Beyond the Border of Reasonableness: Exports, Imports and the Border Search Exception

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BEYOND THE BORDER OF REASONABLENESS: EXPORTS, IMPORTS AND THE BORDER SEARCH EXCEPTION

INTRODUCTION

Customs laws are a means for ensuring the integrity of the country's borders. To further this objective, customs officials have traditionally been granted broad authority within the scope of their duties to conduct searches of incoming persons, vehicles and containers. This type of search—the so-called "border search"—has unique rules governing its legitimacy and scope. Ordinarily, to protect a person's right of privacy, the fourth amendment specifically

1. Customs laws apply to goods; immigration laws apply to people. Border search laws apply to both goods and people and, therefore, overlap for the most part. This note focuses on customs laws and will not be concerned with distinctions between customs and immigration. At the outset, however, the reader should note the difference in penalties for violations of customs and immigration laws. Specifically, the penalty for unlawful immigration is deportation, 8 U.S.C. § 1251 (1976), while the penalty for customs violations is forfeiture of the goods plus possible criminal sanctions. See 19 U.S.C. § 1595(a) (1976); 21 U.S.C. § 881 (1976); 18 U.S.C. §§ 542, 545 (1976). A recurring theme throughout this note is that the possibility of criminal sanctions invalidates the legitimacy of the border search exception. The validity of the border search exception vis-à-vis immigration laws is, therefore, not a focus of concern in this note.

It should also be noted, however, that under rules governing delegation of authority, immigration officials may be designated customs agents. United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973). Thus, an immigration official may conduct an immigration search, form a suspicion that customs laws are being violated, and then, in his or her capacity as a customs official, conduct a further search for customs violations. Id. at 1364. See United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972), cert. denied, 413 U.S. 919 (1973). Thus, while immigration laws will not be considered in this note, the role of immigration officials will be.

2. 19 U.S.C. § 482 (1976). See also 19 C.F.R. § 162.6 (1982) ("All persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a Customs officer."); 19 C.F.R. § 162.7 (1982) ("A Customs officer may stop, search, and examine any vehicle, person, or beast, or search any truck or envelope wherever found, in accordance with [19 U.S.C. § 482].").

3. 19 U.S.C. §§ 482, 1581 (1976). See also 19 C.F.R. § 162.5 (1982) ("A Customs officer may stop any vehicle and board any aircraft arriving in the United States from a foreign country for the purpose of examining the manifest and other documents and papers and examining, inspecting, and searching the vehicle or aircraft."); 19 C.F.R. § 162.7 (1982).


5. See, e.g., Wolf v. Colorado, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.").
proscribes searches that are unreasonable; this standard has been defined more broadly in the context of border searches than in ordinary investigatory contexts. Thus, a search that would be unreasonable if conducted during a routine police investigation may be legitimate when undertaken by customs officers in the course of their duties.

The fourth amendment also provides that warrants shall not be issued except upon a showing of probable cause. The necessity for a warrant will generally be excepted when probable cause is coupled with exigent circumstances, making it impossible to take the time to secure a warrant. Significantly, border searches are exempted from both the warrant and the probable cause requirements, although not because of exigent circumstances; rather, the basis for this exception is historical.

In comparison, it has generally been accepted that probable cause is required for a warrantless export or departure search. The

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6. The fourth amendment provides:
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

7. See, e.g., United States v. Glaziou, 402 F.2d 8, 12 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969) (searches and seizures at border by customs officers are reasonable even though if conducted elsewhere by different officials they would be violative of fourth amendment protections).

8. Id.

9. See supra note 6. Probable cause has been defined as a belief, reasonably arising out of the circumstances known to the law enforcement official, that a person has committed, or is about to commit a violation of law. See, e.g., Carroll v. United States, 267 U.S. 132, 149, 161 (1925).


