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At the Border of Reasonableness Searches by Customs Officials

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NOTES

AT THE BORDER OF REASONABLENESS: SEARCHES BY CUSTOMS OFFICIALS

Border searches[1] are as old as this country[2] but as new as their methods.[3] Customs agents are empowered by statute[4] to search on suspicion for contraband imported "*by* the person in possession or . . . by, *in*, or upon [any] vehicle or beast, or otherwise . . . ."[5] The statute does not expressly include searches for contraband introduced *in* people; but as modern technology and imagination have produced smugglers who transport contraband *in* themselves, customs officials have devised methods to combat such endeavors. The statute also distinguishes be-

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1 "Border search" is a term of art used "to distinguish official searches which are reasonable because made solely in the enforcement of Customs laws from other official searches made in connection with general law enforcement." Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966). Although no court has mentioned it, the distinction often need not be made. Many border searches result from tips, and the Supreme Court has held that an informer's tip can constitute probable cause if buttressed by the informer's previous reliability and the happening of at least some of the predicted events. McCray v. Illinois, 386 U.S. 300, 304 (1967); Draper v. United States, 358 U.S. 307, 312-13 (1959).

2 *See* Act of July 31, 1789, ch. 5, § 23, 1 Stat. 43. The section permits inspectors to search on suspicion. The fact that it was passed with celerity by the same Congress that drafted the fourth amendment has been cited by the Supreme Court as a basis for the privileged position of border searches. Carroll v. United States, 267 U.S. 132, 150 (1925); Boyd v. United States, 116 U.S. 616, 623 (1886). This view, however, has been reasonably criticized on the ground that searches of ships and buildings, and not physically intrusive searches, were the matters contemplated by the First Congress. Note, *Intrusive Border Searches—Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276, 278 (1966).

3 *See, e.g.*, Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) (rectal probe, emetic poured through tube forced through nose and throat into stomach); Denton v. United States, 310 F.2d 129 (9th Cir. 1962) (rectal examination under sedative).

4 [A]ny of the officers or persons authorized . . . to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person on which or whom he or they shall suspect there are goods, wares, or merchandise which are subject to duty or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there are goods which were imported contrary to law; and if any such officer or other person so authorized . . . shall find any goods, wares, or merchandise, on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe are subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. . . .

Smuggling Act § 3, 14 Stat. 178 (1866), 19 U.S.C. § 482 (1964). *See also* Tariff Act of 1930, §§ 581-82, 19 U.S.C. §§ 1581-82 (1964).

5 Smuggling Act § 3, 14 Stat. 178 (1866), 19 U.S.C. § 482 (1964) (emphasis added).

tween searches of people, vehicles, and beasts, which may be triggered by suspicion, and searches of trunks and envelopes, for which "reasonable cause to suspect" is required.[6] The theory behind providing less protection for people than for packages apparently is that trained customs agents can detect telling signs of nervousness in travelers that arouse suspicion not amounting to probable cause.[7]

The statute has had frequent application by lower federal courts. Evidence obtained during border searches has generally been admitted, even though officials forcefully invaded the body of the suspect,[8] conducted the search far from the border,[9] or searched automobiles driven by persons who never left the country.[10] Persons injured during a border search are generally without any remedy.[11] Despite these obvious problems and the lack of any discernible limitations on border searches, the Supreme Court has consistently denied certiorari on the question.[12] In dictum, however, the Court has recognized the unique nature of a border search:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor . . . . Travellers may be so stopped 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.[13]

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6 *Id.* Most courts have interpreted "reasonable cause to suspect" to mean probable cause, *cf.* Draper v. United States, 358 U.S. 307, 310 n.3 (1959), though the phrase has not been interpreted in the context of this particular statute.

For the statute to apply, package searches must be "in the course of entry." Corngold v. United States, 367 F.2d 1, 3 (9th Cir. 1966). In the interior, a warrant will be required for search of a package, *id.*, unless it is impractical to require one. Romero v. United States, 318 F.2d 530 (5th Cir.), *cert. denied*, 375 U.S. 946 (1963).

7 *See* Note, *supra* note 2, at 279.

8 *E.g.*, Blefare v. United States, 362 F.2d 870 (9th Cir. 1966).

9 *E.g.*, Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959) (75 miles from border).

