St. Mary's Law Journal

Volume 3 | Number 1 Article 6

3-1-1971

Border Searches: An Exception to Probable Cause.

Ronald R. Winfrey

BORDER SEARCHES: AN EXCEPTION TO PROBABLE CAUSE

RONALD R. WINFREY

One of the most fundamental constitutional protections is that afforded against unreasonable searches and seizures.[1] Evidence obtained in contravention of the fourth amendment is excluded by both federal[2] and state[3] courts. If evidence is to be admissible, it must be the product of a reasonable search. The Supreme Court has held that a reasonable search, either with or without a warrant, must be based on probable cause.[4]

Border searches are an exception to the probable cause requirement.[5] In *Alexander v. United States*[6] the court stated:

> [I]t is well settled that a search by Customs officials of a vehicle, at the time and place of entering the jurisdiction of the United States, need not be based on probable cause; that "unsupported" or "mere" suspicion alone is sufficient to justify such a search for purposes of Customs law enforcement.[7]

Thus a search deemed reasonable when made by customs officials might be challenged as violative of the fourth amendment if conducted by other law enforcement officials under ordinary circumstances.[8]

Some writers have considered this exception to the probable cause requirement a "prostitution of the fourth amendment and the rights it

---

1 U.S. CONST. amend. IV:
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

2 Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

3 Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed.2d 1081 (1961).

4 Carroll v. United States, 267 U.S. 132, 161, 45 S. Ct. 280, 288, 69 L. Ed. 543, 554 (1925). In Brinegar v. United States, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 1310-11, 93 L. Ed. 1879, 1890 (1949), the Court, paraphrasing *Carroll*, stated that:
Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they 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.

5 *E.g.*, Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966), *cert. denied*, 385 U.S. 977, 87 S. Ct. 519, 17 L. Ed.2d 439 (1966); Thomas v. United States, 372 F.2d 252, 254 (5th Cir. 1967). *See generally* Comment, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968) for a discussion of the historical justification for the border search.

6 362 F.2d 379 (9th Cir. 1966), *cert. denied*, 385 U.S. 977, 87 S. Ct. 519, 17 L. Ed.2d 439 (1966).

7 *Id.* at 382.

8 United States v. Glaziou, 402 F.2d 8, 13 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121, 89 S. Ct. 999, 22 L. Ed.2d 126 (1969).

secures."[9] Others have questioned the "reasonableness" of border searches when probable cause is not present.[10]

Irrespective of the controversy surrounding the border search, the Supreme Court in *Boyd v. United States*[11] early recognized the difference between searches and seizures involving contraband at the border and searches of a man's "private books and papers."[12] The enforcement of customs laws[13] necessarily places certain restrictions on those crossing international boundaries.[14]

Although customs officials have performed intrusive body searches,[15] strip searches,[16] searches far removed from the border[17] and searches

9 Comment, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457 (1968).

10 *See generally* Note, *At the Border of Reasonableness: Searches by Customs Officials*, 53 CORNELL L. REV. 871 (1968); Comment, *The Reasonableness of Border Searches*, 4 CALIF. W. L. REV. 355 (1968).

11 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

12 *Id.* at 623.

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by congress to regulate the collection of duties, the act of July 31, 1789 [1 Stat. at L. 43], contains provisions to this effect. As this act was passed by the same congress which proposed for adoption the original amendments to the constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the amendment.

13 19 U.S.C. § 482 (1964):

> Any 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 is merchandise which is 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, ...

19 U.S.C. § 1581(a) (1964):

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States . . . or at any other authorized place, without as well as within his district, . . . and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

19 U.S.C. § 1582 (1964):

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

14 Carroll v. United States, 267 U.S. 132, 154, 45 S. Ct. 280, 285, 69 L. Ed. 543, 551-52 (1925). The Court stated that:

> Travellers may be 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 and effects which may be lawfully brought in.

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

16 Witt v. United States, 287 F.2d 389 (9th Cir. 1961), *cert. denied*, 366 U.S. 950, 81 S. Ct. 1904, 6 L. Ed.2d 1242 (1961).

17 United States v. Harris, 427 F.2d 1368 (9th Cir. 1970) (per curiam), *cert. denied*,

where there was no positive evidence that the persons searched had crossed an international boundary,[18] the evidence obtained in these searches has generally been admitted.

This comment will discuss the various forms of border searches and recent developments relating to them.

