INTRUSIVE BORDER SEARCHES—IS JUDICIAL CONTROL DESIRABLE?

"[F]rom the commencement of the government" [1] United States customs agents have had the power to make searches at the border without probable cause.[2] A technique which has recently become popular among narcotics smugglers—concealment of the drug in cavities of the smuggler's own body—has created controversy [3] concerning the constitutionality of this long-settled rule. *Blefare v. United States* [4] illustrates both this practice and the controversy it occasions. Blefare was stopped at the Mexican border by customs officials who had information that Blefare had previously peddled Mexican narcotics in Canada.[5] Blefare consented to a doctor's examination, agreeing to drink an emetic. After he sipped the emetic, the doctor saw him regurgitate an object and reswallow it.[6] The doctor then suggested that the emetic be poured into Blefare's stomach through a tube.[7]

[1] Boyd v. United States, 116 U.S. 616, 623 (1886); see notes 17- 20 *infra* and accompanying text.

[2] See notes 13-15 *infra* and accompanying text.

[3] See, *e.g.*, Blefare v. United States, 362 F.2d 870, 880-88 (9th Cir. 1966) (dissenting opinion); Blackford v. United States, 247 F.2d 745, 754-55 (9th Cir. 1957) (dissenting opinion).

[4] 362 F.2d 870 (9th Cir. 1966).

[5] The *Blefare* opinions do not disclose the identity or reliability of the informant, although some information about Blefare's activities was obtained through Canadian officers. Here the contrast is clear between the information needed, under the present rule, by a customs officer to justify a border search, and the information required of a police officer to obtain a search warrant. Under the rule of Baysden v. United States, 271 F.2d 325 (4th Cir. 1959) (search of building for counterfeiting equipment), a federal officer in applying for a search warrant must reveal the sources of his information and the grounds for his belief that there is contraband or other criminal activity in a given place; he may not say simply that he has information about the activity. "If the magistrate may accept the belief of the officer as sufficient, without inquiry as to its basis, controlling significance is attached to the officer's belief rather than to the magistrate's judicial determination." *Id.* at 328.

The information on which police officers make warrantless arrests must be equally particular and reliable. See Beck v. Ohio, 379 U.S. 89, 96 (1964); Costello v. United States, 298 F.2d 99, 101-02 (9th Cir. 1962). However, since under traditional doctrine there is no need for probable cause, let alone a warrant in border searches, see notes 13-14 *infra*, these safeguards would not apply.

[6] At this point, the customs officers clearly had probable cause to believe that Blefare was concealing contraband in his stomach. See Blefare v. United States, 362 F.2d 870, 872 (9th Cir. 1966). For a definition of probable cause, see note 10 *infra*.

[7] The tube, about 5/16 of an inch in diameter, was passed through Blefare's nose, presumably to bypass his clenched teeth, and through his nasal passages into his throat and stomach. 362 F.2d at 872. The uncontradicted testimony of the doctor who performed this operation was that it is standard practice for removing objects from the stomachs of babies. *Id.* at 872 n.2.

There did not seem to be any alternative to this procedure, short of releasing the suspect without making a search. An effective fluoroscopic examination would have required that the suspect drink a barium solution; if he had refused to do so, the barium would be administered in the same way as the emetic. *Id.* at 874. Furthermore, there was need for haste, although the court did not emphasize this aspect. *Compare id.* at 873, *with* Schmerber v. California, 384 U.S. 757, 770 (1966). One of the packets expelled by Blefare was too large to pass through the pyloric valve from his stomach into his small intestine. 362 F.2d at 873. There was thus risk that gastric juices would destroy the rubber covering of the packet, and release the heroin into Blefare's stomach, causing his death. *Id.* at 873-74.

