IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, DELIA SABLAN DADO, Defendant	)	Criminal Case No. 98-0261 **WRITTEN DECISION FOLLOWING TRIAL**

I. PROCEDURAL BACKGROUND

This matter came before the court for bench trial on September 9, 1999, in Courtroom 217A of the Commonwealth Superior Court. Assistant Attorney General, Marvin J. Williams, Esq. appeared on behalf of the Commonwealth of the Northern Mariana Islands ("CNMI" or the "Government"). G. Anthony Long, Esq. appeared on behalf of Defendant Delia Sablan Dado. The Court, having listened to the testimony of the witnesses, reviewed the evidence and exhibits, heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision following trial.

FOR PUBLICATION

[p. 2] **II. FACTUAL BACKGROUND**

1. On July 16, 1998, the Government charged Delia Sablan Dado with one count of illegal

possession of methamphetamine hydrochloride, a drug commonly referred to as "ice," in violation of 6 CMC 2142(a).[1] The facts giving rise to this case are set forth below.

2. On May 12, 1998, the Defendant arrived at Saipan International Airport from Guam. As the Defendant approached the check-out counter of the baggage claim and Customs area, Anja, a passive K-9 dog used to check passengers and baggage for contraband, alerted to the Defendant by sitting in front of her (testimony of Customs Officer Inspector Dennis Reyes). Inspector Reyes then returned the dog to the kennel and left the Defendant in the presence of his supervisor, Lt. Freddi Guajardo. Reyes was not asked, and did not testify, as to whether he informed Lt. Guajardo that K-9 Anja had alerted to the Defendant.

3. Lt. Guajardo testified that he noticed the Defendant as he was leaving his office and entering the passenger arrival area. Guajardo, who was previously acquainted with the Defendant, testified that the Defendant approached him to question him about Inspector Reyes. Guajardo was not asked, and did not testify, as to whether he witnessed K-9 Anja alert to the Defendant.

4. Lt. Guajardo did testify, however, that he directed the Defendant to follow him to a private room to submit to questioning and a baggage search because the Defendant's name appeared on a "Guest List," a document prepared by CNMI Customs Enforcement. According to Guajardo, the Guest List is developed from information provided to Customs and "screened" by members of the Enforcement Unit. Guajardo testified that the List includes frequent travelers, persons with prior arrests and convictions, and persons identified by informants as those for whom Customs should "watch out." Guajardo testified that frequent travel alone could place a person on the Guest List.

[p. 3]

5. Guajardo testified that as a matter of practice, he reviews the customer manifest prior to flight arrival to determine whether any passengers listed on the manifest also appear on the

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[1] On May 20, 1999 the Government moved to Amend the Information thereby charging Dado with the knowing and intentional possession of methamphetamine hydrochloride in violation of 6 CMC § 2142(a) and made punishable under 6 CMC §§ 2142(b) and (d)(1). The Government claimed a typographical error necessitated the Motion to Amend.

Guest List. According to Guajardo, the List contains no information other than names. Guajardo did not prepare the List, confirm the reasons for placing any individual on the List, or place the Defendant's name on the List. Guajardo stated that he was not responsible for reviewing the List or for adding names to, or removing names from, the List although, as acting branch manager for Customs Enforcement, the Guest List was prepared at his direction. Guajardo stated that he does not always receive a hard copy of the Guest List, but when he does receive it, he tries to memorize names on the List. He could not recall whether he looked at the List on May 12, 1998, the day that the Defendant arrived in Saipan.

6. Guajardo learned that the Defendant had been placed on the List at an Enforcement Branch meeting. According to Guajardo, the Defendant's name appeared on the List because she was a frequent traveler and because she had been seen at various establishments and places with "another person" whose name also appeared on the Guest List and who was known to Customs officials as having previously imported crystal methamphetamine.

7. Neither the Defendant nor her attorney learned of the List until the trial in this case. The Government did not produce the List because, according to Guajardo, the version of the Guest List that existed on May 12, 1998 no longer existed. Guajardo explained that because the List was confidential, and because the List was periodically revised and updated, the Enforcement Branch shredded older incarnations of the List and did not retain them.

8. Guajardo testified that as he proceeded to the clearance counter to process passengers arriving from international travel, the Defendant approached him for the second time. At this point, Guajardo instructed the Defendant to place her bags on the counter. When the Defendant identified herself as an employee of the Department of Immigration and asked him what was happening, Guajardo did not address the Defendant's questions but instead directed her to follow him to the x-ray room. Guajardo reiterated that the reason he decided to detain **[p. 4]** the Defendant and remove her to a private room to conduct a more thorough inspection was because her name appeared on the Guest List.

9. Lt. Guajardo testified that at this point, the Defendant appeared nervous and anxious, and

expressed concern that someone might have "called about her." According to Guajardo, the Defendant appeared reluctant to have her bags searched. She told him: "You know me, I work for Immigration," and "where I work I would not do this."

10. Upon reaching the private room, Guajardo asked the Defendant to place her baggage on the counter and proceeded to search her luggage. During the course of the search he located a small lamp containing what appeared to be water. Although there was no testimony as to the significance of this object, Guajardo testified that the presence of the lamp prompted him to inspect the Defendant's purse.

11. Inside the Defendant's purse, Guajardo found a wallet and a small black pouch. Attached to, or in front of, the pouch was a card containing the initials "DEA." Guajardo testified that behind the card was a small plastic bag containing a white, crystal-like substance. Based upon his training and experience, Guajardo assumed that the substance was crystal methamphetamine.

12. Guajardo telephoned Officer Reyes at the kennels and instructed him to bring a narcotics identification testing kit to the examination area. When Officer Reyes arrived, Guajardo handed him the bag and directed him to test the white substance inside the bag. Upon hearing that the white substance had tested presumptively positive for methamphetamine, Lt. Guajardo and Officer Reyes brought the Defendant to the Customs Enforcement Office for further questioning. After obtaining a written waiver from the Defendant (Exhibit "G"), Guajardo asked the Defendant whether she knew that she knew she was in possession of crystal methamphetamine. Guajardo testified that the Defendant responded affirmatively to this question.