INTRUSIVE BODY SEARCH—STRIP SEARCH

The use of body cavities to transport narcotics across international borders has become a common practice.[19] The courts have taken judicial notice of this fact[20] and are striving to set up the "clearest possible guidelines"[21] for law enforcement officials to follow. In establishing these guidelines the courts have had to weigh the problems of effective law enforcement "against the individual's right to human dignity and privacy as protected by the Fourth Amendment."[22]

Following the recognized border search exception to the probable cause requirement, the courts at first upheld intrusive searches at the border on the theory that "mere suspicion"[23] of the possession of contraband would support such searches. Although mere suspicion was held adequate for routine border searches,[24] a series of cases beginning in 1966 established stricter requirements for any of the more intrusive forms of body searches.[25]

THE REASONABLENESS REQUIREMENT

The defendants in *Blefare v. United States*[26] were Canadian citizens. When stopped by customs officials at the San Ysidro, California, port of entry Blefare admitted to Canadian officials that he had previously carried heroin in his stomach through the United States and into

motion for leave to supplement petition granted, 39 U.S.L.W. 3298 (U.S. Jan. 11, 1971) (No. 780) (150 miles from the border); Castillo-Garcia v. United States, 424 F.2d 482 (9th Cir. 1970) (105 miles from the border).

18 United States v. Hill, 430 F.2d 129 (5th Cir. 1970).

19 Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) (female, vagina); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945, 87 S. Ct. 980, 17 L. Ed.2d 875 (1967) (male, rectum); Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) (male, stomach); Denton v. United States, 310 F.2d 129 (9th Cir. 1962) (male, rectum); Barrera v. United States, 276 F.2d 654 (5th Cir. 1960) (male, stomach); King v. United States, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939, 79 S. Ct. 652, 3 L. Ed.2d 639 (1959) (male, stomach).

20 Huguez v. United States, 406 F.2d 366, 376 (9th Cir. 1968).

21 *Id.* at 383.

22 Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967).

23 Witt v. United States, 287 F.2d 389, 391 (9th Cir. 1961), *cert. denied*, 366 U.S. 950, 81 S. Ct. 1904, 6 L. Ed.2d 1242 (1961).

24 Comment, *The Reasonableness of Border Searches*, 4 CALIF. W. L. REV. 335, 361 (1968).

25 Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed.2d 908 (1966); United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945, 87 S. Ct. 980, 17 L. Ed.2d 875 (1967); Blefare v. United States, 362 F.2d 870 (9th Cir. 1966).

26 362 F.2d 870 (9th Cir. 1966).

Canada, and that he had been searched at the Mexican border with negative results. Since Blefare had placed the border officials on notice, when he and another defendant made their return trip to the port of entry they were detained and subjected to a strip search at the border. Nothing was found at this time and the defendants were then taken twelve miles to the office of a doctor who had been previously alerted. He performed a rectal probe on them and again nothing was found. They were then ordered to drink a saline solution to induce vomiting and Blefare did regurgitate but reswallowed quickly. Blefare was then physically restrained and a tube was passed through his nose and throat into his stomach. A fluid was forced into his stomach which induced vomiting and expulsion of the heroin.

In upholding the admission of the heroin into evidence, the court found it necessary to distinguish *Blefare* from *Rochin v. California.*[27] *Rochin* involved an intrusive body search *not* made at the border in which the Supreme Court reversed a narcotics conviction. Police officers in *Rochin* broke into the defendant's bedroom, assaulted him, and forcibly pumped his stomach. The court in *Blefare* noted that *Rochin* was a non-border search and reasoned that the use of excessive force and the wrongful entry involved in that case clearly distinguished it from *Blefare.* It further reasoned that the decision in *Breithaupt v. Abram*[28] was more indicative of the law and that "[u]nder all the circumstances peculiar to this case, this was a reasonable search and seizure."[29] The Supreme Court in *Breithaupt* weighed the taking of Breithaupt's blood while he was unconscious against the public interest in preventing "slaughter on our highways"[30] and concluded that the search was not unreasonable. In *Blefare* protection of the public was also involved—the stemming of the tide of illicit drugs into the United States. Thus the search was held to be reasonable.

THE "CLEAR INDICATION" TEST

The "clear indication" test involving a body search was formulated by the Supreme Court in *Schmerber v.California.*[31] The Court upheld the taking of a blood sample from a defendant who had been involved in an automobile accident. The officer who ordered that the blood be taken acted without a warrant and against the defendant's protests.

27 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952).
28 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed.2d 448 (1957).
29 Blefare v. United States, 362 F.2d 870, 880 (9th Cir. 1966). The "peculiar circumstances" being that a border search was involved and the use of force was not so excessive as in *Rochin.* The "reasonableness" standard for an internal body search was also discussed in Blackford v. United States, 247 F.2d 745, 753 (9th Cir. 1957), *cert. denied,* 356 U.S. 914, 78 S. Ct. 672, 2 L. Ed.2d 586 (1958).
30 Breithaupt v. Abram, 352 U.S. 432, 439, 77 S. Ct. 408, 412, 1 L. Ed.2d 448, 453 (1957).
31 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed.2d 908 (1966).

