On the surface, the 2-1 Ninth Circuit opinion last week holding that San Francisco's former jail strip search policy was unconstitutional appears in line with twenty-plus years of Ninth Circuit precedents. This line of cases started with *Giles v. Ackerman,* 746 F.2d 614 (9th Cir. 1984) and held that jailors could not strip search "minor" offenders (such as Ms. Giles, briefly detained for unpaid parking tickets) who were destined for release after a few hours in jail.

On closer inspection, however, the three opinions in *Bull v. City and County of San Francisco* – majority opinion, concurrence, and dissent -- show cracks beginning to form in Ninth Circuit strip search law. In *Bull,* San Francisco argued that earlier Ninth Circuit strip search cases were distinguishable on two grounds: (1) San Francisco had shown through documentary evidence that it had a major problem with smuggled drugs and weapons in the County Jails; and (2) earlier cases were different from San Francisco's policy because earlier cases had all involved individuals who were strip searched while awaiting bail or who were destined for early release.

On the first point, the judges agreed that San Francisco had shown a serious problem with contraband in the jail. Writing for the majority, Judge Thomas stated that the City's evidence showed "that contraband smuggling was a significant problem in San Francisco jails." Judge Ikuda voted with Judge Thomas, but warned: "[B] y disregarding the jail administrators' urgent concerns about a serious contraband smuggling problem, I agree with the dissent that we are potentially putting lives in the San Francisco detention system at risk." In dissent, Judge Tallman wrote: "We have never before been presented with such a compelling record of dangerous smuggling activity."

Nonetheless, the majority found that these facts did not distinguish San Francisco's policy from those found infirm in earlier cases. The Ninth Circuit held that notwithstanding the evidentiary record, jailors could not strip search prisoners before transferring them into the general jail population for an indeterminate period of time. (Under San Francisco's former policy, arrestees who were not brought in on drugs, weapons or violence charges were only strip searched after they had been allowed a reasonable time to post bail.)

Judge Ikuda's concurrence is particularly noteworthy. She concludes that two decades of Ninth Circuit case law is at odds with the Supreme Court's balancing test as applied to uphold a blanket strip search policy in *Bell v. Wolfish,* 441 U.S. 520 (1979).

Judge Ikuda wrote:

"By effectively eliminating . . . [jail officials'] security concerns from our calculus, we contradict Supreme Court precedent and common sense and take upon ourselves a role unsuited for the courts. . . . Because we have dangerously substituted our

judgment for the judgment of jail administrators, a reconsideration of our case law is urgently needed."

The *Bull* case appears ripe for en banc review in the Ninth Circuit to resolve the tension noted between the Supreme Court's most recent pronouncement on strip searches and 20 years of intervening Ninth Circuit case law in that – in Judge Tallman's words – has strayed "far from the course charted" in *Bell v. Wolfish*."