Blefare refused to consent to this procedure; the emetic was forcibly administered and he vomited two packets of heroin. The Ninth Circuit affirmed his subsequent conviction for narcotics smuggling, holding that the discovery of the heroin was not the product of an "unreasonable" search and seizure.[8]

The contrast between permitting a minor official to search baggage and empowering the official, at his discretion, to authorize extremely intrusive, degrading searches of a man's body, is stark. It is the thesis of this Comment that, whenever practical,[9] a United States Commissioner or other judicial officer should review the evidence, and decide whether there is probable cause to believe that the person suspected is carrying narcotics or other contraband in his body, before an intrusive border search can be made.

Police may, as a rule, make searches only under a valid search warrant issued by a judicial officer after he has read the sworn affidavit of a police officer and found probable cause[10] to believe that there is criminal activity of a sort which would justify the search.[11] Searches made at the borders of the United States by customs and immigration officials form an exception to this rule.[12] A series of recent decisions have emphasized that border searches are in a separate category,[13]

[8] The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." Under the rule of Weeks v. United States, 232 U.S. 383 (1914), it is reversible error to admit in federal court evidence obtained by federal officers through search and seizure which violates the fourth amendment.

[9] It should be practical in nearly all cases for a customs officer to bring a suspect before a United States Commissioner. Commissioners are or could easily be located at almost all points of entry. 28 U.S.C. § 631(a) (1964) provides that each district court shall appoint commissioners in such numbers as it deems advisable. Intrusive searches of the body should be infrequent, in contrast to the number of non-intrusive border searches, and should impose no undue burden on the commissioners' time.

[10] Probable cause exists where the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Chin Kay v. United States, 311 F.2d 317, 320 (9th Cir. 1962) (validity of search warrant); *accord*, Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (search of moving vehicle without warrant); Dumbra v. United States, 268 U.S. 435, 441 (1925) (validity of search warrant); Carroll v. United States, 267 U.S. 132, 162 (1925) (search of moving vehicle without warrant).

[11] See Stoner v. California, 376 U.S. 483, 486 (1964); Nathanson v. United States, 290 U.S. 41, 47 (1933) (search of private dwelling with warrant); Blackford v. United States, 247 F.2d 745, 748 (9th Cir. 1957) (opinion of Barnes, J.), *cert. denied*, 356 U.S. 914 (1958).

[12] There are several other exceptions. Searches may be made without a warrant incident to a lawful arrest, for four purposes—to prevent destruction of evidence, seize concealed weapons, nullify means of escape, Preston v. United States, 376 U.S. 364, 367 (1964), and "seize the things used to carry on the criminal enterprise," Marron v. United States, 275 U.S. 192, 199 (1927), which is in progress when the search is made. Searches of automobiles, ships and other easily moved things may also be made without a warrant. Carroll v. United States, 267 U.S. 132, 149 (1925).

However, unlike a border search, the officer may not search a movable without probable cause, *ibid.*, and, of course, no arrest can lawfully be made without probable cause. See, *e.g.*, Draper v. United States, 358 U.S. 307, 310-11 (1959).

[13] King v. United States, 348 F.2d 814, 818 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965); Witt v. United States, 287 F.2d 389, 391 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961); King v. United States, 258 F.2d 754, 756 (5th Cir. 1958); United

apart from other searches, and require neither arrest nor probable cause.[14] "Unsupported suspicion" is sufficient to justify a border search.[15]

A principal justification for this exception has been found in the events surrounding the adoption of the fourth amendment. One of the first legislative acts of the First Congress was a revenue statute empowering customs officials to search goods, merchandise, packages and the like "on suspicion of fraud."[16] The same Congress some months later proposed the Bill of Rights to the states.[17] This sequence of events has traditionally been interpreted[18] as demonstrating that Congress did not intend that the fourth amendment's prohibition against unreasonable searches should forbid border searches at the discretion of customs officials.[19]

This historical argument, however, does not support a conclusion that all border searches are immunized. Clearly, the First Congress had in mind only searches of ships and buildings, certainly not intrusive searches of the body.[20] A court, faced with an intrusive border search, should therefore not be prevented from imposing judicial control by the history of the customs provisions.