However, the Court did limit the occasions on which such evidence might be obtained.

> 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.[32]

Schmerber's "clear indication" test was first applied to border searches in *Rivas v. United States*.[33] Rivas presented his registration certificate[34] to a customs inspector when he crossed the international border from Mexico into the United States. The agent noticed that Rivas seemed nervous and that he had what appeared to be fresh needle marks on his arms. Another customs agent subsequently made a personal search of Rivas during which he refused to spread his buttocks so that the agent could check his rectum for contraband. Concluding that Rivas was concealing something in his rectum, the customs agents took him to a doctor's office. Upon the termination of the examination of Rivas' eyes and arms, to which he had consented, the doctor concluded that he was under the influence of drugs. The agents then requested the doctor to examine the defendant's rectal area. Rivas refused to submit to the rectal examination, he was then arrested for impeding a federal officer in the performance of his duty, and physical force was used to complete the examination. It was conducted in the usual medical manner and narcotics were found.[35]

The court reaffirmed the border search exception to the probable cause requirement and held that mere suspicion was enough to validate an ordinary border search.[36] The circuit court then turned to *Schmerber* and borrowed some of the Supreme Court's "clear indication" terminology.

> An honest "plain indication" that a search involving an intrusion beyond the body's surface is justified cannot rest on the *mere chance* that desired evidence may be obtained. Thus we need not hold the search of any body cavity is justified merely because it is a border search, and nothing more. There must exist facts

32 *Id.* at 769, 86 S. Ct. at 1835, 16 L. Ed.2d at 919 (emphasis added).

33 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945, 87 S. Ct. 980, 17 L. Ed.2d 875 (1967).

34 18 U.S.C. § 1407 (1964). This statute requires persons who are users of narcotics or those who have been convicted of a narcotics violation with a penalty of more than one year to register with customs officials upon entering or leaving the United States.

35 Rivas v. United States, 368 F.2d 703, 705-6 (9th Cir. 1966), *cert. denied*, 386 U.S. 945, 87 S. Ct. 980, 17 L. Ed.2d 875 (1967).

36 *Id.* at 709.

> creating a clear indication, or plain suggestion, of the smuggling. Nor need those facts reach the dignity of nor be the equivalent of "probable cause" necessary for an arrest and search at a place other than a border.[37]

Rivas had been previously convicted of a narcotics violation and was a registered user of narcotics. When stopped at the border he appeared extremely nervous and fresh needle marks were found on his arms. He refused to allow a rectal examination and was under the influence of narcotics. These facts were held to furnish the "clear indication" to the customs officials that he might be smuggling contraband.[38]

Thus the "clear indication" test established in *Schmerber*[39] and applied to intrusive border searches in *Rivas*[40] effectively distinguished between the "mere suspicion" requirement for ordinary border searches and the stricter requirements for more intrusive searches.

The "Real Suspicion" Test

The Ninth Circuit Court of Appeals in *Henderson v. United States*[41] added another requirement to the "clear indication" test of *Schmerber-Rivas*. Mrs. Henderson was stopped by customs agents at the border as she crossed it in an automobile driven by another party. One of the agents thought that he had stopped and searched Mrs. Henderson previously and that contraband had been found at that time. This recollection (later shown to be erroneous) was the sole reason for a subsequent strip search of the defendant by an inspectress. Since she did not cooperate fully with the inspectress when she was ordered to bend over and pull her buttocks apart and up so that an inspection could be made of her vagina, the inspectress concluded that she was concealing something in her vagina. On the basis of the inspectress' suspicions and the agent's recollection, Mrs. Henderson was taken to a doctor who removed two rubber packages, each two inches in diameter, which contained a total of ninety-three grams of heroin.[42]

In reversing Mrs. Henderson's conviction on the ground that her fourth amendment rights had been violated, the court stated that if anything more than the ordinary border search is involved, that is, "if the party, male or female, is to be required to strip, we think that something more, at least a *real suspicion*, directed specifically to that person, should be required."[43] Thus a real suspicion that con-

37 *Id.* at 710 (court's emphasis).
38 *Id.*
39 Schmerber v. United States, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed.2d 908 (1966).
40 Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945, 87 S. Ct. 980, 17 L. Ed.2d 875 (1967).
41 390 F.2d 805, 808 (9th Cir. 1967).
42 *Id.* at 809.
43 *Id.* at 808 (emphasis added).

traband will be found directed specifically toward the person involved is a necessity for a strip search. If the search goes beyond a casual examination of the body and involves an internal search then the "clear indication" test must be applied before such a search would be lawful.[44] Since the internal search of Mrs. Henderson resulted solely from the customs agent's erroneous recollection and the inspectress' suspicions, the "clear indication" test was not met.[45]