13. Id. See infra text accompanying notes 92-103.

14. See United States v. Marti, 321 F. Supp. 59, 63 (E.D.N.Y. 1970) (warrantless search by customs officials permissible because based upon probable cause); see also Samora v. United States, 406 F.2d 1095, 1098 (5th Cir. 1969) (customs officials "were entitled to detain [defendant's] car, make a reasonable search and seize the [contraband]," since search was based on probable cause). Contra United States v. Stanley, 545 F.2d 661, 667 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978) (export search conducted without probable cause held permissible due to "similarity of purpose, rationale and effect" between incoming and outgoing
Court of Appeals for the Second Circuit, however, recently concluded otherwise. The court held that there is little difference between a search of incoming people or goods—the traditional component of the border search exception—and an export search. The court concluded that since import searches have special rules, export searches should be governed by these same rules. In so holding, the Second Circuit has created entirely new search and seizure law. The rationale used by the court in reaching its decision, however, raises serious questions of constitutional propriety and validity.

This note examines the basic issue of whether the justification for excepting border searches from ordinary fourth amendment requirements includes exports as well as imports, by first examining the constitutional and practical justifications of the border search exception itself. The thesis of this note is two-fold. First, although the historical justification for the constitutional validity of the border search is subject to dispute, because of practical considerations there is good reason to continue to except routine import border searches from ordinary fourth amendment requirements. For any search other than routine, however, ordinary fourth amendment protections should apply in the form of judicial review of the facts as to why a search should be undertaken. Second, there is no justification for including export searches within the border search exception: The historical basis for excepting incoming border searches is in no way applicable to export searches, governmental interests in containing certain exports are not as compelling as those in restricting certain imports, and the right to privacy of people lawfully within the United States demands the protections ordinarily afforded by the fourth amendment.

border crossing searches). See infra notes 285-93 and accompanying text.

16. See infra notes 92-103, 240-50 and accompanying text.
17. United States v. Ajlouny, 629 F.2d 830, 834 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981). The issue of export searches has taken on increased importance in recent years due to the unlawful exportation of computer hardware and munitions. See, e.g., Periscope, Keeping U.S. High-Tech Secrets Safe, Newsweek, October 4, 1982, at 19.
19. See infra notes 105-45 and accompanying text.
20. See infra notes 146-206 and accompanying text.
21. See infra notes 197-206 and accompanying text.
22. See infra notes 238-50 and accompanying text.
23. See infra notes 35-41 and accompanying text.
24. See infra notes 251-58, 306-12 and accompanying text.


**HISTORY OF THE BORDER SEARCH**

Since the first customs laws were enacted, courts have permitted customs officials to search any person, vehicle or container entering the country, on the suspicion that dutiable merchandise was being concealed or that contraband was being shipped. These “border searches” have always been exempt from the fourth amendment’s probable cause and warrant requirements. This exemption has been justified on historical reasons: (1) The original statute authorizing the collection of revenue on dutiable goods permitted searches of incoming ships and vessels based upon only a “reason to suspect,” while, at the same time, it required a warrant based upon probable cause for searches of any dwellings, stores or buildings; and, (2) this statute was enacted by the same Congress that two months later passed the Bill of Rights for ratification by the states. This temporal context has been utilized by the Supreme Court to demonstrate the validity of the border search exception. Practical considerations involving the difficulty of controlling smuggling into the country are a secondary consideration justifying the exception.

29. This note is concerned only with contraband or dutiable goods, and not illegal immigration. See supra note 1.
30. See, e.g., cases cited supra note 11.
31. Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29. The statute specifically provides: That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited. Id. at 43.
32. 1 ANNALS OF CONG. 951 (J. Gales ed. 1789) [hereinafter cited as 1 ANNALS].
34. See, e.g., United States v. Freeman, 579 F.2d 942, 946 (5th Cir. 1978); United States v. Glaziou, 402 F.2d 8, 12 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969).
Different policy considerations underlying the export, as opposed to the import, search are the reason why probable cause has, until recently, been considered a requirement for warrantless export searches. An import search is carried out to protect the integrity of the country's borders. An export search cannot be based on this concept because the departing person or goods originates from within the country's borders. An import search is conducted to ensure that contraband is seized before entry, so that it will not affect the citizenry. Goods being exported, however, obviously do not pose the same threat. Therefore, the governmental interest in conducting export searches cannot be the same. Additionally, import searches serve to ensure that the government is receiving the duty to which it is entitled. Since outgoing goods are not subject to duty, the governmental interest, again, is different.