Nor do present statutes preclude judicial supervision of intrusive border searches.[21] In *Carroll v. United States*,[22] the Supreme Court

States v. Yee Ngee How, 105 F. Supp. 517, 519 (N.D. Cal. 1952); Marsh v. United States, 344 F.2d 317, 324 (5th Cir. 1965) (dictum). To date, the Supreme Court has not granted certiorari in any case involving a border search. It denied certiorari in Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958) (search involving an anal probe), and in Lane v. United States, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964) (defendant vomited packet of heroin after consenting to drink emetic).

[14] Landau v. United States Attorney, 82 F.2d 285, 286 (2d Cir.), *cert. denied*, 298 U.S. 665 (1936), and cases cited note 13 *supra*.

[15] Cervantes v. United States, 263 F.2d 800, 803 n.5 (9th Cir. 1959) (dictum).

[16] Act of July 31, 1789, ch. 5, § 23, 1 Stat. 43.

[17] 1 ANNALS OF CONG. 88, 913 (1789).

[18] See Carroll v. United States, 267 U.S. 132, 150 (1925); Boyd v. United States, 116 U.S. 616, 623 (1886).

[19] The same view prevailed in England, where similar statutes had been in effect since the Restoration, and during the controversies over general warrants in Wilkes v. Wood, 1 Lofft 1, 98 Eng. Rep. 489 (K.B. 1763), and Entick v. Carrington, 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (C.P. 1765). For a discussion of this controversy, see 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND 110-13, 245-52 (1889).

[20] The Act of 1789 authorizes searches of ships, buildings, packages, etc. Act of July 31, 1789, ch. 5, §§ 23-24, 1 Stat. 43. These provisions in no way contemplate the intrusive body search, which was not then medically feasible.

[21] Border searches are today authorized by these statutes. Tariff Act of 1930, 46 Stat. 747, as amended, 19 U.S.C. §§ 1581-82 (1964) (§ 1581—boarding vessels; § 1582—Secretary of the Treasury may establish regulations for search of persons and baggage); REV. STAT. § 3061 (1875), 19 U.S.C. § 482 (1964) (search of vehicles and persons). These provisions, substantially identical to the Act of 1789, make no mention of intrusive searches.

The re-enactment doctrine, rejected in Girouard v. United States, 328 U.S. 61, 69-70 (1946), would not afford grounds for finding congressional approval of intrusive border searches. This type of search did not gain judicial prominence until the early 1950's. See cases cited note 13 *supra*.

[22] 267 U.S. 132 (1925).

accepted as constitutional a statute authorizing federal prohibition agents to search automobiles without a search warrant. The Court obviously found significant the fact that Congress had already considered and balanced the conflicting social interests.[23] The present statutes dealing with border searches, however, clearly do not reflect any congressional balancing of the interests involved in intrusive border searches,[24] thus leaving a court latitude to impose a solution reflecting its own balance of the social interests.

The reasons for the border search exception are usually stated simply:

> The necessity of enforcing the customs laws has always restricted the rights of privacy of those engaged in crossing the international boundary.[25]
>
> Travellers may be stopped [and searched] in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.[26]

The public interest in collection of customs duties, preservation of public health and the like constitutes a strong policy reason for allowing non-intrusive searches at the border without probable cause or arrest.[27] It may be argued that many, if not most, searches at the border are made because an experienced inspector has detected small signs of nervousness and uneasiness in a traveller which reliably provoke suspicion but which do not constitute "probable cause." It would require enormous police activity on both sides of a border to assemble a dossier sufficient to constitute probable cause to search each person attempting to smuggle some small item. Because of these administrative difficulties and the number of people crossing the border, it would be impractical, in the great majority of cases, to require that a search warrant be obtained, or that the customs officer have probable cause to search, before allowing the search to be made.[28]

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[23] See *id.* at 143-47; *cf.* Abel v. United States, 362 U.S. 217, 233-34 (1960).