Although *Henderson* established the "real suspicion" test for strip searches, the test was not specifically defined until the Ninth Circuit rendered its opinion in *United States v. Guadalupe-Garza.*[46] The defendant in *Guadalupe-Garza* was detained at a secondary inspection point at the border after a customs inspector noted that the defendant seemed to be shying away from him. Upon subsequent questioning, the defendant stated he had brought nothing with him from Mexico. The inspector observed that he appeared nervous while answering these questions. The defendant was then directed to disrobe, but nothing was found during the strip search. The inspector saw what appeared to be old "tracks" on his arms and noticed that the defendant's "stomach was beating fast."[47] Based on these observations and the defendant's evasive answers to subsequent questions concerning the "tracks," he was taken to a hospital where a rectal probe was performed with negative results. An emetic was then injected into his hip with unsatisfactory results. After oral emetics were administered the defendant expelled the contents of his stomach which included two balloons containing approximately five grams of heroin.[48]

The court held that the heroin was the product of an illegal search and then proceeded to define the "real suspicion" test that had first appeared in *Henderson.*

> "Real suspicion" justifying the initiation of a strip search is subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law.
>
> The objective, articulable facts must bear some reasonable

44 *Id.* The court stated:
[I]f there is to be more than casual examination of the body, if in the course of the search of a woman there is to be a requirement that she manually open her vagina for visual inspection to see if she has something concealed there, we think that we should require more than a mere suspicion. Surely, to require such a performance is a serious invasion of personal privacy and dignity, and so unlawful if "unwarranted." Surely, in such a case, to be warranted, the official's action should be backed by at least the "clear indication," the "plain suggestion," required in *Schmerber* and *Rivas.*
45 *Id.* at 809.
46 421 F.2d 876 (9th Cir. 1970).
47 *Id.* at 877.
48 *Id.* at 878.

> relationship to suspicion that something is concealed on the body of the person to be searched; otherwise, the scope of the search is not related to the justification for its initiation, as it must meet the reasonableness standard of the Fourth Amendment. (*Cf. Terry v. Ohio*, . . . , 392 U.S. at 29, 88 S. Ct. 1868; *Warden v. Hayden* (1967) 387 U.S. 294, 310, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (Mr. Justice Fortas, concurring).[49]

The court stated that the "objective, articulable facts" in the case did not warrant a real suspicion that the defendant was concealing something on his person.[50]

Although cases involving border searches and their attendant problems were a proven fertile field for litigation, the Supreme Court consistently denied certiorari[51] until this precedent was broken by the Court in a strip search case, *United States v. Johnson*.[52] Mrs. Johnson and a female companion were stopped by a customs inspector as they walked across the border at San Ysidro, California. After talking with Mrs. Johnson, the inspector requested a customs inspectress to search her. During the course of the strip search heroin was found hidden in the defendant's panties.[53] At the defendant's trial the inspector testified "that he had considerable experience in examining persons at the border for narcotics."[54] The inspector was then asked by the prosecution if he had been suspicious before he ordered the strip search of the defendant. He replied, "I was, yes, sir."[55]

The court in reversing the defendant's conviction held that the "real suspicion" test as defined in *Guadalupe-Garza* was controlling and that this test had not been met. The strip search in *Johnson* was not supported by "objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that"[56] Mrs. Johnson was concealing contraband on her person. The search was initiated solely on the inspector's suspicion. The court stated that there were no "objective, articulable facts" in the record to support his suspicion and if "such facts existed, it was incumbent upon the government to prove them."[57]

---

49 *Id.* at 879.

50 *Id.* The "objective articulable facts" being that the defendant had tilted his head and had shied away from the customs inspector. He had also appeared nervous. The observation of the "tracks" on his arms and his evasive answers did not occur until *after* he had been stripped.

51 Note, *At the Border of Reasonableness: Searches by Customs Officials*, 53 CORNELL L. REV. 871, 872 & n.12 (1968).

52 425 F.2d 630 (9th Cir. 1970), *cert. granted*, 39 U.S.L.W. 3297 (Jan. 11, 1971) (No. 577, 1970 Term).

53 *Id.* at 631.

