ROP v. Techur, 6 ROP Intrm. 340 (1997)
REPUBLIC OF PALAU,
Plaintiff,

v.

JULIANA TECHUR
Defendant.

CRIMINAL CASE NO. 256-96

Supreme Court, Trial Division
Republic of Palau

Order denying motion to suppress
Decided: June 20, 1997

Counsel for Plaintiff: Janine Udui, Assistant Attorney General

Counsel for Defendant: Marvin Hamilton

R. BARRIE MICHELSEN, Associate Justice:

Defendant Juliana Techur is accused of various drug offenses as a result of a search and seizure of outbound cargo at the Airai International Airport; She has filed a motion to suppress evidence. 18 PNC § 312. For purposes of this motion, the Defendant assumes that the pertinent statements in the affidavit of probable cause are true.

Officer Ngirblekuu's affidavit states that a box was presented by Defendant to a cargo agent for Continental Micronesia on May 12, 1997, for shipment to Kosrae. When asked by the cargo agent to identify the contents of the box, she said it contained canned food, betelnut, and food items. The agent accepted the package, ⊥341 filled out the appropriate documents for cargo and had the Defendant sign the forms. Subsequently, during a routine canine inspection of the outgoing cargo, a narcotics dog "alerted" to the box that Defendant had delivered for shipment. The narcotics officer at the scene notified a customs officer who subsequently opened the box. Thirteen packages of vegetable like matter which appeared to be marijuana was found. The narcotics officer took the box and its contents back to the narcotics office where he conducted a field test for marijuana. The result was positive.

In this motion the Defendant does not attempt to press the argument, unsuccessful to date in the United States, that canine sniffs are searches subject to the usual constitutional protections surrounding searches. *See United States v. Place* , 103 S.Ct. 2637 (1983). Rather, she proceeds directly to the issues raised by the opening of the package after the canine sniff, suggesting that such a search, unsupported by probable cause, was a constitutional violation, because no exception to the warrant requirement applies.

The government argues that the search conducted here was a "border search," and as such this Court should followed the logic of the case of *United States v. Montoya de Henandez* , 105 S.Ct. 3304, 3308 (1985). In that case the Court said:

> Since 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 warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. *See United States v. Ramsey* , 431 U.S. 606, 616-671, 97 S.Ct. 1972, 1978-1979, 52 L.Ed.2d 617 (1977), citing Act of July 31, 1789, ch. 2, 1 Stat. 29. This Court has long recognized Congress' power to police entrants at the border. *See Boyd v. United States* , 116 U.S. 616, 6 S.Ct. 524, 528, 29 L.Ed. 746 (1886).

Searches at international borders are a universal norm. The drafters of the Palau constitution were familiar with the practice in the Trust Territory of the Pacific Islands. The Palau Constitution incorporated the search warrant requirement that was a familiar part of Trust Territory law. Prior to the implementation of the Constitution in 1981 border searches would have been thought to be reasonable in this jurisdiction. Indeed, the practice was so unremarkable that it never generated a reported decision in the Trust Territory Reports. None of the language in the Palau constitution can be construed to be an effort to restrict border searches to something stricter than what had been previously ⊥342 allowed. The "border search" exception to the warrant requirement applies here.

Defendant suggests that the Airport is not a "border." The border of the Republic of Palau, she argues, may be as far as 200 miles away. [*See* Article I, section 1, Palau Constitution; territory of Palau extends 200 miles out from a straight archipelagic baseline].

Whether international flights or maritime vessels are searched at the very point at which they pass into Palau's 200 mile maritime zone, or whether they are searched at the airport or dock upon arrival, the intrusiveness of being searched remains the same. The United States Supreme Court has stated that the spot of the arrival and disembarkation of passengers may be deemed the "functional equivalent" of an international border, and that statement seems to be logically correct. An example that court used was that

> a search of the passengers and cargo of any airplane arriving at a St. Louis Airport after a non stop fight from Mexico City would clearly be the functional equivalent of a border search.

Almeida-Sanchez v. United States, 93 S.Ct. 2535, 2539 (1973).

The United States Circuit Court for the Fifth Circuit has considered this issue at some length and has found that a checkpoint is a functional equivalent of an international border if the checkpoint; (1) does not have traffic that is "disproportionately domestic"; (2) is permanent; and (3) "approximates the effect of one physically located at the border." See full discussion in *United States v. Jackson*, 825 F.2d 852 (5th Cir. 1987) (en banc). This test is a useful one, and is

adopted in this analysis. The court takes judicial notice that the checkpoint at the airport meets this test.

Therefore, searches at the Airai International Airport of passengers and cargo that are part of the airport's international traffic are searches at the functional equivalent of a border, and therefore should be considered border searches.

The Defendant furthers argues that even if the border search exception to the warrant requirement is applicable, it should not apply to outbound passengers and cargo. Although "outbound" cases are few compared to "arrival" cases, they are uniform in holding that the border search exception applies. *See, e.g., United States v. Stanley* , 545 F.2d 661 (9th cir. 1976), *United States v. Swarovski*, ⊥343 592 F.2d 131 (2nd Cir. 1979); *United State v. Ajlouny*, 629 F.2d 830 (2nd Cir. 1980). I believe that is the correct rule to apply here. In Palau, the ability of marijuana growers to expand sales to an international market, and therefore increase the profitability of their criminal enterprises, has a direct and adverse effect upon the government's ability to protect the public. In other contents, the Palau government also has the responsibility to enforce its environmental laws prohibiting export of certain items. These government responsibilities are no less weighty than those justifying the search of items entering the country.

Defendant asks that if the border search exception is to be applied here, that it only apply prospectively, because residents of Palau were not on notice that such an exception existed. The request is denied. Border searches of cargo have been part of the legal landscape here during the whole of the American era that proceeded the Palau Constitution. Furthermore, anyone sending contraband to Kosrae would be on notice that nondetection of the cargo upon arrival in Kosrae depends on FSM customs officers in Kosrae not exercising their right to search. The rule used in this case cannot be said to be an unanticipated development in the law, nor could have the shipper had a reasonable expectation that the cargo would not be subject to search before delivery to its intended recipient.

Defendant also points out the significant difference between the usual manner of searches of incoming cargo compared to searches of cargo leaving the country. Searches of items entering the country are routinely conducted int he presence of the owner or consignee. Searches of items that have left the possession of the shipper, and are in the hands of carriers, raise the specter of the "secret search."

This troubling aspect was discussed by Judge Kozinski, of the Ninth Circuit Court of Appeals in his dissent in *United States v. Nates*, 831 F.2d 860, 867 (9th Cir. 1987).

> Being subject to a secret search and then never being told about its something think most people would find especially offensive, and this then bears on the reasonableness of the procedure employed by the government.

In addition, such searches carry additional risk of property damage, increased opportunities for theft, and the opportunity of planting of evidence. Because secret departure searches raise additional problems not present in entry searches conducted in the ⊥344 presence

of the shipper, it may be that standard for such searches of outbound cargo will be held to a different standard than searches conducted in the presence of an owner or agent. Such standards could possibly include a requirement of reasonable suspicion, the opening of the cargo in the presence of an observer or witness, and the subsequent notification of the owner or consigner that a search was conducted. Since all of these elements were present in this case, the issue of whether such additional standards ought to be considered constitutionally required can be left for the future case law.

The motion to suppress the evidence is denied.