10 *E.g.*, Rodriguez-Gonzalez v. United States, 378 F.2d 256 (9th Cir. 1967).

11 *See* pp. 880-81 *infra*.

12 *E.g.*, Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966); Lane v. United States, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964); Bible v. United States, 314 F.2d 106 (9th Cir.), *cert. denied*, 375 U.S. 862 (1963); Witt v. United States, 287 F.2d 389 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961); Murgia v. United States, 285 F.2d 14 (9th Cir. 1960), *cert. denied*, 366 U.S. 977 (1961); King v. United States, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939 (1959); Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958).

13 Carroll v. United States, 267 U.S. 132, 153-54 (1925). The case involved bootlegged liquor and held that an automobile could be searched without a warrant if there was probable cause for the search, even though the search was not incident to a valid arrest. *Accord*, Brinegar v. United States, 338 U.S. 160 (1949).

The Ninth Circuit, however, has attempted to fit border searches into the traditional constitutional pattern, holding that in border search cases there is "*probable cause* to search every person . . . by reason of . . . entry alone."[14]

Should the Supreme Court decide to grant certiorari in a border search case, it will have to strike a balance between the rights of the individual crossing the border and the governmental interest in protecting the integrity of that border. The following border search questions must be resolved against the background of the fourth amendment prohibition against *unreasonable* searches,[15] which extends to both the initiation of a search[16] and the method employed.[17] How far into the interior may a search take place and still be a border search? Must a person actually cross the border? Do customs officials enjoy a wider range of search methods than ordinary law enforcement officials?

I

PROBLEMS OF BORDER SEARCHES

A. *"Completed Entry"*

The same Supreme Court dictum that authorized border searches[18] also limited them, requiring reinstatement of the normal standard of probable cause once a person has lawfully entered the country.[19]

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14 Witt v. United States, 287 F.2d 389, 391 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961) (emphasis added).

15 "The right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV.

16 Under the fourth amendment a search with a warrant is clearly reasonable. McCray v. Illinois, 386 U.S. 300, 314 (1967) (dissenting opinion). The Supreme Court has defined probable cause as "a belief, reasonably arising out of circumstances known to the seizing officer," that a crime is being committed. Carroll v. United States, 267 U.S. 132, 149 (1925). Using this definition, the Court has said that, when there is probable cause to arrest, a warrantless search can be made incident to the arrest to prevent destruction of evidence. Preston v. United States, 376 U.S. 364, 367 (1964). This might be an alternative ground for supporting border searches conducted by means of a stomach pump. A smuggler swallows a balloon full of heroin in Mexico, expecting to regurgitate it on the American side of border. If the balloon remains in the smuggler's stomach for very long, stomach acid will destroy the balloon, liberating a fatal overdose of heroin into the smuggler's system and, incidentally, destroying the evidence. *See* Blefare v. United States, 362 F.2d 870, 885-86 (9th Cir. 1966) (dissenting opinion).

17 The distinction is not new. *See* Blackford v. United States, 247 F.2d 745, 749-50 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958). *See also* Note, *Search and Seizure at the Border—The Border Search*, 21 RUTGERS L. REV., 513, 516 (1967).

18 Carroll v. United States, 267 U.S. 132, 153-54 (1925).

19 But those *lawfully within* the country, entitled to use the public highways,

Personal freedom from unreasonable search, however, often conflicts with the government's right to pursue contraband.[20] Modern smuggling methods often force searchers to interfere with personal rights in order to enforce laws prohibiting possession of contraband.[21] The task, therefore, is to determine when "entry" is complete, and thus when personal freedom from unreasonable search overcomes the government's interest in choking off traffic in contraband.

For example, in *United States v. Yee Ngee How*,[22] the defendant, who had been searched while aboard ship, was searched again at the end of the pier, this time with incriminating results. Admitting the evidence, the court speculated: "Had the petitioner or his possessions been searched while he was off the ship and within the city, the situation would have been different . . . ."[23] In *Cervantes v. United States*,[24] the government did not even attempt to maintain that a search seventy miles from the border was a border search. Finding completed entry and no probable cause for the search, the court reversed the conviction based on evidence obtained in the illegal search.[25]

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have a right to free passage without interruption or search *unless there is known* to a competent official authorized to search, *probable cause* for believing that their vehicles are carrying contraband . . . .

Id. at 154 (dictum) (emphasis added).