13. Prior to trial, the Government produced the statement of Officer Reyes concerning the events leading up to the detention and search of the Defendant (Declaration of G. Anthony Long **[p. 5]** supporting Mot. to Exclude or Suppress Evidence Derived from Detention and Search ("Long Decl.") at Ex. "A."). Officer Reyes' Statement made no mention of the Guest List. *Id.* Based upon the discovery information provided by the Government, counsel for the Defendant was led to believe that the detention and secondary search of the Defendant's

person and baggage was the result of the K-9 alert (Long Decl.at ¶ 4). In light of Lt. Guajardo's trial testimony, establishing that he had not witnessed the K-9 alert and that he decided to detain the Defendant and remove her to a private room because she appeared on the Guest List, the court permitted the Defendant to file post-trial motions to challenge the search and to suppress all evidence obtained thereby.

14. Pursuant to this court's order, on September 24, 1999, Defendant filed a post-trial motion to exclude or suppress evidence derived from the detention and search. In her Motion, Defendant admits that the detection of contraband by a narcotics dog would provide probable cause for a search.[2] Since the detention and search of the Defendant's baggage were based upon the "Guest List" instead of the positive reaction of a trained K-9, however, Defendant claims that the search and seizure were unlawful because there was no probable cause or even reasonable suspicion that the Defendant was engaged in criminal activity. In response, the Government argued that probable cause was not required for the customs search in this case, and that, based upon the circumstances, Customs properly approached and searched the Defendant.

III. QUESTIONS PRESENTED

1. Whether CNMI law permits customs officers to search baggage and hand-carried items.
2. Whether the stop, detention, and interrogation of the Defendant and the subsequent examination of her purse and baggage qualify as a "search" and "seizure" protected by Article **[p. 6]** I, § 3 of the Commonwealth Constitution and the Fourth Amendment to the United States Constitution.
3. Whether evidence of methamphetamine hydrochloride, confiscated from the Defendant during this border search, should be suppressed on grounds that the search violated the Defendant's constitutional rights to privacy and protection from unreasonable search and seizure under Article I, § 10 and Article I, § 3 of the Commonwealth Constitution.

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[2] Mot. at 2, note 1, *citing United States v. Beale*, 736 F.2d 1289 (9th Cir. 1984) (en banc). *See also United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110 (1983) (under the United States Constitution, a "canine sniff" is not a search).

IV. ANALYSIS

For the reasons set forth below, the court concludes that Lt. Guajardo possessed lawful authority to inspect the Defendant's baggage and purse pursuant to Customs Regulation 4305. Lt. Guajardo was not, however, authorized to single out the Defendant for investigation and remove her to a private area for interrogation without objectively reasonable, articulable suspicion that she was engaged in criminal activity. Because, under the circumstances presented, Lt. Guajardo could not have reasonably suspected the Defendant of criminal activity, the court finds that the Government had no justification to detain the Defendant and conduct the search. Accordingly, the court GRANTS the motion to suppress, and excludes all evidence of the search and all statements made by the Defendant following the search.

A.

Defendant first contends that CNMI law authorizes Customs only to "inspect" the baggage and hand carried parcels of persons arriving in the CNMI, and thus the detention and subsequent search of the Defendant were unlawful (Mot. at 3-4). In response, the Government asserts that CNMI Customs Officials have ample authority to conduct border searches under federal law, since 19 U.S.C. § 482 expressly authorizes customs officers to stop and search a suspect at the border when there is "'reason to suspect... the introduction of merchandise contrary to law in the United States'"(Response to Mot. to Suppress at 2).

The court disagrees. As an initial matter, the Government's reliance upon federal law to justify the actions of CNMI Customs Officials is misplaced. The Northern Mariana Islands are not **[p. 7]** included within the customs territory of the United States.[3] Nor does the Government pont to any federal statute or regulations authorizing CNMI Customs agents to conduct warrantless border searches. Since a warrantless border search is valid only if conducted by officials specifically authorized to conduct such searches,[4] and the regulations authorizing customs

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[3] COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA (hereinafter, "Covenant") § 603, 48 U.S.C. § 1601 note, *reprinted in* Commonwealth Code at B-101 et seq.

[4] *United States v. Whiting*, 781 F.2d 692, 696 (9th Cir. 1985).

inspections and searches in the Commonwealth were promulgated under CNMI law and not pursuant to 19 U.S.C. § 482 or any other federal statute authorizing the CNMI government to carry out federal customs laws,[5] the court examines these regulations, along with the agency's construction of the statutes that it administers, to determine whether CNMI Customs Officials have the authority to conduct warrantless border searches of the type at issue here. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed2d 694 (1984).

Effective February 25, 1997, the Department of Finance adopted permanent regulations providing for the day to day operations of the Division of Customs Service.[6] Contrary to the superseded regulations relied upon by both parties, these regulations set forth procedures governing the search and inspection of passengers, baggage, and hand carried articles on the date the Defendant arrived in Saipan. *See* Customs Service Regulations, section 4305, *reprinted in* 18 Commonwealth Reg. No.12 at 14788-14792 (Dec. 15, 1996). In material part, these Regulations provide:

> **Section 4305.2(c) <u>Violations of Law</u>**
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> The Customs agent may *inspect* without warrant any person arriving in the Commonwealth to determined [sic] whether such person is violating the Controlled Substances Act, the **[p. 8]** Weapons Control Act, the Anti-drug Abuse Act of 1991, and/or other laws and regulations enforced at the ports entry
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> **Section 4305.3 <u>Inspection of Baggage</u>**
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> A Customs agent may *inspect* without warrant the baggage and hand carried parcels of persons arriving in the Commonwealth in order to ascertain what articles are contained therein and whether the articles are taxable prohibited, or restricted.

18 Commonwealth Reg. at 14788-14789 (emphasis added).

In comparison with federal statues expressly authorizing customs agents to perfom

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[5] *See, e.g.*, Contraband Seizure Act, 49 U.S.C. § 80301 *et seq.*, (the "Act"), authorizing forfeiture of aircraft, vehicle, or vessels used to facilitate the transportation, concealment, receipt, possession, purchase, sale, exchange, or giving away of contraband. Pursuant to 49 U.S.C.§§. § 80303 and 80304, Congress expressly authorized the Governor of the Northern Mariana Islands to carry out customs laws on the seizure and forfeiture of aircraft, vehicles and vessels, and to prescribe regulations to enforce the Act.