[24] See note 21 *supra.*

[25] Landau v. United States Attorney, 82 F.2d 285, 286 (2d Cir.), *cert. denied,* 298 U.S. 665 (1936).

[26] Carroll v. United States, 267 U.S. 132, 153 (1925) (dictum).

[27] In Witt v. United States, 287 F.2d 389, 391 (9th Cir. 1961), the court suggested:

> No question of whether there is probable cause for a search exists when the search is incidental to the crossing of an international border, for there is reason and probable cause to search every person entering the United States from a foreign country, by reason of such entry alone.

However, this is merely a legal fiction, rephrasing the doctrine that it is permissible to make searches at the border on suspicion alone, for in reality customs officials make searches which are clearly not based on probable cause.

[28] Abuse would occur if the courts were loose in their definition of "the border"; but to date they seem to have decided soundly that, with some exceptions, searches

Border searches were formerly viewed as primarily a search of one's clothing and luggage,[29] at most a nuisance and inconvenience to the traveller. The rule permitting customs officials to make limited searches without the usual safeguards has been justified on the ground that the public interest in enforcing the customs laws outweighs the public interest in protecting the privacy of its members from minor invasions. However, in the case of an extremely intrusive search and its correspondingly greater invasion of privacy, the balance should tip the other way.

Both *Rochin v. California*[30] and *Schmerber v. California*[31] involved intrusive non-border searches of the body. In *Rochin* the Supreme Court found, in Mr. Justice Frankfurter's often-quoted words, that Rochin's right to due process of law under the fourteenth amendment[32] had been violated:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation.[33]

It is not clear whether Mr. Justice Frankfurter meant that "forcible extraction" alone was a constitutional violation, or whether

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at any great distance from the border are not border searches. Marsh v. United States, 344 F.2d 317, 324-25 (5th Cir. 1965) (sixty-three miles); Contreras v. United States, 291 F.2d 63 (9th Cir. 1961) (seventy-two miles). *But see* Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963) (seventy miles). Compare Taylor v. United States, 352 F.2d 328 (9th Cir. 1965); United States v. Yee Ngee How, 105 F. Supp. 517 (N.D. Cal. 1952). The searches are border searches if the point at which the search is made is truly a point of entry, because it would be impractical to have an inspection station exactly at the border, Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959) (seventy-five miles), or if the search is the result of a continuous surveillance beginning at the border. King v. United States, 348 F.2d 814, 816 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965). *But see* Plazola v. United States, 291 F.2d 56, 61 (9th Cir. 1961).

[29] See notes 20, 21 *supra* and accompanying text. Mr. Justice Brennan, in Schmerber v. California, 384 U.S. 757, 767-68 (1966), implicitly makes this distinction:

> Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—"houses, papers, and effects"—we write on a clean slate.

[30] 342 U.S. 165 (1952).

[31] 384 U.S. 757 (1966).

[32] California police illegally entered Rochin's home and saw him hastily swallow two capsules. Failing in their attempts to force open his mouth, they took him against his will to a hospital and held him while his stomach was pumped. It yielded the remains of two capsules which contained morphine.

Rochin was decided before Mapp v. Ohio, 367 U.S. 643 (1961), applied the federal exclusionary rule, see note 8 *supra*, to the states. Hence, the decision was based upon the due process clause of the fourteenth amendment, instead of the fourth amendment.

[33] 342 U.S. at 172.

the violation was composed of the totality of events—forcible extraction, illegal invasion of Rochin's privacy and assaults upon his person. The lower courts have found that *Rochin* adopted the latter view,[34] although it is more likely that Mr. Justice Frankfurter meant the former.[35]

The "shock the conscience" standard of due process suggested in *Rochin* seems, with one exception,[36] to have fallen into disuse.[37] In *Breithaupt v. Abram*,[38] Mr. Justice Clark balanced the social interests in deciding whether the involuntary taking of a blood sample was a violation of due process:

> As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of this kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the . . . mortal hazards of the road.