20 [I]n the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment . . . .

Boyd v. United States, 116 U.S. 616, 624 (1886) (dictum).

21 *E.g.*, INT. REV. CODE OF 1954, §§ 4721-24 (failure to pay tax on narcotics unlawful).

22 105 F. Supp. 517 (N.D. Cal. 1952).

23 *Id.* at 523 (dictum). *See also* Landau v. United States Att'y, 82 F.2d 285, 286 (2d Cir.), *cert. denied*, 298 U.S. 665 (1936).

24 263 F.2d 800 (9th Cir. 1959).

25 After a second trial and second conviction, the case was ordered dismissed for lack of probable cause for the arrest. Cervantes v. United States, 278 F.2d 350 (9th Cir. 1960). Other Ninth Circuit cases the next year found searches at a distance from the border to be non-border searches. Contreras v. United States, 291 F.2d 63 (9th Cir. 1961) (probable cause needed at checkpoint 72 miles from border); Plazola v. United States, 291 F.2d 56 (9th Cir. 1961) (50 miles). "The search did not purport to be, nor was it, a border search." *Id.* at 63. *See also* United States v. Hortze, 179 F. Supp. 913 (S.D. Cal. 1959), in which, at a checkpoint an unspecified distance between the Mexican border and Los Angeles, officers jointly employed by the Immigration and Naturalization Service and the Bureau of Customs started to inspect defendant's car, ostensibly in a search for aliens under the Immigration and Nationality Act of 1952, § 287, 8 U.S.C. § 1357(a),(c) (1964). During the search, marijuana was found in a package of cigarettes. The court refused to admit the evidence, saying, "when Inspector Hanks opened the Salem cigarette package, he did not expect to find an alien." 179 F. Supp. at 917. The court went on to say that inspectors lacking a warrant or probable cause must not be permitted to delay travel "to an extent not necessary for the conduct of a bona fide search for aliens . . . ." *Id.* at 918.

The distinction between border search cases triggered by mere suspicion and completed entry cases in which probable cause is required was clouded by the Fifth Circuit in *Marsh v. United States*.[26] The court refused to admit in evidence narcotics seized sixty-three miles from the border by a constable who searched in response to a radio message from customs agents at the border. In dictum, the court stated:

> The right of border search is indeed broad, and the *border itself is elastic. Judged by Texas standards,* sixty-three miles is a small distance, and if the Customs agents had any reason, even though not ordinarily measuring up to "probable cause," it might, under all of the circumstances, suffice to meet the constitutional test of reasonableness and amount to "probable cause."[27]

The description is of a hybrid search, not quite a border search because *mere* suspicion is insufficient,[28] yet not quite a completed entry because probable cause is not required. Nothing more has been said about hybrid searches, and there is little support for the court's approval of a "border search" in the interior based on a request relayed from the border.[29]

In *Alexander v. United States*,[30] the Ninth Circuit set forth an extremely elastic test of the legality of searches after entry:

> [T]he legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contrabrand which might be found . . . was aboard the vehicle at the time of entry . . . .[31]

By this test, a customs agent could conceivably spend months

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26 344 F.2d 317 (5th Cir. 1965).

27 *Id.* at 324 (emphasis added; footnotes omitted). The court found no proof in the record of knowledge on the part of the telephoning customs agent. In the only similar Fifth Circuit case the search was upheld. Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959) (75 miles).

28 At the border " 'unsupported' or 'mere' suspicion alone is sufficient to justify such a search for purposes of Customs law enforcement." Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

29 *See* Jones v. United States, 326 F.2d 124, 131 (9th Cir. 1963) (concurring opinion): "It would be unduly restrictive of the idea of pursuit to require that the officers pursue the car in person." However, since an unwatched suspect could have picked up contraband between the border crossing and the search, the concept of "pursuit by radio" clashes with the surveillance aspect of the test for admissibility suggested in Alexander v. United States, 362 F.2d 379, 382 (9th Cir.).

30 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

31 *Id.* at 382.

following a person hundreds of miles from the border, and still conduct a border search, because he may be able to convince the fact-finder that the contraband was aboard when the vehicle crossed the border.[32] As a result, a search in Iowa might legitimately be conducted on mere suspicion. The prevailing *Alexander* test thus destroys the concept of completed entry and subordinates the personal rights of individuals to the government's right to seize contraband.