[6] 19 Commonwealth Reg. No.2 at 15155 (Feb. 15, 1997).

inspections as well as searches,[7] the CNMI Legislature has simply authorized the Department of Finance to "be responsible for customs and baggage inspection and other related matters." 1 CMC § 2553(i). Whereas federal law expressly authorizes the Secretary of the Treasury to prescribe regulations for the search of persons and baggage, moreover, section 2557 of the Commonwealth Code is silent on the subject, containing instead a broad delegation authorizing the Department of Finance to promulgate regulations "not inconsistent with law" regarding those matters within its jurisdiction. *Compare, e.g.,* 1 CMC § 2557 (authorizing the promulgation of regulations not inconsistent with law regarding matters within jurisdiction of Department of Finance) *with* 19 U.S.C. § 1582 (authorizing the promulgation of regulations governing the search of persons and baggage, and stating that "all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers of agents of the Govemment under such regulations"). Although none of the statutes cited as authority for the promulgation and issuance of the Customs Service Regulations expressly grant CNMI Customs Agents authority to conduct a search,[8] part **[p. 9]** 4300.5 of the Regulations themselves authorize the Customs Service Division "to develop procedures and policies, including procedures and policies for the purpose of conducting searches on individuals ... necessary for the proper functioning of the Customs Service." 18 Comm. Reg. No.12 at 14754 (Dec. 12, 1996).

An administrative regulation has the force and effect of law, but only when it is the product of an exercise of delegated legislative power. Regulations that are inconsistent with provisions of the acts that they implement cannot stand. *Portland Audubon Soc. Endangered Species Committee*

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[7] *See, e.g.,* 19 U.S.C. 19 U.S.C. § 482 (authorizing customs officers to "stop, search, and examine persons and merchandise); 19 U.S.C. § 1401(j) and 19 U.S.C. § 1581. *See also* 50 U.S.C. § 2411 (specifically extending search and seizure authority to Customs). The statute provides, in material part, that "the United States Customs Service is authorized to search, detain,...and seize goods or technology at those points of entry or exit from the United States where officers of the Customs Service are authorized by law to conduct such searches, detentions and seizures...."

[8] The Regulations at issue point to the following statutes as authority for the promulgation of Customs Service Regulations: 1 CMC § 2553 (charging the Department of Finance with the collection of customs duties and the responsibility for customs and baggage inspection), 1 CMC § 2557 (authorizing the Department of Finance to adopt rules and regulations for matters within its jurisdiction), 4 CMC § 1104 (authorizing the Director of Finance to define terms in certain regulations by reference to the Internal Revenue Code), 4 CMC § 1402(d) (authorizing the Secretary to require, by regulation, that persons importing goods supply information about nonbusiness purposes), 4 CMC § 1425 (authorizing the promulgation of regulations consistent with export fee), and 4 CMC § 1818 (empowering the Director of Finance with authority to prescribe rules and regulations governing taxes, penalties, fees and related charges).

, 984 F.2d 1534 (9th Cir.1993). To be valid, the regulation must fall within the power granted by the legislature and must fit within the parameters of statutes that define the powers of the agency. Accordingly, in determining whether the delegation in section 2553 encompasses the authority to conduct a warrantless search, the court faces two questions: first, whether the legislature has spoken directly on the precise question at issue; and, second, if the statute is silent or ambiguous with respect to this issue, whether the agency's response is based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. U.S.A.*, 467 U.S. 837, 843, 104 S.Ct.2778, 2781-2, 81 L.Ed.2d 694 (1984). Where congressional intent is clear, the inquiry ends. When, as here, the statute in question permits an agency to issue regulations "not inconsistent with law regarding matters within its jurisdiction," and its jurisdiction is limited by statute to "customs, baggage inspection and other related matters," at best the statute is silent or ambiguous with regard to whether customs officials are empowered to conduct searches. In such a case, the question before the court is whether the agency's answer is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 844, 104 S.Ct. 2782.

In determining the issue, courts generally grant considerable deference to an agency's construction of a statute that it is charged with administering. *Id.* If the Legislature has explicitly left some statutory gap for the agency to fill, courts view this as an express delegation of authority to the agency to clarify a specific provision of statute by regulation, and such legislative regulations are **[p. 10]** given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 843-844, 104 S.Ct. at 2782. On the other hand, when the delegation of authority to fill in statutory gaps is implicit, a court may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives. *In re I/M/O Route 206 at New Amwell Road, Block 161, Lot 13B (Hillsborough)*, 731 A.2d 56 (N.J.Super.1999). In such cases, courts further construe related statutes as a whole, attempting to give effect to all language and to harmonize all provisions. *Heidgirken v. Wash. Dept. of Natural Resources*, __ P.2d__, 2000 WL 146813 (Wash.App. Feb.11, 2000). The court may not, however, substitute its own construction of a statutory provision for a reasonable interpretation made by administrator of an agency, and will

defer to the agency's construction of its governing statutes unless it is unreasonable. *Chevron*, 467 U.S. at 843-844, 104 S.Ct. at 2782.

In addressing this issue, the court notes that even a cursory review of the Code reflects that the Legislature has not used the words "search" and "inspect" interchangeably in dealing with similar issues. *See, e.g.* 3 CMC § 4333 (requiring *inspection* of entry permits or entry permit applications of persons entering the Commonwealth by right of status pursuant 3 CMC §4321(a) but permitting warrantless *searches* of the person and possessions of the alien seeking entry); 3 CMC § 4381(c) (empowering immigration officers to conduct a warrantless *search* at the immigration inspection counter of a Commonwealth port of entry of any person seeking admission to the Commonwealth, provided that such officer has probable cause to suspect that such a *search* might produce documents or other items related to immigration matters that would lead to the exclusion of that person); 3 CMC § 4334 (empowering Immigration Officers to board and *search* vessels and aircraft without warrants and to *search,* without a warrant, the person and possessions of an alien when an Immigration Officer has reason to believe that the *search* would disclose evidence of grounds for deportation, or when incident to an arrest) (emphasis added).[9] Pursuant to the Fish, Game, and Endangered Species Act,**[p. 11]** moreover, the Legislature has expressly authorized the Director of Finance and his designees to make inspections and searches. In material part, the Act enables persons authorized by the Director of Finance

> to detain for inspection and *inspect* any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation... [and to] *search* with or without a