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[34] See, *e.g.*, Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) (opinion of Powell, J.); Blackford v. United States, 247 F.2d 745, 751 (9th Cir. 1957) (opinion of Barnes, J.), *cert. denied*, 356 U.S. 914 (1958).

[35] Further on in his opinion in *Rochin*, Mr. Justice Frankfurter referred to coerced confessions and concluded:

> It would be a stultification of the responsibility which the course of constitutional history has cast upon this court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.

342 U.S. at 173. In his dissent in Irvine v. California, 347 U.S. 128 (1954), Mr. Justice Frankfurter wrote:

> [I]n *Rochin* . . . the Court held that "stomach pumping" to obtain morphine capsules, later used as evidence in a trial, was offensive to prevailing notions of fairness in the conduct of a prosecution and therefore invalidated a resulting conviction as contrary to the Due Process Clause.

Id. at 143. Mr. Justice Jackson, writing for himself and three others in *Irvine*, suggested:

> [*Rochin*] presented an element totally lacking here—coercion . . . applied by a physical assault upon his person to compel submission to the use of a stomach pump. This was the feature which led to a result in *Rochin* contrary to that in *Wolf*. Although Rochin raised the search and seizure question, this Court studiously avoided it and never once mentioned the *Wolf* case. Obviously, it thought that illegal search-and-seizure alone did not call for reversal.

Id. at 133.

[36] The test retains vitality in cases involving police brutality, such as Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961) (by implication).

[37] In the next invasion of privacy case to come before the Court, Irvine v. California, 347 U.S. 128 (1954) (electronic eavesdropping), an attempt was made to apply the "shock the conscience" test, with the result that five different opinions were written, four of which criticized the "shock the conscience" standard or ignored it completely. A factor contributing to the decline of the *Rochin* test may be the Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961), to apply fourth amendment search and seizure standards, as well as the exclusionary rule, to state prosecutions. This decision makes it unnecessary, in appropriate cases, to employ fourteenth amendment due process standards.

[38] 352 U.S. 432, 439 (1957).

In *Schmerber v. California*,[39] another blood sample case, the Court amplified its approach,[40] holding that the "interests in human dignity and privacy" protected by the fourth amendment required "*clear indication* that in fact . . . evidence will be found" before such a search can be made.[41]

> Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for search of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . ." The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.[42]

The emphasis placed by the Court on the requirement that the officer have "clear indication" that the search will be successful seems to create two tests: one a test of probable cause to arrest, the other a test of probable cause to search. Therefore, an officer desiring to make an intrusive non-border search must arguably have probable cause for both arrest and search—although in the ordinary case, probable cause would be required only for the arrest.[43] Analogously, a customs officer may have authority by virtue of his office to detain a traveller and to make a limited search, but in order to make an intrusive body search he would need probable cause.[44]

The sufficiency of the reasons for making the search, and the practicality of obtaining a warrant, are factors to be considered in

[39] 384 U.S. 757 (1966).

[40] Breithaupt v. Abram, 352 U.S. 432 (1957), was decided before Mapp v. Ohio, 367 U.S. 643 (1961). The Court in *Schmerber*, which came after *Mapp*, was able to apply fourth amendment standards.

[41] 384 U.S. at 769-70. (Emphasis added.)

[42] *Id.* at 770. Mr. Justice Brennan, writing for the Court, held that the officer was justified in acting without a warrant in this instance, for there was danger that the evidence would be destroyed before a warrant could be obtained, through the evaporation of the alcohol out of the blood stream. See Comment, 18 STAN. L. REV. 243 (1965), for a critical appraisal of this view.

[43] See, *e.g.*, Stoner v. California, 376 U.S. 483, 486 (1964).