54 *Id.*

55 *Id.*

56 United States v. Guadalupe-Garza, 421 F.2d 876, 879 (9th Cir. 1970).

57 United States v. Johnson, 425 F.2d 630, 632 (9th Cir. 1970), *cert. granted*, 39 U.S.L.W.

THE EXTENDED BORDER SEARCH

If the term "border search" were taken literally, only those searches occurring directly on the international border could be construed as such. If this were the definition, the only class of persons subject to border searches would be those physically located at an actual point of entry into the United States. The statutory authority given customs officials is not so restrictive as to require a literal interpretation of the term "border search."[58] If the authority of customs officers was strictly limited to the immediate area of the point of entry, the customs laws could not be effectively enforced.[59] The classes of persons who are subject to border searches were discussed by the court in *United States v. Glaziou*:

> The class of persons who may be subjected to a border search is not limited to those suspected persons who are searched for contraband upon first entering the United States. Also included in the class are persons who work in a border area when leaving the area; persons engaged in suspicious activity near border areas; and, in some situations, persons and vehicles after they have cleared an initial customs checkpoint and have entered the United States. Therefore, we hold that when an individual has direct contact with a border area, or an individual's movements are reasonably related to the border area, that individual is a member of the class of persons that a customs officer may, if his suspicions are aroused, stop and search while the individual is still within the border area.[60]

3297 (Jan. 11, 1971) (No. 577, 1970 Term). In a strong dissent, Judge Byrne distinguished *Johnson* from *Henderson* and *Guadalupe-Garza*. In those two cases an intrusive body search occurred following a strip search but here, the defendant merely undressed, handed her clothing to the inspectress and the heroin was found in the crotch of her panties. "There was no searching investigation of the appellant's body surface, no examination of her skin or private parts," at 633. The dissent also expressed the opinion that the case was "on all fours" with Witt v. United States, 287 F.2d 389 (9th Cir. 1961). The only difference was that in *Witt* the heroin was found in Witt's brassiere and in the instant case it was found in Johnson's panties. Thus Judge Byrne suggests that the holding in *Johnson* effectively overrules *Witt*. The "articulable facts" test was also followed in the recent case of United States v. Saville, No. 25,799 (9th Cir., Dec. 21, 1970). The court held that the customs agent's subjective suspicion met the "articulable facts" test. As in the *Johnson* case the female defendant had concealed the narcotics in her panties but the male defendant employed a rather unique article of underclothing to transport the narcotics. In this writer's opinion he was the first to attempt to smuggle heroin across the border in a jockey strap.

58 19 U.S.C. § 482 (1964) gives customs officials the authority to search for contraband "as well without as within their respective districts."

19 U.S.C. § 1581(a) (1964) also broadly defines customs official's authority to "go on board any vessel or vehicle at any place in the United States . . . or at any other authorized place, without as well within his district, . . . and . . . search the vessel or vehicle . . . and any person, trunk, package or cargo on board. . . ." Thus by statute customs officials are not restricted to the immediate border area.

59 United States v. Glaziou, 402 F.2d 8, 12 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121, 89 S. Ct. 999, 22 L. Ed.2d 126 (1969).

60 402 F.2d 8, 14 (2d Cir. 1968) (citations omitted), *cert. denied*, 393 U.S. 1121, 89 S. Ct. 999, 22 L. Ed.2d 126 (1969).

In the same opinion the court, citing *Carroll v. United States*,[61] stated that the border search doctrine would not apply after an individual had left the "reasonably defined border area."[62] The court then noted that although an *ordinary* border search could not be justified outside the immediate border area, this did not preclude officers from making an *extended* border search.[63]

Although the Supreme Court in *Carroll* spoke of reinstatement of the probable cause requirement once a person was "lawfully within the country,"[64] evidence obtained in searches some distance from the border has generally been held admissible although the searches were based on less than probable cause.[65] The Supreme Court has noted that the Fifth and Ninth Circuits have not always been in accord on the tests they employ to determine the legality of an extended border search.[66]

The Ninth Circuit and the Surveillance Requirement

The surveillance requirement for extended border searches was expressly recognized by the Ninth Circuit Court of Appeals in *King v. United States*.[67] A search made eight miles from the border was held to be a valid border search. The customs officials had been notified by an informer that King had gone to Mexico to purchase amphetamine pills and would cross the border driving one of two automobiles (the model, color and license number were also furnished). King was spotted by a customs agent and was followed eight miles inland until he was stopped, his automobile searched and a quantity of amphetamine pills discovered.[68] The court reasoned that customs searches could not be made precisely on the border but of necessity had to

61 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

62 United States v. Glaziou, 402 F.2d 8, 14 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121, 89 S. Ct. 999, 22 L. Ed.2d 126 (1969).

63 *Id.* at n.4. Analogous to the extended border search are those searches made by immigration officers in their searches for aliens pursuant to 8 U.S.C. § 1357 (1964). *See generally* Comment, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007, 1010 n.15 (1968).

64 267 U.S. 132, 154, 45 S. Ct. 280, 285, 69 L. Ed. 543, 552 (1925). The Fifth Circuit also recognized the existence of an imaginary geographical barrier beyond which probable cause would be a requisite to searches by customs officials. The court stated in Thomas v. United States, 372 F.2d 252, 254 (5th Cir. 1967) that "there must come a point when a traveler's entry into this country is complete so that the protection of the Fourth Amendment attaches to him." After passing this point "the traveler no longer may be the subject of a border search based on suspicion."