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[9] *See also* 2 CMC § 1321(a)(2) (authorizing the Department of Natural Resources and the Coastal Resources Management Office to board, *search or inspect* any vessel or aircraft which may be found within the exclusive economic zone upon probable cause that such vessel or aircraft may have on board any substance proscribed for dumping); 4 CMC § 5461(a)(1) (empowering duly authorized persons to stop and board any vessel during daylight hours and without any particularized suspicion in order to make an *inspection* for compliance, but during non-daylight hours, to conduct safety *inspections* only for cause, based on a reasonable and articulable suspicion of non-compliance ... "or, if conducted under administrative standards so drafted that the decision to make such a safety search or inspection is not left to the sole discretion of the person authorized to conduct such a *search or inspection*); 4 CMC § 5461(a)(2) (providing that if, "during the course of any hailing, stopping, search or inspection... there arises probable cause of any criminal or other unlawful activity,...[authorized persons] may conduct whatever searches and seizures in relation thereto, or, engage in any other forms of activity in connection with the vessel or such activity, to the extent permissible under the United States or Commonwealth Constitution"); 7 CMC § 2150 (providing for seizure without process of property subject to forfeiture when the seizure is *incident to an arrest or a search under a search warrant* or an *inspection under an administrative inspection warrant*) (emphasis added); Revised Tinian Casino Gaming Control Act of 1989, 10 CMC § 2511 *et seq.*, permitting warrantless *searches* of licensees in order to *inspect* any gaming equipment or chips or records).

> warrant any person entering or leaving the Commonwealth, ...[to] seize any item including its container and any other contents of such container, found during such *inspection or search*, which the person making the inspection has reasonable grounds to believe is being imported or exported in violation of... [the Act].

2 CMC § 5109(e)(1). Accordingly, the court finds that when the Legislature intended to empower an entity with the authority to conduct a search, it said so.

In 1989, however, the Legislature enacted Public Law 6-38 ("Contraband Offenses") to prohibit persons from entering the Commonwealth with the intent to import, among other things, controlled substances. 6 CMC § 2301, et seq. According to section one of the Act, an integral purpose of the legislation was to provide for an effective customs inspection system that would include prosecution of persons who were importing or attempting to import contraband. *See* 6 CMC §2301, Commission Comment; SEN. COMM. REP. NO.6-143 at 1. In 6 CMC §2302, the Customs Service was given primary responsibility and authority to enforce the legislation "concurrent with the authority of any other law enforcement agency as provided by law." Pub. L. 6-38 expressly empowered the Customs Service to, among other things, make arrests upon probable cause, to **[p. 12]** execute warrants, and to seize evidence related to the violation of the Act. Conspicuous in its absence from the legislation, however, is any mention of Customs conducting searches.

Later in 1991, the Legislature enacted the Anti-Drug Abuse Act of 1991 to provide, as set forth in the preamble, additional measures that would assist in preventing the importation of controlled substances into the Commonwealth. As one of these measures, the preamble references the enhanced enforcement capability of Customs and the authority for Customs to perform inter-island and outbound searches.[10] The Act also designated the Commonwealth's Customs Service as a "law enforcement agency" and agents employed by Customs as "law enforcement officers." H.B. No. 7-245, § 5 (e), amending 6 CMC § 2141. Notwithstanding the purposes outlined in the preamble, however, the legislation itself simply amended 6 CMC § 2304 to extend the geographical jurisdiction of the Customs Service to include all official customs points of entry into and points of exits out of the Commonwealth. *Id.* at §§ 8(a), 8(c). Conspicuous in its absence once again from

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[10] See Publ L. No. 7-42, § § 2-3; H. 245, 7TH NORTHERN MARIANAS COMMONWEALTH LEG., 3rd Sess. (1991).

the substantive portion of the statute was any language referencing the authority to search. Section 8(b) of the Act, however, did provide that when Customs "discovers, or when the Customs Service has probable cause to discover, imported contraband... at a point of entry, their jurisdiction shall also extend inside the Commonwealth to the destination(s) where the person importing the contraband travels to deliver, consume, and or distribute the contraband...." Pub. L. No. 7-42 § 8(b), *codified at* 6 CMC § 2304.[11]

Although the reference to inter-island and outbound searches appears in the preamble of the Act, the preamble, although entitled to great weight, is not law and does not control the substantive provisions of the statute. 1A SUTHERLAND STAT. CONSTRUCT. ("SUTHERLAND") § 20.20 (5th ed. **[p. 13]** 1992).[12] At the same time, it is beyond cavil that as a sovereign nation, the Commonwealth requires a Customs Service with plenary power to safeguard CNMI borders and thus the power to inspect, as well as search, baggage and persons presenting themselves at the border seeking entrance. Were this not so, the legislature's designation of Customs agents as law enforcement officers with all powers attendant to such officers, the delegation of authority to Customs to "discover contraband," and the intent to invest Customs with the authority to perform outbound and inter-island searches, referenced in the preamble to Pub. L. No. 7-42, would make no sense.

The court therefore finds that the agency's construction of section 2553(i), as encompassing the authority to conduct border searches, is not entirely unreasonable. In reaching this conclusion, the court is bound to consider the United States Supreme Court's pronouncements on the unique function and status of border searches. The Court has repeatedly emphasized the sovereign's right to protect itself against the importation of smuggled or prohibited goods by conducting routine

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[11] In signing H. 7-245, however, the Governor expressed "serious concern" that section 8(b) could "be construed to give excessive discretion of authority to customs officers by allowing them to conduct warrantless searches anywhere in the commonwealth at any time and thus to infringe on citizens' rights of freedom from unreasonable searches. Although the Governor urged the legislature to seriously consider defining what constitutes "probable cause to discover," the legislation contains no such definition. See Letter from the Hon. Benjamin T. Manglona to Sepaker Pedro R. Guerrero and Senate President Joseph S. Inos (Oct. 31, 1991), *accompanying* Publ. L. No. 7-42.

[12] The function of the preamble "is to supply reasons and explanations and not to confer power or determine rights. Hence it cannot be given the effect of enlarging the scope or effect of a statute." SUTHERLAND, *Ibid.* at §23.03

searches of people, vehicles, and luggage at the border.[13] Because of these special considerations, courts have traditionally recognized the plenary power of customs to conduct routine border searches and upheld this power against constitutional challenge. *E.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 549, 105 S.Ct. 3304, 3310, 87 L.Ed.2d 381 (1985) (although decided on constitutional grounds, the decision is also firmly founded on federal customs search statutes that were designed to implement the sovereign's right to protect its international borders by giving special powers to customs officials at the border, beyond those exercised by ordinary law enforcement agents).