B. *Informers, Entrapment, and the "Never Leaving" Problem*

Although border searches can be made on mere suspicion,[33] most appellate cases result from tip-initiated arrests.[34] The identity of the informer in the interior may be relevant to the separate issues of probable cause and guilt.[35] Since probable cause is not required at the border, the source of an inspector's suspicion is irrelevant. On the guilt-related question of entrapment, however, the informer's identity should be as relevant at the border as it is in the interior. If a paid informer makes the crime possible, a defense of entrapment is made out.[36]

In *Lannom v. United States*,[37] for example, customs agents received a tip that a car loaded with marijuana would be driven across the border and parked behind a laundromat, to be driven away later by another person. The predicted events occurred and the second driver was arrested after a search revealed the contraband. At trial the defendant demanded the identity of the informer, on the ground that if the informer were the first driver, there was an entrapment. The court found no tangible evidence that the informer's identity would be helpful to the defense. The dissent argued that the government should be required to prove that it did not, through its own agents, accomplish the illegal importation.[38] The dissenter's solution seems more desirable, since it preserves entrapment as a viable defense.

Searching for contraband is markedly different from using police

32 For an application of the test, see, *e.g.*, Rodriguez-Gonzalez v. United States, 378 F.2d 256 (9th Cir. 1967) (constant surveillance until search some 15 hours and 20 miles after border crossing).

33 Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

34 A survey of the appellate cases arising from border searches reveals that at least 60% of the arrests are instigated by tips from informers.

35 *See* Roviaro v. United States, 353 U.S. 53 (1957).

36 *See* Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

37 381 F.2d 858 (9th Cir. 1967), *cert. denied*, 389 U.S. 1041 (1968). *See also* Ruiz v. United States, 380 F.2d 17 (9th Cir. 1967); Rodriguez-Gonzalez v. United States, 378 F.2d 256 (9th Cir. 1967).

38 381 F.2d at 862-63 (dissenting opinion).

machinery to capture a suspected criminal. The aim of the border search is primarily to eliminate traffic in contraband and only secondarily to arrest the smuggler. In *Lannom*, however, customs agents knowingly allowed the car to pass through their station and maintained surveillance, permitting the immediate trafficker to escape, not in order to capture the contraband, but solely to arrest a higher-up. Since the statute does not limit the border search to the automobile, a person who never crosses the border but who either knowingly or innocently steps into the marked car is himself subject to an intrusive border search. This might occur if the second driver in the *Lannom* situation brushed his hand in front of his mouth moments after entering the car. This delayed-action border search seems a perversion of purpose to satisfy the ends of law enforcement officials.

C. *Body Searches*

Border officials enjoy a much wider latitude in deciding whether to search than law enforcement officials in the interior. Apparently they are also accorded broader leeway in searching the body of a suspected smuggler.

1. *Reasonableness in the Interior*

The standards of reasonableness of body searches by ordinary law enforcement officials can be gleaned from a comparison of two leading cases. In *Rochin v. California*,[39] a shocked Supreme Court reversed a narcotics conviction based on evidence obtained when the police broke into the defendant's bedroom, assaulted him, and forcibly pumped his stomach to obtain the capsules he had swallowed to avoid detection.[40] In *Schmerber v. California*,[41] the Court upheld the admission of blood tests taken over the defendant's objection "by a *physician* in a *hospital environment* according to *accepted medical practices*."[42] Invasions of

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39 342 U.S. 165 (1952).

40 [W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. 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.

Id. at 172.

41 384 U.S. 757 (1966). *Rochin* was decided prior to Mapp v. Ohio, 367 U.S. 643 (1961), which applied the fourth amendment to the states. *Schmerber* was thus the first fourth amendment intrusive search case decided by the Court, although the Court presumably could have considered intrusive non-border searches by federal officials previously.