65 *E.g.*, Stassi v. United States, 410 F.2d 946, 951 (5th Cir. 1969) (reasonable cause to suspect that defendant possessed contraband supported a search 10 miles from the border); Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966), *cert. denied*, 385 U.S. 977, 87 S. Ct. 519, 17 L. Ed.2d 439 (1966) (constant surveillance supported an extended border search).

66 Harris v. United States, 400 U.S. 1211, —, 91 S. Ct. 4, 5, 27 L. Ed.2d 30, 32 (1970).

67 348 F.2d 814, 816 (9th Cir. 1965), *cert. denied*, 382 U.S. 926, 86 S. Ct. 314, 15 L. Ed.2d 339 (1965).

68 *Id.* at 815-16.

"be made somewhere north of the border between Mexico and the United States."[69] King had been kept under constant surveillance from the time he crossed the border until he was stopped.[70] It was evident that whatever was found in the search had been in the automobile when it crossed the border.[71]

To the surveillance requirement set out in *King* the court in *Alexander v. United States*[72] added the "totality of surrounding circumstances" doctrine:

> Where, however, a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination of whether the *totality of surrounding circumstances,* including the time and distance elapsed as well as the manner and extent of surveillance, are such to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a "border search."[73]

The vehicle involved in *Alexander* had been placed under surveillance when it crossed the border into the United States. The car was under constant surveillance until it was stopped except for a couple of minutes when it was lost from view. This hiatus did not invalidate the search as there was no evidence tending to show any change in the condition of the automobile during the break in surveillance.[74] Further, neither the distance traveled nor the time elapsed indicated any opportunity for a change in condition.

The "totality of circumstances" test promulgated in *Alexander* was followed by the Ninth Circuit Court of Appeals in *Rodriguez-Gonzalez v. United States.*[75] Acting on information supplied by an informant, customs officials allowed a car occupied by a man and a woman to pass across the border at San Ysidro, California, and followed it to a public parking lot in San Diego, California, where it remained

---

69 Murgia v. United States, 285 F.2d 14, 16 (9th Cir. 1960), *cert. denied,* 366 U.S. 977, 81 S. Ct. 1946, 6 L. Ed.2d 1265 (1961).

70 King v. United States, 348 F.2d 814, 816 (9th Cir. 1965), *cert. denied,* 382 U.S. 926, 86 S. Ct. 314, 15 L. Ed.2d 339 (1965). Although the surveillance by the customs officer was the key to the court's opinion, it noted that the specificity of the informant's information, the reasonableness of the time lapse between the defendant's crossing of the border and the search, and the reasonable distance from the border all contributed to the validity of the search.

71 *Id.*

72 362 F.2d 379 (9th Cir. 1966), *cert. denied,* 385 U.S. 977, 87 S. Ct. 519, 17 L. Ed.2d 439 (1966).

73 *Id.* at 382 (emphasis added).

74 *Id.*

75 378 F.2d 256 (9th Cir. 1967).

overnight under surveillance. The following day the defendant entered the car, left the parking lot and was heading toward Los Angeles when he was stopped and searched by customs officials. Although the search occurred some twenty miles from the border and fifteen hours after the car had crossed the border, the court held that it was a valid border search.

Citing the test in *Alexander*, the court stated that there could "be no doubt that the manner and extent of the surveillance of the car appellant was driving excludes the possibility that the marijuana found hidden in the rear door was placed there at any time following entry into the United States. From the time the car in question crossed the international border . . . until it was stopped, . . . it was under constant surveillance by a team of officers."[76]

Three basic considerations are weighed by the courts in applying the "totality of circumstances" test. The Ninth Circuit Court of Appeals consistently states that the amount of time that has lapsed between the time a defendant crosses the border and the time a search takes place is one of the considerations. The second consideration is the total distance that a defendant has traveled from the border. The surveillance maintained by the customs officials is the third consideration. In light of two recent Ninth Circuit cases,[77] the "totality of circumstances" test has been trimmed to only one "circumstance" —surveillance.

In *Castillo-Garcia v. United States*[78] customs agents had received information from an informant that a certain automobile would cross the border carrying a large amount of marijuana. When the car crossed the border it was placed under constant surveillance maintained some seven hours until the car was stopped and finally searched 105 miles from the border. The court upheld the decision of the trial court to admit into evidence the marijuana seized during the search. The court reasoned that as long as surveillance was maintained the distance from the border was important only as it related to the surveillance. The distance involved in this case could have been 105 miles or 500 miles and had surveillance been shown, it would still have been held to be a valid border search.[79] The time element involved was not even considered by the court.