At the same time, the decision to search must comport with constitutional safeguards. The court has serious concerns that without a statute setting forth standards for conducting warrantless **[p. 14]** searches, virtually unfettered authority and unbridled discretion has been left entirely in the hands of CNMI Customs Officers. Absent legislative guidance defining, for example, the basis upon which these searches should occur and concepts such as "probable cause to discover," Customs Officers run the risk of conducting warrantless searches anywhere in the Commonwealth, at any time, and for virtually any reason, thereby impermissibly infringing on citizens' fundamental rights to privacy and freedom from unreasonable searches. See note 11, *supra*. Based upon the foregoing, the court finds that Lt. Guerrero was authorized to inspect as well as search the baggage and purse of the Defendant. Whether the search was constitutionally permissible, however, is a different issue.

B.

As an initial matter, the parties admit that what transpired in this case went beyond a routine border inspection (Mot. at 5-6; Response at 4). The court agrees. This case does not involve a random screening of a passenger and her luggage, or only a brief detention during which a traveler would be required to furnish a response to a brief question or two and possibly produce a document evidencing a right to be in the United States. *Dunaway v. New York*, 442 U.S. 200, 210-211, 99

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[13] The principle that searches at a border, without probable cause and without a warrant, are "reasonable" is "as old as the Fourth Amendment itself." *United States v. Ramsey*, 431 U.S. 606, 619, 97 S.Ct. 1972, 1980, 52 L.Ed.2d 617 (1977); *see also Boyd v. United States*, 116 U.S.616, 6 S.Ct.524, 29 L.Ed.746 (1886) (border search doctrine was not subject to the general requirement of the Fourth Amendment).

S.Ct. 2248, 2255, n.12, 60 L.Ed.2d 824 (1979) (investigatory stop "usually [consumes] less than a minute and [involves] a brief question or two"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975). Nor was the Defendant subjected to the kind of cursory visual inspection necessarily limited to what could have been seen without a search. *United States v. Ludlow*, 992 F.2d 260, 264 (10th Cir.1993) (at routine border stop, border patrol agents may question occupants of vehicle concerning citizenship and customs matters, ask them to explain suspicious circumstances or behavior, and make visual inspection only). In this case, Lt. Guajardo singled out the Defendant because her name appeared on a Guest List, stopped her for investigation, removed her to a more secure location, detained her for more thorough questioning, and thoroughly examined her purse and baggage to look for evidence of a crime. On the basis of these facts, the **[p. 15]** court concludes that what transpired was a "search" within the meaning of article I, § 3 of the Commonwealth Constitution and Fourth Amendment to the United States Constitution.[14]

Second, the court finds that a "seizure" of the Defendant occurred. Under the Commonwealth Constitution, a "seizure" is "an arrest" or "other interference with the activities of a person or the confiscation or other interference with the status or possession of personal property without consent." Constitutional Analysis, *supra* note 14, at 7. Although the Defendant was not handcuffed, nor did Customs Agents brandish any weapons to induce her to move to a private room for questioning, neither the evidence in this case nor common sense suggests that the Defendant was free to walk away.

On the basis of *United States v. Mendenhall*, 336 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), however, the Government contends that because the defendant voluntarily consented to accompany Customs officers to the private interrogation room, her relocation and detention did not constitute an arrest. *Mendenhall*, however, differs significantly from this case on its facts.

Mendenhall involved an initial stop of a deplaning passenger in an airport and a subsequent relocation of that passenger to the DEA office for further questioning. In *Mendenhall*, the defendant

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[14] Constitutional Convention of the Northern Mariana Islands, ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (Dec. 6, 1976) (hereinafter, "Constitutional Analysis") at 7-8 (defining "search" under Article I, § 3 as "an intrusion into a constitutionally protected area for the purpose of finding a suspected criminal or evidence of a crime"). "Constitutionally protected areas" with respect to searches and seizures include "persons, houses, papers, and other belonging."

had not been targeted for questioning prior to her arrival, and the two DEA agents who stopped her testified that they did so on the basis of conduct which appeared, to them, to be characteristic of persons "unlawfully carrying narcotics." 446 U.S. at 548; 100 S.Ct. 1874. Immediately after the DEA agents approached, identified themselves as federal agents, and examined her ticket and identification, the suspect consented to a search. The DEA agents wore no uniforms; the agents immediately returned the suspect's ticket and identification to her; the DEA agents did not take custody of her baggage; and the agents were careful to advise that the suspect could decline to be searched. After holding the initial stop to be proper because it involved a mere request to see the **[p. 16]** respondents's identification and ticket, the Court proceeded to validate the relocation of the passenger, holding that the evidence was sufficient to support the district court's finding that the passenger voluntarily consented to accompany the DEA officers.

Since *Mendenhall* affirmed the finding of consent, the Court did not bother to address the issue of whether there was sufficient cause for the relocation, absent consent. The Court simply ruled that the respondent had not been seized simply because the agents approached her, asked her if she would show them her ticket and identification, and posed a few questions. Because the search of the respondent was not preceded by an impermissible seizure of her person, the Court therefore concluded that her apparent consent to the subsequent search had not been "infected" by an unlawful detention. 446 U.S. at 558; 100 S.Ct. at 1879.

The case before the court differs in several material respects. First, Dado was not invited to accompany Lt. Guajardo to a private room for further questions. Lt. Guajardo directed her to do so. Once in the private office, moreover, Lt. Guajardo took possession of the Defendant's luggage and purse, and immediately thereafter, proceeded to search them despite the Defendant's reluctance that he do so. Lt. Guajardo never advised the Defendant that she could decline to be searched, and there was no testimony that the Defendant's agreement to a search was even called for. Since acquiescence to lawful authority cannot be equated with consent, the investigative seizure of the Defendant and the subsequent search of her belongings cannot be justified on this ground. *Florida v. Royer*, 460 U.S. 491, 494, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229 (1983).