42 384 U.S. at 771 (emphasis added).

the body are not per se unconstitutional; only improperly conducted searches violate a suspect's rights. The Court, however, carefully warned against a broad reading of its opinion in *Schmerber*, saying that it "in no way indicates that it permits more substantial intrusions . . . ."[43]

2. *Reasonableness at the Border*

In contrast to the holding in *Rochin* and the warning in *Schmerber*, no border search has been found unreasonable, despite physical abuse,[44] stomach pumping,[45] rectal searches,[46] and even injection of sedative.[47]

In *Alexander v. United States*,[48] the Ninth Circuit suggested that there is a separate test of reasonableness for border searches; but the case involved a nonintrusive search, and no distinction was made between reasonable initiation and reasonable method of search. The court said in dictum:

> In conferring upon Customs officers such broad authority, circumscribed only by Constitutional limitations of the Fourth Amendment, the Congress has in effect declared that a search which would be "unreasonable" within the meaning of the Fourth Amendment, if conducted by police officers in the ordinary case, would be a reasonable search if conducted by Customs officials in lawful pursuit of unlawful imports.[49]

Although this language can be interpreted broadly, the factual context suggests that the court intended to describe the reasonableness of initiating the search, not the reasonableness of the methods employed. In a subsequent Ninth Circuit case, *Blefare v. United States*,[50] where the reasonableness of the method was directly in issue, *Alexander* was not even cited.

In *Blefare* defendants were convicted of smuggling heroin into the

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43 *Id.* at 772.

44 *E.g.*, Blefare v. United States, 362 F.2d 870 (9th Cir. 1966); Denton v. United States, 310 F.2d 129 (9th Cir. 1962); Barrera v. United States, 276 F.2d 654 (5th Cir. 1960); King v. United States, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939 (1959); Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958).

45 Whether the stomach is actually "pumped" has turned into a nice semantic question. *See* Blefare v. United States, 362 F.2d 870, 879 n.3 (9th Cir. 1966). The procedure was also upheld in Lane v. United States, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 375 U.S. 862 (1964); Barrera v. United States, 276 F.2d 654 (5th Cir. 1960); King v. United States, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939 (1959).

46 *E.g.*, Blefare v. United States, 362 F.2d 870 (9th Cir. 1966); Denton v. United States, 310 F.2d 129 (9th Cir. 1962); Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958).

47 Denton v. United States, 310 F.2d 129 (9th Cir. 1962).

48 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

49 *Id.* at 381.

50 362 F.2d 870 (9th Cir. 1966).

United States in their stomachs. They were detained and disrobed at the custom house and then taken twelve miles to the office of a previously alerted doctor. After an unsuccessful rectal probe, a solution to induce vomiting was administered. Still unsuccessful, the customs agents physically restrained Blefare while a tube was forced through his nose and throat and into his stomach. Packets of heroin were recovered in the regurgitation. The court held the search reasonable in light of the lack of substantial pain,[51] the fact that the defendant would have had to make himself regurgitate anyway,[52] and the lack of viable alternative procedures. The court cited border search cases approving both rectal and emetic searches, noting that "[*s*]*ome knowledge* of the presence of the narcotics in the stomach of the suspect is necessary."[53] Blefare's previous discussions with Canadian police and needle marks on his arms supplied a "strong presumption." The court felt it necessary, however, to distinguish *Rochin* on the grounds that the police in *Rochin* were guilty of wrongful entry and use of excessive force. Also, the internal importation of narcotics and judicial dismissal of charges against Blefare, the court felt, would be more shocking to the average citizen than the police behavior involved. Thus, the shock-the-conscience test, born to measure the conduct of *police,* was used in *Blefare* to judge the behavior of *defendants* in determining admissibility of evidence against them. That the court took time to distinguish *Rochin* indicates that it felt at least some doubt that a separate test exists at the border for reasonableness of method.

The policy dilemma present in all border search cases was clearly presented in *Blackford v. United States.*[54] There customs agents conducted a forced rectal examination that yielded smuggled heroin. The majority stressed the evils of illicit drug traffic and discussed the alternatives to allowing the search. The defendant might procure a writ of habeas corpus and later remove the narcotics himself; he might recover the narcotics in jail; or the police might have to sift through mounds of excrement. Stating by way of dictum that a border search can be *unreasonably* executed but still constitutionally acceptable if not shocking, the *Blackford* court found the search reasonable according to the following tests: knowledge, sanitary and scientific nature of the search, presence of a doctor, and absence of force. The dissent believed that the grant of power to customs agents was excessive, "fraught

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51 *Id.* at 872 n.1.

52 *Id.* at 873 n.3.

53 *Id.* at 875 (emphasis added).