Because the governmental interest in outgoing, as opposed to incoming, goods is different, the degree of personal intrusion in each context is also different. There is no opprobrium attached to import searches, since they have long been a fact of incoming passage and are directed toward no one particular class of persons. The incoming passenger is not unreasonably subject to the imposition of a search because he or she is on notice that a search will take place. Since these expectations are not present in export searches, the personal intrusion into the departing traveler's right to privacy is greater.

Despite these practical considerations, some courts have attempted to add a fourth amendment gloss to the import exception by holding that mere entry into the United States gives rise to probable cause for a search, or that "mere" suspicion is all that is neces-

35. See cases cited supra note 14.
38. See cases cited supra note 37.
40. Id.
41. Id.
42. E.g., Witt v. United States, 287 F.2d 389, 391 (9th Cir.), cert. denied, 366 U.S. 950 (1961).
sary to conduct a valid border search.43 Such decisions, while impliedly questioning the constitutional propriety of the border search exception, provide no real analysis of the underlying issues. The great majority of people entering the country are not attempting to smuggle contraband; therefore, probable cause can hardly be said to exist merely because one is entering the country.44 Similarly, a requirement of "mere suspicion" provides no guidance for subsequent judicial review and is, therefore, akin to no requirement at all. As one court has pragmatically noted, "even 'mere suspicion' is not required" for a legitimate border search.45 The only requirement judicially imposed on customs officials is that the search be conducted "reasonably."46

The decisions that attempt to place a constitutional gloss on the legitimacy of the border search exception evidence insufficient analysis by the judiciary as to the very basis of the exception. The result has been confusing rationalizations47 and dubious holdings.48 This same failure to properly analyze the border search exception is now being repeated in regard to export searches.49 It is, therefore, neces-

44. Note, supra note 37, at 55 n.13. The absurdity of this argument is exemplified by the fact that if mere entry gives rise to probable cause, then even the most intrusive search of a body cavity would be permissible in all circumstances. Id.
45. Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967). Mere suspicion, however, is not sufficient to justify a search of a body cavity. Id. See Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967). For such an intrusive search, a "clear indication," Henderson, 390 F.2d at 808, or a "plain suggestion," Rivas, 368 F.2d at 710, of smuggling is required.
47. For example, the different rationales utilized by the Ninth Circuit for permitting border searches are illustrated in the sequence of cases, Witt v. United States, 287 F.2d 389 (9th Cir.), cert. denied, 366 U.S. 950 (1961), Alexander v. United States, 362 F.2d 379 (9th Cir.), cert. denied, 385 U.S. 977 (1966), and Henderson v. United States, 390 F.2d 805 (9th Cir. 1967). The court held that (1) mere entry into the United States gave rise to probable cause for a search, Witt, 287 F.2d at 391, (2) "mere suspicion" was all that was necessary to conduct a permissible border search, Alexander, 362 F.2d at 382, and (3) even "mere suspicion" was not necessary to conduct a permissible border search, Henderson, 390 F.2d at 808.
48. For example, even searches that involved physical abuse have been held to be reasonable. See, e.g., Bleafare v. United States, 362 F.2d 870 (9th Cir. 1966) (administration of emetic to induce vomiting); Lane v. United States, 321 F.2d 573 (5th Cir. 1963) (rectal searches); Denton v. United States, 310 F.2d 129 (9th Cir. 1962) (injection of sedative). Cf. Rochin v. California, 342 U.S. 165, 172 (1952) (pumping defendant's stomach after breaking into his house, a nonborder setting, is "conduct that shocks the conscience").
sary to examine the constitutional justification for the exception, in
order to formulate a more legally sound standard for future judicial
review of customs officials’ actions.