Although the Government also claims that the relocation of the Defendant for questioning

was proper as a *Terry* stop, *Terry* also declined to address the constitutional propriety of an investigative "seizure" of a person and her personal effects upon less than probable cause for purposes of detention and/or interrogation, absent consent. *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). *See also United States v. Place,* 462 U.S. 696, 706, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110 (1983) (declining to extend *Terry* to permit warrantless search of personal luggage without probable cause to pursue investigation). *Terry* simply holds that under appropriate circumstances and in an appropriate manner, a police officer may approach a person for the purposes of **[p. 17]** investigating possible criminal behavior even though there is no probable cause to make an arrest. As in *Mendenhall*, such a seizure will be upheld as constitutionally permissible so long as it was justified at its inception. Obviously, once an investigation has focused on a suspect, and if the purpose for which a suspect's luggage has been seized is a search requiring probable cause, then the initial seizure cannot be justified on anything less. *Place,* 462 at 706; 103 S.Ct. at 2644.

In *Florida v. Royer,* a seminal case spelling out when an investigative detention becomes so intrusive as to constitute a *de facto* arrest, the Supreme Court found particularly significant the fact that the police moved the suspect from an airport concourse to a DEA interrogation room. 460 U.S.491, 504-505, 103 S.Ct.1319, 1328-29, 75 L.Ed.2d 229 (1983). What had begun as a consensual inquiry in a public place, the Court found, had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with the Defendant's explanations, sought to confirm their suspicions that the suspect was carrying contraband. In *Royer*, as in the instant case, there were no safety or security reasons to justify moving the suspect from the airport concourse to a more private area. To the Court, it appeared that the only reason prompting the officers to transfer the site of the encounter from the concourse to the interrogation room was to search the luggage. Similarly, in *United States v. Moreno,* 742 F.2d 532, 535 (9th Cir. 1984), the Ninth Circuit ruled that the suspects were subject to a *de facto* arrest when the police relocated them from the public area of an airport to a "highly detentive environment ... a small room that had been specially designated for police business, alone with several officers who relayed to them that they were suspected of carrying narcotics." *See also United States v. Woods*, 720 F.2d 1022, 1027 (9th Cir.

1983) (*Terry*-stop became an arrest when the police moved the suspects from an airport cocktail lounge to police station); *United States v. Prim*, 698 F.2d 972-976-77 (9th Cir. 1983) (relocating defendant from the public area in an airport terminal to the DEA office 100 yards away transfomed investigative detention into an arrest).

Having concluded, therefore, that there was a "seizure" and a "search" within the meaning of the Commonwealth and Federal Constitutions, the court must determine whether the seizure and subsequent search were constitutionally reasonable.

[p. 18] **C.**

The Fourth Amendment to the United States Constitution and Article 1, section 3 of the Commonwealth Constitution guarantee the "right of the people to be secure in their persons, houses, papers and belongings against unreasonable searches and seizure." U.S. CONST. amend. IV, § 3; N.M.I. CONST. Art. I § 3 (1976). In addition to these rights, the Commonwealth Constitution provides for a right of individual privacy that "shall not be infringed except upon a showing of compelling interest." N.M.I. Const. Art. I § 10 (1986). The right of the people of the Commonwealth to be free from unreasonable search and seizure is, accordingly, "firmly grounded in the Commonwealth Constitution." *CNMI v. Aldan*, App. No. 96-034 (N.M.I. Sup.Ct. Dec. 4, 1997). For the government to intrude upon the constitutionally protected right to privacy, "it must show that there is a 'public purpose' which advances the health, safety or welfare of the community." Constitutional Analysis, *supra* note 13 at 30. If such a purpose exists, then the government must further demonstrate that the public purpose advanced by the intrusion is compelling: that is, "that the intrusion was necessary and could not have been accomplished in any other less intrusive way." *Id.*

Both the Federal and Commonwealth Constitutions prohibit only unreasonable searches and seizures. *Harris v. United States*, 331 U.S. 145, 150, 67 S.Ct. 1098, 1101, 91 L.Ed.1399 (1947). What is "reasonable," moreover, necessarily "depends upon all of the circumstances surrounding the search and seizure and the nature of the search and seizure itself." *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985). As a matter of law, "warrantless searches are presumptively unreasonable" except when they fall within a few narrowly defined

exceptions. *Horton v. California,* 496 U.S. 128, 133, 110 S.Ct. 2301, 2306, 110 L.Ed.2d 112 (1990); *Aldan, supra* at 3-4. Border searches are one such exception.

In *Montoya de Hernandez,* the United States Supreme Court affirmed that "[s]ince the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." 473 U.S. at 537, **[p. 19]** 105 S.Ct. at 3308. Referring to Congress' power to police entrants at international borders,[15] the Court reinforced the notion that routine border searches need not meet any requirement of reasonable suspicion, probable cause or warrant. 473 U.S. at 539 105 S.Ct. at 3310.

On a constitutional level, then, it is beyond question that agents of the federal government may, without cause, search persons and packages entering the country without violating the rights guaranteed by the Fourth Amendment. Because the Commonwealth also has sovereign authority to prohibit entry into its territory, it is likewise entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he or she may lawfully carry. These inspections, made at the border, are "reasonable simply by virtue of the fact that they occur at the border." *See, e.g., Ramsey,* 431 U.S. at 617, 97 S.Ct. at 1979; *Commonwealth v. Idip,* Crim. Case No. 91-31 (N.M.I. Super.Ct. May 24, 1991) (routine border searches of persons and baggage do not require a warrant, probable cause, or even reasonable suspicion).

As with any governmental intrusion into the privacy of an individual, however, border searches are not immune from constitutional scrutiny. Under federal law, routine searches are made reasonable by the decision to cross the border and "[t]o this extent, the person involved has no expectation of privacy that society is prepared to recognize as reasonable." *United States v. Ashbury*, 586 F.2d 973, 975 (2d Cir. 1978). This is not to say, however, that all searches can be justified simply because they occur at a national border. The more intrusive the search, the greater must be the suspicion of criminal activity to justify it. *See United States v. Ramos-Saenz,* 36 F.3d

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[15] *See* 19 U.S.C. § 1582 ("all persons coming into the United States from foreign countries shall be liable to detention and search authorized...[by customs regulations"]. Customs agents may, in turn, "stop, search, and examine" any "vehicle, beast or person" upon which an officer suspects there is contraband or "merchandise which is subject to duty." 19 U.S.C. § 482; see also §§ 1467, 1481; 19 C.F.R. §§ 162.6. 162.7 (1984).