54 247 F.2d 745 (9th Cir. 1957), *cert. denied,* 356 U.S. 914 (1958).

with almost certain abuse," and "on its face . . . within the interdiction of the Fourth Amendment."[55]

Authorizing intrusive border searches on mere suspicion as long as the methods are not shocking means giving customs agents the power to follow a suspect for long periods of time and then pump his stomach and search his rectum after injecting him with a sedative or physically restraining him with the degree of force necessary to carry out the search. Prohibiting such searches could mean an alarming increase in the amount of narcotics that crosses the border within body cavities.[56] Is there any middle ground? And, perhaps more important, is there any protection for the traveler about to be subjected to such humiliation and possible injury?

II

A Proposed Solution

A. *Protecting Innocent and Guilty Alike*

Border search cases arise on motions to suppress evidence. In each case incriminating evidence has been found; and in each case the question is, was it found according to the rules of the game? One Supreme Court Justice has suggested that for every broken rule exposed and conviction reversed there are many illegal searches that yield no incriminating results and thus never come before the courts.[57] *Blefare*-type searches may interfere with innocent individuals as well as smugglers.

The innocent traveler injured by overzealous customs officials apparently has no civil remedy. In *Klein v. United States*,[58] the plaintiff sought damages for physical and mental harm resulting from negligent detention and search. Although the complaint sounded in negligence,

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55 *Id.* at 755 (dissenting opinion).

56 In 1960 the Ninth Circuit took judicial notice of the fact that 18-20% of all heroin traffic on the Mexican-United States border in California is concealed in body cavities. Murgia v. United States, 285 F.2d 14, 15 n.1 (9th Cir. 1960), *cert. denied*, 366 U.S. 977 (1961).

57 Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). In one case a rectal search was made without success. No court would have heard of the search if the suspect had not also been the defendant in Blefare v. United States, 362 F.2d 870, 871 (9th Cir. 1966), where an emetic search five weeks later proved fruitful. A similar case nearly escaped judicial notice when the defendant accepted an emetic and regurgitated a few times without vomiting any packets of heroin. The customs agents decided that the suspect was indeed innocent, but while being driven back to his car he vomited again, this time bringing up the heroin. Lane v. United States, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964).

58 268 F.2d 63 (2d Cir. 1959).

the Second Circuit found that the action was actually for battery and false arrest, exceptions to the Federal Tort Claims Act.[59] Although cases generally involve the rights of the guilty, one must remember that the Bill of Rights was written to protect the innocent from the arbitrary use of power. "A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike."[60]

B. *A Solution Rejected: The Health Warrant*

In *Camara v. Municipal Court*,[61] the Supreme Court faced a problem similar to that arising in border search cases. After holding that health department searches made without a warrant were "siguificant intrusions upon the interests protected by the Fourth Amendment,"[62] the Court had to find a way to interpose a magistrate without unduly restricting the health inspector, whose function has a "unique character." The Court settled on a definition of probable cause that takes into account "the nature of the search."[63] For health inspections, probable cause need not relate to a particular building, but rather can be satisfied by a showing of the legitimacy of the inspector's undertaking.

On its face, this "synthetic search warrant"[64] is an appealing solution to the border search cases as well. In both situations traditional judicial acceptance and strong policy grounds have promoted the searches. But an important factor in *Camara* was that health inspections are normally *less* intrusive than police searches; many border searches, on the other hand, are *more* intrusive.

The *Camara* warrant requires too little to make it useful in the border search situation. If a customs officer need only state a legitimate purpose to get a warrant, the warrant would not offer any significant protection against searches. The only barrier to forcing a tube through a suspect's nose would be the requirement that the agent give his word that he really is searching for narcotics.

59 28 U.S.C. § 2680(h) (1964). Since customs agents are federal officers, the injured party would have no claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964), which pertains only to deprivations of rights by *state* officials under color of law. *See, e.g.*, Johnson v. District of S. Mo. Comm'rs, 258 F. Supp. 669 (W.D. Mo.), *appeal vacated as moot*, 368 F.2d 184 (8th Cir. 1966).

60 Draper v. United States, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting).

61 387 U.S. 523 (1967).

62 *Id.* at 534.

63 *Id.* at 538, quoting with approval the dissenting opinion of Justice Douglas in Frank v. Maryland, 359 U.S. 360, 383 (1959).

64 387 U.S. at 538, quoting with disapproval Frank v. Maryland, 359 U.S. 360, 373 (1959).