---

[76] *Id.* at 258, *accord*, Bloomer v. United States, 409 F.2d 869, 871 (9th Cir. 1969) (border search of car at laundromat in San Ysidro, Cal.); Gonzalez-Alonso v. United States, 379 F.2d 347, 350 (9th Cir. 1967) (border search 11 miles from the border); Lannom v. United States, 381 F.2d 858, 861 (9th Cir. 1967), *cert. denied*, 389 U.S. 1042, 88 S. Ct. 784, 19 L. Ed.2d 833 (1968) (border search 1½ miles from the border).

[77] United States v. Harris, 427 F.2d 1368 (9th Cir. 1970) (per curiam), *cert. denied, motion for leave to supplement petition granted*, 39 U.S.L.W. 3298 (U.S. Jan. 11, 1971) (No. 780); Castillo-Garcia v. United States, 424 F.2d 482 (9th Cir. 1970).

[78] 424 F.2d 482 (9th Cir. 1970).

[79] *Id.* at 485.

The search and seizure of a truck parked in Los Angeles, California, some 150 miles from the border was held to be a border search in *United States v. Harris*.[80] The defendants filed an application for a stay of judgment of the Ninth Circuit Court of Appeals pending disposition of a petition for certiorari which had been filed in the Supreme Court. Mr. Justice Douglas in granting the stay noted the different tests applied in the Fifth and Ninth Circuits regarding the legality of extended border searches, but indicated no view on the merits. He did, however, state that the "rather old dictum of this Court in *Carroll v. United States*, 267 U.S. 132, 154, 45 S. Ct. 280, 69 L. Ed. 543, hardly meets the refinements of these new distinctions."[81] Certiorari was denied in this case although Justice Douglas was of the opinion that it should have been granted.[82]

The Fifth Circuit and Reasonable Cause to Suspect

The Fifth Circuit Court of Appeals showed its reluctance to view all customs related searches as border searches in *Marsh v. United States*.[83] In this case a county constable had stopped the defendant's car sixty-three miles from the border on the basis of a call from a customs agent asking him to "exercise a lookout for Mr. Martinez."[84] The constable detained the defendant until a customs agent arrived and searched the car. At the trial no proof was offered as to the information which caused the customs agent on the border to telephone the constable and ask him to arrest Martinez.

The court recognized that the authority to make a border search was broad and that the definition of border was elastic. However, it refused to view the search as a border search stating:

> [I]f the Government seeks to qualify the action as a geographically "extended" border search, it must show at least the circumstances known to the officers at the border which reasonably justified the request relayed to officers in the interior. Any other doctrine would render travelers who had recently entered into this country subject to almost unlimited arrest and search without any cause save the simple request of a border officer at an interior point.[85]

The court did not specify the circumstances that would have justified the search as a border search. It only mentioned those which would reasonably justify the request relayed to the constable.

---

80 427 F.2d 1368 (9th Cir. 1970) (per curiam), *cert. denied, motion for leave to supplement petition granted*, 39 U.S.L.W. 3298 (U.S. Jan. 11, 1971) (No. 780).
81 Harris v. United States, 400 U.S. 1211, —, 91 S. Ct. 4, 5, 27 L. Ed.2d 30, 32 (1970).
82 39 U.S.L.W. 3298 (U.S. Jan. 11, 1971) (No. 780).
83 344 F.2d 317 (5th Cir. 1965).
84 *Id.* at 322.
85 *Id.* at 325.

The "reasonable cause to suspect" requirement was discussed by the Fifth Circuit Court of Appeals in *Willis v. United States.*[86] In *Willis* the defendant's vehicle had returned to the border after having once departed for the interior. It was then driven parallel to the border and during the course of the journey the vehicle was observed by the officers as it was driven to a lonely place off the highway. This particular area was notorious as a pickup point for smuggled narcotics. The car was subsequently stopped by the officers six miles from the border and contraband was found. Based on the officers' observations of the car on its circuitous route along the border the court held that they had "reasonable cause to suspect that the appellants were bringing heroin into the United States in a manner contrary to law."[87] Further, the car was under constant surveillance except for a short period of time. Thus by implication the Fifth Circuit recognized that surveillance was one of the considerations to be weighed in establishing a "reasonable cause to suspect."