59, 61 (9th Cir. 1994). Under the law of the Ninth Circuit, a passenger arriving at a border can be subjected to a routine search of her luggage, as well as the contents of her pockets and purse, without any suspicion at all.[16] In the Ninth Circuit, moreover, only when a border search reaches the degree of intrusiveness present in a strip search or body cavity search is a search not routine. *Ramos-Saenz*, 36 **[p. 20]** F.3d at 61; *see also United States v. Couch*, 688 F.2d 588, 604 (9th Cir.), *cert. denied*, 459 U.S. 857, 103 S.Ct, 128, 74 L.Ed.2d 110 (1982) (strip search at border requires "real suspicion"; body cavity search requires "clear indication that suspect is carrying contraband and in the body cavity").

These federal court rulings, however, are not dispositive of the court's inquiry. Nor is the apparent agreement of the parties.[17] As a commonwealth, the CNMI has the right to self-government. COVENANT at § 103. Similarly, the Commonwealth has the sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. COVENANT at Article II; *see also Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741 (1980). In light of the additional protections afforded CNMI citizens under Article I, § 10 of the Commonwealth Constitution and the greater protection afforded by the search and seizure provisions of Article I,§ 3,[18] therefore, the court must first determine whether it is appropriate for the court to resort to independent constitutional grounds to decide this case, rather than deferring to comparable provisions of the United States Constitution.

In *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986), the Washington State Supreme Court articulated a set of six nonexclusive criteria relevant to determining whether, in a given situation, a state's constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language of the State Constitution; (2) significant differences in

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[16] *United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995).

[17] The parties agree that, at a minimum, CNMI customs officials required reasonable suspicion that the Defendant was smuggling contraband before they could detain her for question and a search of her luggage and purse (Mot. at 5-6; Response at 2). Even an explicit concession on this point, however, would not relieve this court of performing its judicial function of deciding the issue. *Sibron v. New York*, 392 U.S. 40, 58, 88 S.Ct. 1889, 1900, 20 L.Ed.2d 917(1968), *quoting Young v. United States*, 315 U.S. 257, 258, 62 S.Ct. 510, 511, 86 L.Ed. 832 (1942).

[18] *CNMI v. Sablan*, Crim. Case No. 94-35F (Super.Ct. Nov. 1, 1994) (Article I, § 3 provides greater protection against unreasonable search and seizure than that guaranteed by the Fourth Amendment).

the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) difference in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Because recourse to the Commonwealth constitution as an independent source for recognizing and protecting the individual rights of CNMI citizens "must spring not from pure intuition, but from a process that is **[p. 21]** at once articulable, reasonable, and reasoned,"[19] the court adopts the *Gunwall* analysis and examines these criteria in concluding that this is an appropriate case in which to resort to independent constitutional grounds in order to reach the conclusions that it does here.

1. The textual language of the state constitution. In some cases, the text of the state constitution may provide grounds for reaching a decision different from that which would be arrived at under the Federal Constitution. *Gunwall*, 720 P.2d at 812. Since applicable provisions of Article I, § 3 at issue in this case mirror the wording of the Fourth Amendment to the United States Constitution,[20] the court does not find that the text of Article I, § 3 alone provides grounds for a decision different from that which would be arrived at under the Federal Constitution.

2. Significant differences in the tests of parallel provisions of the federal and state constitutions. Even when parallel provisions of the state and federal constitutions do not have meaningful differences, other relevant provisions of a state's constitution may require that the state constitution be interpreted differently. The Commonwealth Supreme Court has already recognized that Article I, § 10 provides a level of protection from unreasonable search and seizure beyond that guaranteed by Article I, § 3. *Aldan*, Slip. Op. *supra* at 3-4. This lends support to the court's considering the protections guaranteed by both provisions, independently of federal law, in determining when a search has unreasonably intruded into a defendant's private affairs.

3. State constitutional and common law history. A review of CNMI constitutional history further reflects an intention to confer a level of protection under Article I, § 10 beyond that afforded

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[19] *Gunwall*, 720 P.2d at 813.

[20] The Commonwealth Constitution expands upon the Fourth Amendment by expressly addressing wiretapping and comparable techniques and by providing remedies to persons who are the victims of illegal searches or seizures. These provisions are not at issue here.

by the Federal Constitution. In discussing the "fundamental constitutional right to individual privacy" guaranteed under section 10, the framers emphasized:

> The right to individual privacy incorporates the concept that each individual person has a zone of privacy that should be free from government or private intrusion. Each person has the right to be let alone. ... This constitutional provision recognizes the necessary **[p. 22]** balance between the individual's right to privacy and the public's right to protect and promote the health and safety of the community. It sets that balance in favor of the individual, by making the individual's right to privacy a constitutionally protected fundamental right.

Constitutional Analysis , *supra* note 14, at 28-29. Whereas Article I, § 3 protects "persons, houses, papers, and other belongings" from unreasonable search and seizure, [21] Article I, § 10 requires that any intrusion into these areas be necessary to accomplish a compelling governmental interest in protecting the health, safety or welfare of the community, and further that no less intrusive method exists. *Id.* at 7-8, 28-29. In *Aldan*, the Supreme Court recognized that the "compelling state interest" language contained in Article I, § 10 is material and must be considered in determining whether a search is reasonable under Article I, § 3. *Aldan*, Slip. Op. *supra* at 3-4. This emphasis lends further support to looking to the Commonwealth Constitution for a resolution in this case.

4. Preexisting state law. Gunwall recognizes that previously established bodies of state law, including statutory law, may also bear on the granting of distinctive constitutional rights and can assist in defining the scope of a constitutional right later established. 720 P.2d at 812. In that there is no previous body of law addressing the rights to be protected in this case, the court does not find this criteria helpful in determining whether to resort to independent constitutional grounds in this case.

5. Differences in structure between the federal and state constitutions. The Commonwealth of the Northern Mariana Islands is self-governing, in political union with and under the sovereignty of the United States of America. COVENANT, § 101. As a commonwealth, the CNMI is an autonomous political entity, sovereign over matters not ruled by the United States Constitution. This distinction and the due consideration traditionally afforded by the courts to the local customs

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[21] Constitutional Analysis, *supra* note 14, at 7 (discussing the protections against unreasonable searches and seizures guaranteed by Article I, § 3).

of the people of the Commonwealth supports the court's looking to the Commonwealth Constitution for the protection of the defendant's privacy rights in the context presented here.