C. *A Possible Answer*

The problems are highlighted by the following series of hypothetical situations:

(*1*) An anonymous informant notifies customs agents that a particularly described person will attempt to cross the border carrying narcotics in his rectum. An exterior investigation of the undressed suspect shows no external evidence to verify the tip.

(*2*) Same as (*1*), except external verification is present.

(*3*) Same as (*1*), except the tip is that the suspect will be carrying narcotics in his stomach, making external evidence impossible to obtain.[65]

(*4*) Same as (*1*), except the informer is known to be reliable.

(*5*) Same as (*2*), except the informer is known to be reliable.

(*6*) Same as (*3*), except the informer is known to be reliable.

Under present law, an intrusive search is authorized on mere suspicion, and the suspect could be searched immediately in all cases. Under the *Camara* warrant, the customs agent would be allowed to search the suspect in all cases as soon as he presents himself before a magistrate, announces his purpose, and obtains a warrant. Under Supreme Court holdings in informer cases in the *interior*,[66] searches (*4*), (*5*), and (*6*) would be authorized without a warrant as soon as the information supplied by the informer is partially verified by the occurrence of the predicted series of events; *a fortiori* these searches would be constitutionally acceptable at the border. And search (*2*) would be legitimate, since the information supplied by an informant was verified not only by the happening of a predicted event, but also by the independent appearance of probable cause.[67] The problem, then, is with searches (*1*) and (*3*), and the issues are the familiar ones of reasonableness of the initiation and reasonableness of method.

On the problem of reasonable initiation of search, the Supreme

65 A fluoroscope can detect the presence of foreign objects in the stomach, but a distasteful barium solution must be drunk before the technique works. To administer the barium to an uncooperative suspect would involve the same procedure as administering an emetic. Blefare v. United States, 362 F.2d 870, 874 (9th Cir. 1966).

66 McCray v. Illinois, 386 U.S. 300 (1967); Draper v. United States, 358 U.S. 307 (1959).

67 In Ng Pui Yu v. United States, 352 F.2d 626 (9th Cir. 1965), an informer of unknown reliability gave customs agents a tip. A 30-man team watched 14 Chinese parade relentlessly from the ship on which they worked to defendant's apartment where they stayed briefly before returning to the ship. Finally, two of the Chinese were pulled from the parade and, at the request of officers, they removed packets of opium being smuggled rectally. This provided probable cause for a search of defendant's apartment.

Court has set forth different tests in two non-border search cases. In *Camara* the Court said:

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon *whether the burden of obtaining a warrant is likely to frustrate the governmental purpose* behind the search.[68]

Applied to border searches, the concern is not with either the quantity of narcotics crossing the border or even the integrity of the country's borders. Rather, the pragmatic concern of the Court is with balancing the need for the warrant against the possible frustration of purpose by requiring one. The only possible frustration would result from destruction of the evidence—and death of the suspect—if the container in his stomach leaked or was destroyed by stomach acid. The problem could be obviated by explaining this possibility to the suspect before detaining him for a reasonable time. In *Schmerber*, where the potential for such frustration was noted by the Court, another element was added:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the *mere chance* that desired evidence might be obtained. In the absence of a *clear indication* that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.[69]

Obviously some degree of certainty is required before a man's body is invaded. Even in *Blefare* the Ninth Circuit noted that "[s]ome knowledge . . . is necessary."[70] Unless the Supreme Court is willing to allow a different standard of reasonableness in initiating an intrusive search merely because it is at the border, the language in *Schmerber* would seem to indicate that searches (*1*) and (*3*), intrusive searches without probable cause, would not be allowed. But this is not in accord with a literal reading of the statute,[71] especially as interpreted by the Ninth Circuit in *Alexander*, where " 'unsupported' or 'mere' suspicion alone" was held "sufficient to justify such a search for purposes of Customs law enforcement."[72] Under *Alexander*, the basis for the requisite mere

68 387 U.S. 523, 533 (1967) (emphasis added).

69 384 U.S. 757, 769-70 (1966) (emphasis added).

