -- apparently
3 there's no evidence of anything blowing up, but that doesn't
4 mean that individuals' security was implicated as they drove
5 away from the border knowing that their valuable property
6 had been altered by unknown government functionaries.

7 If the Court has no further questions, I'll
8 submit.

9 QUESTION: Thank you, Mr. Hubachek. Ms. Blatt, you
10 have three minutes remaining.

11 REBUTTAL ARGUMENT OF LISA S. BLATT

12 ON BEHALF OF THE PETITIONER

13 MS. BLATT: Thank you, Mr. Chief Justice. Justice
14 Kennedy, you asked about the 25 percent figure, and in the
15 appendix to the petition at 12a, that 25 percent figure
16 relates to vehicle drug seizures, so what customs meant by
17 seizures was from the vehicle. That wouldn't include stuff
18 found in someone's pockets.

19 Justice Breyer, you asked about how we track
20 searches. There's apparently a nationwide computer tracking
21 system where customs tracks all of their searches, both
22 positive and negative, and when there's a positive report
23 search, it's called a seizure. When there's a negative,
24 it's called an incident report, and the agent is in fact
25 required to document what his reasons were -- were for

1 conducting the search, and the supervisor must read that,
2 and if there was a problem developing about improper use of
3 his resources at the border, the agent would be either
4 trained or disciplined.

5 QUESTION: Are those public documents?

6 MS. BLATT: I would doubt it. I don't know,
7 Justice Kennedy, but given that it includes the reasons for
8 conducting the search, but I -- I just don't know. I know
9 it's called the TECS, but I don't know whether that's public
10 or not.

11 QUESTION: Is it public that such a thing exists?
12 Is there --

13 MS. BLATT: I've just made it public.

14 (Laughter.)

15 QUESTION: But -- but -- I mean besides your word
16 for it. I trust you implicitly, but I'd like to be able to
17 cite something other than you.

18 (Laughter.)

19 MS. BLATT: I -- I'd have to go --

20 QUESTION: Okay.

21 MS. BLATT: -- on the Internet or something like
22 that, Justice Scalia.

23 QUESTION: I don't want to cut you off if you had
24 something else to say.

25 MS. BLATT: No, that was --

1 QUESTION: I just want -- I do think it's correct
2 though, is it not, that what really we're asked to decide is
3 whether you have the power to make random searches? I know
4 that they're costly and unlikely, but I think it -- it's --
5 it's not unlikely in today's world that you might decide you
6 want to search every one-hundredth vehicle or ever twenty-
7 fifth vehicle to let the world know that even if they hire
8 Ronald Coleman they might get searched. That is correct,
9 isn't it?

10 MS. BLATT: That's correct, Justice Stevens, and
11 it's quite conceivable if the country ever went on a red
12 alert that the commissioner of customs might say, or if
13 there was some vague intelligence about smuggling in pick-up
14 trucks, they might want to do very extensive searches of
15 pick-up trucks. Now whether they'll actually ever come to
16 that I hope not, but yet, this -- the -- the border power --
17 the power to conduct a border search is one without any
18 particularized suspicion.

19 Thank you, Mr. Chief Justice.

20 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Blatt.

21 The case is submitted.

22 (Whereupon, at 11:12 a.m., the case in the above-
23 entitled matter was submitted.)

24

25