[p. 23] *6. Matters of particular state interest*. As a traditional sovereign function, Customs administration of the Northern Mariana Islands has been and currently is undertaken by the Commonwealth directly. The Commonwealth issues its own regulations governing customs enforcement. Since there is no need for national uniformity of rules regarding customs regulation, there are no reasons of national policy militating against deciding this case on the basis of CNMI law. Moreover, "American 'rule' over the Commonwealth of the Northern Mariana Islands derives its legitimacy from the consent of the Northern Mariana people and from the national respect for the unique customs and values that have developed over hundreds of years." *Saipan Stevedore Co. Inc. v. Director, Office of Workers' Compensation Programs*, 133 F.3d 717, 721 (9th Cir.1998). In that at least one Commonwealth court has previously ruled that the unique characteristics of the Commonwealth require a strict reading of its search and seizure provisions and that these provisions provide greater protection than that guaranteed by the Fourth Amendment,[22] the absence of national policy considerations, combined with the deference traditionally accorded historical and cultural considerations by the courts, strongly suggest that CNMI law should apply here.

Having concluded on the basis of the previous analysis that the court may adequately resort to separate and independent grounds of decision in this case, the court now proceeds to do so.

D.

Although random inspections at the border may be reasonable simply by virtue of the fact that they occur at the border, where, as here, a customs official targets a suspect for interrogation before landing, detains that suspect immediately upon arrival, and then escorts her to a secure area for a more thorough inspection and search simply because her name appeared on a "Guest List," the action is neither random nor routine In this case, the action is personal in nature and aimed at the discovery of a crime.

The Govemment argues that its actions at the border can be justified by the threat to public

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[22] *CNMI v. Sablan*, Crim. Case. No. 94-35F (Super. Ct. Nov. 1, 1994).

safety, health and welfare posed by the importation of contraband and weapons (Response at 3). **[p. 24]** Plainly these interests are substantial,[23] thus in balancing the Defendant's diminished right of privacy at the border against the government's longstanding concern for the protection of its international borders and the "exceptionally dangerous threat" posed by drug abuse to the safety and welfare of the Commonwealth,[24] the scale tips heavily in the Government's favor. The court therefore concludes that, at a minimum, a particularized and objective basis for assuming a suspect is engaged in criminal activity need be present in order for customs officials to detain that suspect for a non-routine investigation at the border. Absent a reasonable suspicion of wrongdoing, the detention would be unlawful under Article I, § 3 and Article I, § 10 of the Commonwealth Constitution.

In reaching this conclusion the court is mindful of certain factors. First, at issue is a non-routine stop and interrogation at the border.[25] Because of the inherently transient nature of drug courier activity at airports, allowing customs officers to make brief investigative stops at airports on reasonable suspicion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics. Second, the protections afforded by Article I, § 10 of the Commonwealth Constitution require that any intrusion into a suspect's privacy be necessary and accomplished by no less intrusive means. Under these circumstances, customs agents must therefore have had a "particularized and objective basis for suspecting" that Dado was engaged in criminal activity prior to detaining her for interrogation.

To determine whether the agent's suspicion was reasonable in this case, the court determines whether the factors identified as prompting the search describes "behavior that should excite the suspicion of a trained border patrol agent that criminal activity is afoot." *United States v.*

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[23] *Place*, 462 U.S. at 703, 103 S.Ct. at 2642 (where authorities possess specific and articulable facts warranting a reasonable belief that the luggage contains narcotics, the government interest in seizing the luggage briefly to pursue a further investigation is "substantial").

[24] *See* PL 7-42, the "Anti-Drug Abuse Act of 1991," §§ 2 and 3, *codified at* Comment, 6 CMC § 2141.

[25] In reaching this decision, the court emphasizes that routine inquiries about the purpose for entry into the Commonwealth and the travel plans incident to it may be asked without a reasonable suspicion of wrongdoing. The officer is entitled to responses to such questions and is under no affirmative obligation to put the person seeking entry at ease. This is especially true where the officer perceives unusual responses, conduct, demeanor, or appearance.

Rodriguez, 976 F.2d 592, 594 (9th Cir.), *amended on den. of reh'g*,997 F.2d 1306 (9th Cir. 1993). At a **[p. 25]** minimum, the suspicious conduct relied upon by Lt. Guajardo to justify the search must have been sufficiently distinguishable from that of innocent people under the same circumstances as to have clearly, if not conclusively, set the Defendant apart from them. *Id*., 976 F.2d at 596. Under the facts presented in this case, the court does not agree that the Defendant's conduct justified this level of assurance

The factors upon which Lt. Guajardo relied to target the Defendant for questioning could well be subject to innocent interpretation. For example, the nature of air travel alone may induce the state of nervousness subsequently relied upon by border officials to justify a passenger's detention. *United States v. Berry*, 670 F.2d 583, 596 (5th Cir.1982). The fact that the Defendant was a frequent flier is also consistent with innocent travel. Likewise, the possibility that the Defendant may have been seen with another person who also made the List does not rise to a sufficient reason to detain her. Although it is only sensible to allow customs officers to exercise the very judgment they have developed both individually and collectively, the reasons justifying the stop must be reasons that are probative of behavior in which few innocent people would engage. *U.S. v. Sokolow*, 490 U.S. 1, 8, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989). In short, the court believes that the factors relied on by Lt. Guajardo to place the Defendant on the Guest List could apply to a very large category of innocent travelers who would be subject to virtually random seizures, were the court to conclude that so little foundation could justify a seizure. *Reid v. Georgia*, 448 U.S. 438, 431, 100 S.Ct. 2752, 2754, 64 L.Ed.2d 890 (1980) (agent could not have reasonably suspected petitioner of criminal activity simply because he appeared to fit a so-called "drug courier profile").

[p. 26] **V. CONCLUSION**

For all the reasons stated above, the court concludes that the Government lacked sufficient justification to conduct the search of the Defendant's baggage and purse since Lt. Guajardo lacked reasonable suspicion to detain the Defendant in the first place. All evidence taken from the Defendant, including her statement, was tainted by the illegal detention. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Accordingly, Defendant's motion to suppress

is **GRANTED.**

So ORDERED this 23 day of February, 2000.

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Associate Judge