[44] A warrant should be required except in cases, such as *Schmerber*, see note 42 *supra*, where it is not feasible to obtain one. See note 54 *infra*.

determining the reasonableness of a search. The requirement of "clear indication that . . . evidence will be found" protects the citizen's privacy by ensuring that only those searches will proceed in which there is great likelihood of success. The requirement of a hearing before an impartial judicial officer, as in an application for a warrant to search a building, further protects this privacy by increasing the accuracy of the determination[45] of whether there is probable cause to search. When it has been adjudged that it is probable that a citizen is engaged in criminal activity, then the interest of society in law enforcement outweighs the interest in preserving the privacy of the suspect, and it is "reasonable" to make the search.

The requirements of *Schmerber* clearly would apply to other intrusive searches, such as a search of the stomach or rectum. But *Schmerber* is not a border-search case. Should the *Schmerber* requirements be applied to intrusive border searches? Should the balance between privacy and law enforcement struck in *Schmerber* be the same in an intrusive border search, or do the special considerations of border searches tip the balance the other way?

Both taking a blood sample and searching body cavities involve invasions of privacy. However, taking a blood sample is not a very intrusive procedure; it is safe, almost painless and very common.[46] A rectal probe is uncomfortable but not painful if the subject is cooperative.[47] On the other hand, both a rectal probe and emetic-induced vomiting are far more embarrassing and undignified than the taking of a blood sample; induced vomiting involves discomfort approaching illness. There is consequently a greater need to protect the privacy of the suspect when confronted with the more intrusive type of search. Furthermore, while it is demonstrable that both narcotics smuggling and drunken driving are major problems, it would seem difficult to prove that one is more serious than the other. If searches at the border may be more intrusive than taking a blood sample, and if the policy reasons for searches without probable cause at the border are no more pressing than the reasons for taking blood samples, then the regard for the dignity and privacy of the individual expressed by the Supreme Court in *Schmerber* would demand the protection there granted—review by an impartial judicial officer, wherever practical, to ensure that there is probable cause to make the search.

One other distinguishing feature of border searches should be considered. It is more efficient and convenient to search for narcotics and other smuggled goods at the border, for it is the one place and time when the smuggler must necessarily have the contraband in his possession. After the smuggler crosses the border, he may cache the

[45] See Johnson v. United States, 333 U.S. 10, 13-14 (1948).
[46] See Breithaupt v. Abram, 352 U.S. 432, 435-37 (1957).
[47] Blackford v. United States, 247 F.2d 745, 752 (9th Cir. 1957) (opinion of Barnes, J.), *cert. denied*, 356 U.S. 914 (1958).

contraband, and it may then take much investigative work to connect him with it. However, this advantage inherent in searching at the border would not be completely lost if the *Schmerber* requirements were applied; searches of body cavities could be made if probable cause were shown, and the usual searches of clothing and baggage could be made without probable cause. Increased protection for the traveller's privacy would outweigh the loss of convenience in making intrusive searches of the body without probable cause.[48]

Case law on border searches, as developed in the lower federal courts, reveals judicial concern for the intrusiveness of searches, and with the amount of force which might be applied to a suspect.[49] For example, *Blackford v. United States*[50] involved the use of a rectal probe after Blackford's disclosure, corroborated by other evidence, that he had concealed heroin in his rectum. (Blackford nevertheless did not consent to its removal.) The Ninth Circuit held that the fourth amendment imposed restrictions on the extent of searches of the person, but that this search was reasonable because the officers used "only slight force," took thorough medical precautions and had "precise knowledge of what and how much was where." [51] In fact, although Blackford's body was examined on the authority of customs officers to search without probable cause, his anus was not probed until after he had been arrested without a warrant. The court ruled that the officers had probable cause to make the arrest[52] and, as in *Schmerber*, the same evidence which established probable cause to arrest also indicated the likely success of the search.