The court, in *Thomas v. United States,*[88] was specific in setting out the criteria required for an extended border search. Customs authorities in El Paso, Texas, received a tip from an informer that a certain person, who was described in detail, was attempting to purchase narcotics in Mexico. Thomas' hotel was placed under surveillance and when he crossed the border into Mexico, he was followed by a customs agent. The agent broke off the surveillance when he became fearful that Thomas had seen him. When Thomas re-entered the United States by streetcar, he passed through an inspection station but was not apprehended. Customs agents stopped and searched him some one and one half hours after he had returned to the United States and within six blocks of the border. The court ruled that the narcotics were seized in a valid border search. The tip from the informer and the surveillance furnished the agents with "reasonable cause to suspect"[89] that Thomas was carrying contraband. The court distinguished

86 370 F.2d 604 (5th Cir. 1966). The basis of the "reasonable cause to suspect" test is found in 19 U.S.C. § 482 (1964) which states that:

> Any 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 is merchandise which is 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 is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any 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* is 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 (emphasis added).

87 *Id.* at 604.

88 372 F.2d 252 (5th Cir. 1967).

89 *Id.* at 254.

the case from *Marsh*[90] by noting that the government in *Marsh* had revealed none of the circumstances which would have justified the extended border search. In the instant case, the circumstances revealed that the agents had "ample reason to suspect" Thomas, and thus the search was justified.[91]

The importance of surveillance was again discussed in *Walker v. United States*.[92] Customs agents had received a tip that the defendant was going to bring heroin across the border. He was not searched at the border and was allowed to proceed into the United States. The car was kept under surveillance by the customs agents until they were forced to contact the Texas Department of Public Safety to set up a roadblock to stop the defendant because of the high rate of speed of his car. He was stopped at the roadblock, his auto searched, and heroin was found. The court refused to suppress the evidence holding that the search was a valid border search. It stated that "[W]hile border searches must measure up to the constitutional standard of reasonableness, suspicion that a person is carrying merchandise unlawfully imported into the United States is sufficient."[93] Although the court reasoned that suspicion was enough to support an extended border search, it also stressed that the suspicion had to be reasonable. Without the surveillance employed in *Walker* it is doubtful that the court could have found the degree of reasonableness necessary to support an extended border search.

Stassi v. United States[94] reiterates the Fifth Circuit Court of Appeals' position that only "reasonable cause to suspect" is necessary to justify an extended border search. Again, surveillance was involved. Customs officials in McAllen, Texas, received information that a shipment of heroin would be smuggled into the United States and a subsequent phone call gave a description of the smuggler. The tip led customs officials to a bus station where a woman was spotted who matched the description given by the informant. Without the woman's knowledge, her luggage was searched and found to contain heroin. She was not arrested but allowed to board a bus to Houston, Texas, where she was to meet her contact. A customs agent was on the bus with her and other agents followed in automobiles. Both the woman and her contact were arrested in Houston and the heroin was seized. In upholding the search as a border search the court held that "[i]t was necessary only that the customs agents had reasonable cause to *suspect* that the suitcase contained heroin which had been smuggled into this country, and

90 Marsh v. United States, 344 F.2d 317 (5th Cir. 1965).
91 Thomas v. United States, 372 F.2d 252, 255 (5th Cir. 1967).
92 404 F.2d 900 (5th Cir. 1968).
93 *Id.* at 902.
94 410 F.2d 946 (5th Cir. 1969).

that their conduct in connection with the search and seizure was reasonable."[95] The knowledge possessed by the customs agents of the daily smuggling of narcotics into the United States from Mexico gave them reasonable cause to suspect that the heroin had been brought in unlawfully. Their conduct and methods in making the search were reasonable.[96]

CONCLUSION

The courts have developed these several tests to be applied to searches at the border and to extended border searches. These tests are not always clearly enunciated and the application of the tests to particular cases has not been consistent throughout the federal circuits.

It is evident that the Fifth Circuit Court of Appeals recognizes the importance of surveillance in establishing the legality of an extended border search. Although their opinions stress the "reasonable cause to suspect" test, surveillance forms the basis of the reasonableness of the test. It is submitted that the tests employed by the Fifth and Ninth Circuits in determining the legality of extended border searches are not as distinguishable as urged by the United States Supreme Court.[97]

Body searches at the border have given birth to a number of tests. The degree of intrusiveness involved determines the test to be used. All tests exceed the "mere suspicion" requirement for ordinary border searches, but none reach the dignity of the probable cause requirement of the fourth amendment.

It is clear that the federal courts experience difficulty in deciding which test to apply in any given situation. If learned judges experience these difficulties, what can be expected of law enforcement officials who are charged with enforcing the customs laws? In granting certiorari in *United States v. Johnson*,[98] the Supreme Court has recognized the existing problems and could go far in resolving them.

---

[95] *Id.* at 951-52 (court's emphasis).
[96] *Id.*
[97] Harris v. United States, 400 U.S. 1211, —, 91 S. Ct. 4, 5, 27 L. Ed.2d 30, 32 (1970).
[98] 425 F.2d 630 (9th Cir. 1970), *cert. granted*, 39 U.S.L.W. 3297 (Jan. 11, 1971) (No. 577, 1970 Term).