70 Blefare v. United States, 362 F.2d 870, 875 (9th Cir. 1966).

71 Smuggling Act § 3, 19 U.S.C. § 482 (1964), quoted in note 4 *supra*.

72 Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966). Judge Ely, dissenting in *Blefare*, worried about the consequences of allowing both

suspicion could be found in the anonymous tip. But this clashes with the traditional notions of decency and fairness that have guided the Court, and is opposed to the theory behind our accusatory system.[73] Without probable cause, intrusive searches like searches (*1*) and (*3*) should not be allowed, and their fruits should be held inadmissible on the ground that the inspector lacked the requisite "clear indication."

But what of the rationale that an experienced customs inspector can somehow detect signs of nervousness in a person crossing the border carrying contraband? These signs do not constitute probable cause, but may give rise to a suspicion on the part of customs agents that justifies a search stopping short of invasion of the body. At issue is a balance, not between the rights of the individual and destruction of the evidence as in *Schmerber*, but rather between the right of the individual to be free from an intrusive search and the governmental interest in preventing bodily crevasses from serving as inspection-free sanctuaries for contraband. While this is a naked policy question, in the case of nervousness, as in searches (*1*) and (*3*), "fundamental human interests" should prevail. But in searches (*2*), (*4*), (*5*), and (*6*) the right to search should be upheld. There is little difficulty in implementing this policy decision.

Should the Court hold the Smuggling Act unconstitutional? Although the statute may be viewed as offending traditional due process notions, it should be read in light of the state of the art at the time the first customs enforcement section, allowing search on suspicion, was passed. Undoubtedly the section's framers had in mind the search of luggage and clothing. Because the smuggling techniques of today were unheard of when the statute was drafted, the intrusive search was neither necessary nor contemplated.

A line must be drawn between acceptable and unacceptable searches at the border. Though necessity probably dictates upholding searches of luggage and clothing and perhaps even forcing a traveler to undress, a warrant should be obtained for any more intrusive search.[74] The requirement for the warrant should be similar to that set forth in *Camara*: the search should be shown to fulfill a legitimate governmental purpose. But something more is needed to justify unleashing physical force and potent drugs onto and into the body of a traveler. Whereas no specific showing of probable cause is required

intrusive searches and the "mere suspicion" rule. *See* Blefare v. United States, 362 F.2d 870, 886 (9th Cir. 1966). (dissenting opinion).

[73] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[74] This was the suggestion of Judge Ely, dissenting in Blefare v. United States, 362 F.2d 870, 886 (9th Cir. 1966).

in nonintrusive health inspections, *some* showing of a "clear indication" or an objectively reasonable suspicion should be made before an intrusive search is permitted to proceed. The evidence must convince the magistrate that there is good reason to suspect that contraband is being smuggled internally, a test clearly less rigorous than that of probable cause.[75] To effectuate this, a United States Commissioner should be located in each custom house, and customs officers should be allowed to detain suspects for a reasonable time, perhaps up to three hours. A suspect should be advised of the dangers in keeping a container of heroin within his stomach or in other body cavities, and he should be given a chance to consent to—and cooperate with—a search.[76]

One other problem exists. By diluting the concept of completed entry, the courts of appeals have created the possibility that border searches will be made in any part of the country days after the suspect has crossed the border. The *Alexander* criteria for convincing the fact-finder that the suspect's condition was unchanged from the border until arrest should be supplemented; provision should be made to restrict border searches to some specific distance.[77] This would control arbitrary activity by customs agents but still allow them the tool of continuous surveillance to determine if there are conspirators awaiting the arrival of contraband. As discussed above, the courts should be wary of extending the right of border search in cases where the suspect himself has never crossed the border; and the defense of entrapment should be preserved by compelling the goverument to demonstrate that in *Lannom*-type situations it did not accomplish the importation through its own agents.

In border searches a legitimate governmental interest conflicts with fundamental personal rights. But by continuing to allow nonintrusive searches on mere suspicion and requiring for intrusive searches a warrant based on something less than probable cause, a balance can be struck. The innocent can cross the border without fear, and the guilty without impunity.

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75 *See* note 16 *supra.*

76 *See* Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied,* 356 U.S. 914 (1958). When a condom of heroin in defendant's rectum burst, he cooperated with officials.

77 The Immigration and Naturalization Service has defined the "reasonable distance" from the border within which its searches might be conducted as 100 air miles. 8 C.F.R. § 287.1 (1967), defining Immigration and Nationality Act of 1952, § 287, 8 U.S.C. § 1357(a)(3) (1964).