Courts have employed the term "reasonable" to denote several different concepts. One court noted the "fine balance" struck in *Blackford* between "a strict regard for the rights of the individual and the sterility which would follow efforts at law enforcement" [53] if such searches were held unconstitutional. The rationale for the search's

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[48] It is possible that police will have more difficulty in amassing enough data to convince a magistrate that probable cause is present, notably because the criminal activity has taken place outside of the United States. However, the customs officers are usually aware of those involved in the narcotics trade and can concentrate their efforts on investigating them. The border officials in *Blefare* learned of defendant's activities through information transmitted by Royal Canadian Mounted Police. Blefare v. United States, 362 F.2d 870, 871, 885 (9th Cir. 1966). Furthermore, international cooperation in narcotics control is increasing. See JEFFEE, NARCOTICS—AN AMERICAN PLAN 64, 166-82 (1966).

[49] The Second Circuit noted that customs searches could be carried too far. Landau v. United States Attorney, 82 F.2d 285, 286 (2d Cir.), *cert. denied*, 298 U.S. 665 (1936). The Fifth Circuit held that "untoward acts" of the *Rochin* type would make a border search "unreasonable." Lane v. United States, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964).

[50] 247 F.2d 745 (9th Cir. 1957) (opinion of Barnes, J.), *cert. denied*, 356 U.S. 914 (1958).

[51] *Id.* at 752.

[52] *Id.* at 749.

[53] King v. United States, 258 F.2d 754, 755 (5th Cir. 1958) (dictum), *cert. denied*, 359 U.S. 939 (1959).

reasonableness was given in terms of a balance of competing social interests.[54] "Reasonable" is thus used in the sense of a sound value judgment.

Another court[55] interpreted *Blackford* as imposing a twofold requirement of reasonableness. First, "the search must be 'reasonable' in scope and extent. An officer making a valid search must not resort to overly rigorous or drastic means." [56] Here, "reasonable" is used in a physical sense to describe the constitutional limits imposed on the extent, intensiveness, force used and surrounding circumstances of the search. For example, it would be unreasonable to torture a suspect into revealing the location of contraband, or to take a blood sample without taking proper medical precautions.[57]

Second, a search would be reasonable "only if the circumstances warrant a search initially," [58] as in a search incident to arrest, or a search by custom officers at a port of entry. Here, "reasonable" is used in the sense of "for good reason," meaning a search properly within the authority of the person making it, as a customs officer searching baggage at a port of entry. However, as noted previously,[59] customs officials may search without any reason at all, and the fourth amendment has traditionally been interpreted as allowing this practice, because it is "reasonable," in the sense of a value judgment, to do so. The word is also used, as in *Blackford*, in the sense of "for good reason" to mean that the customs official has knowledge amounting to probable cause to make an extensive, intrusive search of a suspect's person.

Judicial sensitivity to the myriad problems presented by these border search cases, as depicted by the various requirements imposed through differing usages of "reasonable," reflect the policy concerns

54 The *Blackford* result still leaves the customs officer with the responsibility of deciding whether there is probable cause to make an intrusive body search. This is unfortunate, as a judicial officer can make a more dispassionate and consequently more accurate determination of probable cause than a police officer, and thus give more protection to the privacy of citizens. See Johnson v. United States, 333 U.S. 10, 13-15 (1948). None of the four reasons for permitting searches incident to arrest, see note 12 *supra*, are pertinent here. While there is some risk that a rubber container may be dissolved by stomach acids, see note 7 *supra*, this process may take over forty-eight hours, Blefare v. United States, 362 F.2d 870, 874 (9th Cir. 1966), and there should be ample time to consult a judicial officer. Consequently, given the markedly reduced risk that the evidence will be destroyed, a commissioner's hearing, where practical, should be mandatory. See Schmerber v. California, 384 U.S. 757, 770-71 (1966).

55 United States v. Mitchel, 158 F. Supp. 34 (S.D. Tex. 1957), *aff'd sub nom.* King v. United States, 258 F.2d 754 (5th Cir. 1958).

56 *Id.* at 36.

57 Another example of a physical limit is the standard proposed by Mr. Chief Justice Warren:

> We should, in my opinion, hold that due process means at least law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids . . . .

Breithaupt v. Abram, 352 U.S. 432, 442 (1957) (dissenting opinion).