Origins of the Fourth Amendment

The origins of the fourth amendment have been traced through
English history to the issuance of general warrants in the early four-
teenth century and writs of assistance in the seventeenth century. Enormous
discretion was delegated to the customs official holding
the writ of assistance. The writ was effective during the lifetime of
the reigning sovereign; it empowered the holder, as well as any des-
ignated assistant, to search wherever they suspected uncustomed
goods to be.

In the colonies, people at first were unopposed to the use of
these writs. In time, however, this attitude began to change. People
resisted execution or sued the executing official. Then, in October
1760, King George II died. Pursuant to statute, all writs of assistance
were to expire six months after the death of the sovereign. At
the same time, the French-Canadian fighting in Canada ended, leaving
England free to utilize the colonies exclusively as a source of

50. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 22 n.4 (1966);
N.B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED
STATES CONSTITUTION 22 (1970 ed.). General warrants lack specificity as to who or what is to
be searched and what is expected to be found. They are utilized to conduct fishing expeditions
to obtain evidence. J. LANDYNSKI, supra, at 20-30; N.B. LASSON, supra, at 18-50.

51. Writs of assistance were authorized by act of Parliament in 1662, 13 & 14 Car. 2,
ch. 11, § 5 (1662). See J. LANDYNSKI, supra note 50, at 30-32; N.B. LASSON, supra note 50,
at 51-54. Writs of assistance were general warrants utilized by customs officials to search for
contraband or dutiable imports on which the duty has not been paid. The official holding this
writ had unlimited discretion as to where he may search. The name is derived from the fact
that all officers of the Crown were charged with assisting those executing the warrant. J.
LANDYNSKI, supra note 50, at 30-32; N.B. LASSON, supra note 50, at 51-54.

52. N.B. LASSON, supra note 50, at 54. See J. LANDYNSKI, supra note 50, at 22, 31. In
the colonies, customs officers were given the “same power and authorities” that officials in
England had been granted by act of Parliament in 1696. N.B. LASSON, supra note 50, at 53 (7 &
8 Will. 3, ch. 22, § 6 (1696)). The actual extent of this power, however, became the focus of
serious debate. See infra notes 70-71 and accompanying text.

53. N.B. LASSON, supra note 50, at 55. In Massachusetts Bay, where the use of writs of assistance
was most widespread, Chief Justice Sewall of the Superior Court had granted writs
to customs officers, in spite of his own doubts as to their legality, in part because there was no
opposition to them at the time. Id. at 57.

54. Id.

55. Id. But see J. LANDYNSKI, supra note 50, at 33 n.59 (expiration of writs of assistance
within six months was a matter of legal practice rather than statutory requirement).

revenue. The resulting strict enforcement of trade laws set the stage for what was to occur over the next fifteen years.

In February 1761, all writs of assistance expired. Several Massachusetts Bay merchants thereafter petitioned the Superior Court in opposition to the issuance of new writs. In what has become known as the Writs of Assistance Case, the merchants argued that since general warrants were not sanctioned by the common law, the writs of assistance mentioned by the Act of 1662 must be construed as special warrants, requiring specificity as to the person or place to be seized or searched, if, their argument continued, this statute did authorize general warrants, then it was unconstitutional and repugnant to the Magna Carta.

Professor Nelson B. Lasson notes that "[h]ad judgment been given at the conclusion of the arguments, the decision would probably have been given against the writs." Judgment was deferred, however, until characterization of the practice in England could be ascertained. It was subsequently determined that in England applications by customs officials for general warrants were made "without even the affidavit or order of the court." Thus, after a second argu-