58 United States v. Mitchel, 158 F. Supp. 34, 36 (S.D. Tex. 1957).

59 Notes 13-15 *supra* and accompanying text.

of the Supreme Court in *Schmerber* and *Breithaupt v. Abram*.[60] The Court in *Schmerber* emphasized the need for proper medical precautions and for evidence of criminal activity sufficiently strong to convince an impartial judicial officer that there is probable cause to believe the search will reveal criminal activity. And in *Breithaupt*, the Court justified the intrusive body search as constitutional by examining and balancing the conflicting social interests.

When and if the Supreme Court grants certiorari in an intrusive border search case, three alternatives will be open to it:

(1) It can accept the standard proposed by Mr. Chief Justice Warren[61] and rule that this, like any other intrusion into the body, is unconstitutional. This course of action would run counter to public policy in that it would, for all practical purposes, invite smugglers to seek immunity from customs searches by swallowing the items sought to be smuggled. Narcotics in particular are small and easily swallowed; great quantities of them are already smuggled in body cavities.[62] While it might be possible to make arrests by keeping suspects under surveillance until they try to regurgitate the drugs, this procedure would be very difficult and time-consuming. The very strong public interest in suppressing the international narcotics trade and other smuggling would be ignored if all intrusive searches were declared unconstitutional per se.

(2) The Supreme Court could hold that the type of search made in *Blefare* was constitutional. However, this would concentrate great powers of harassment and oppression in the hands of the customs officers.[63] Millions of people—both citizens and non-citizens—cross the borders of the United States every year. This number is growing as it becomes easier to travel. Clearly the opportunities for harassment are enormous and demand some sort of judicial supervision.

(3) The Supreme Court could rule, as Judge Ely suggested in his dissent in *Blefare*,[64] and as Mr. Justice Brennan held in another context in *Schmerber*,[65] that at some point in the ascending scale of intensiveness of search a line must be drawn beyond which a customs officer may not go, unless he makes a showing of probable cause before a judicial officer and obtains a search warrant. This holding would erect a magisterial screen to protect travellers from extremely intrusive searches unless there is probable cause to believe that the search would expose contraband.

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[60] 352 U.S. 432 (1957).

[61] See note 57 *supra*. This standard apparently has the support of Justices Black, Douglas and Fortas. See the dissenting opinions in Schmerber v. California, 384 U.S. 757, 773-79 (1966).

[62] Blackford v. United States, 247 F.2d 745, 752 (9th Cir. 1957).

[63] *Id.* at 754-55 (Stephens, J., dissenting).

[64] 362 F.2d at 880-81.

[65] 384 U.S. at 770.

Clearly, it is one thing to stop a traveller to ask him his place and date of birth; this is hardly a nuisance. But it becomes a more serious and degrading business, increasingly an inconvenience and an affront to the dignity of the traveller, as the search progresses from his luggage to the contents of his pockets, his clothing, his naked body, his rectum and his stomach.

Mr. Justice Holmes remarked, in another context: "I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized." [66] Border searches have advanced several degrees in intensiveness in the last few years,[67] and a new judicial standard has surely become desirable. To the extent that "reasonableness" may be defined as a balance between the interest of society in protecting its members from extreme invasions of their privacy and the interest of society in collecting customs duties and suppressing criminal activity,[68] a scheme which achieves such a balance by imposing judicial control would seem more consonant with the fourth amendment guarantees than allowing stomach searches at the discretion of customs officials, or prohibiting them altogether.

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[66] Leroy Fibre Co. v. Chicago, M. & St. P. Ry., 232 U.S. 340, 354 (1914) (separate opinion).

[67] See note 24 *supra.*

[68] It is submitted that the basis must be the one upon which the common law has always sought to proceed, the one implied in the very term "due process of law," namely a weighing or balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment.
Pound, *A Survey of Social Interests,* 57 HARV. L. REV. 1, 4 (1943).