57. Id.
58. N.B. Lasson, supra note 50, at 57.
59. Id. See also J. Landynski, supra note 50, at 33; W. Tudor, supra note 56, at 56-
60. Paxton's Case (1761), in J. Quincy, Reports of Massachusetts Bay, 1761-1772
61. See N.B. Lasson, supra note 50, at 66. For discussion of this case, see id. at 58-63; J. Landynski, supra note 50, at 33-35; W. Tudor, supra note 56, at 56-88.
62. J. Landynski, supra note 50, at 34; N.B. Lasson, supra note 50, at 59; W. Tudor, supra note 56, at 62-86.
63. J. Landynski, supra note 50, at 34-35; N.B. Lasson, supra note 50, at 59; W. Tudor, supra note 56, at 70-71. The provision of the Magna Carta to which the merchants referred states: "No freeman shall be taken or [and] imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land," quoted in N.B. Lasson, supra note 50, at 20. Professor Lasson contends that this clause has "been taken to mean much more than it originally did, because of the general tendency—and indeed the great temptation—to explain what is not altogether familiar in an ancient document with what is familiar in one's own experience." Id.
64. N.B. Lasson, supra note 50, at 62.
65. Id. at 62-63.
ment, the Superior Court ruled in favor of the customs officials and granted them new writs.

With the enactment of the Stamp Act in 1765, however, customs enforcement became nearly impossible. In England, the attorney general opined that writs of assistance issued by the colonial superior courts were invalid since the Act of 1662 authorized their issuance only by the Court of the Exchequer. Professor Lasson points out, however, that the subsequent "legalization" of these writs of assistance by an act of Parliament in 1767, "aided little in the administration of the law . . . both in New England, where the people resisted, and in most of the other colonies where the courts themselves were obdurate." After the Declaration of Independence, seven different states drafted constitutional provisions condemning general warrants and affirming the right to be free from unreasonable searches and seizures. Some of these provisions required an oath or affirmation to validate the warrant.

In 1787, the Constitutional Convention convened. For a variety of reasons, the Framers postponed consideration of a bill of rights.

66. The second oral argument was held in November 1761. Id.
67. Id. See also J. Landynski, supra note 50, at 35.
68. The Stamp Act imposed stamp duties on the American colonies as a means for raising revenue. 5 Geo. 3, ch. 12 (1765). The statute was criticized as being beyond the constitutional power of Parliament, unjust, impolitic and, most pointedly, unable to raise significant revenue. N.B. Lasson, supra note 50, at 68 n.60. The Stamp Act was repealed by statute, 6 Geo. 3, ch. 11 (1766), after riots in opposition to the act occurred in the colonies. See N.B. Lasson, supra note 50, at 68.
70. Id. at 70. This had been another argument proffered in the Writs of Assistance Case to invalidate the writs as issued in America. Id. at 61-62.
71. 7 Geo. 3, ch. 46, § 10 (1767) (granting colonial superior courts authority to issue writs of assistance). N.B. Lasson, supra note 50, at 70 n.67.
72. N.B. Lasson, supra note 50, at 72.
73. Professor Lasson notes that on October 26, 1774, the Continental Congress petitioned the King for a redress of grievances, including the abuse of search power: "The officers of the customs are empowered to break open and enter houses, without the authority of any civil magistrate, founded on legal information." Id. at 75. Professor Lasson concludes that it is, therefore, surprising that the Declaration of Independence, which, for the most part, was a list of grievances against the Crown, contains no specific mention of writs of assistance. Id. at 80. See also J. Landynski, supra note 50, at 37-38.
74. These states were Virginia, Pennsylvania, Maryland, North Carolina, Vermont, Massachusetts and New Hampshire. N.B. Lasson, supra note 50, at 82 n.17.
75. The provisions of Pennsylvania, Maryland, Massachusetts, and New Hampshire had such requirements. Id. at 81-82.
76. The subject of the Bill of Rights first came up five days before adjournment. 2 M. Farrand, The Records of the Federal Convention of 1787 587-88 (1937). One reason...
This postponement led, in large part, to the Constitution's adoption by only a narrow margin of convention voters,77 a refusal by three of the drafters to sign it,78 and the failure of two states to ratify it.79 Moreover, five states ratified the Constitution while specifically requesting amendments.80 At his inauguration in May 1789, George Washington added his voice to the call for amendments.81

Despite this demand, one of the first orders of business before the new House of Representatives was the creation of a system of revenue collection through the imposition of import duties.82 During the months of April, May and June of 1789, the House debated the question of import duties almost continuously.83 Then on June 8, in the middle of these debates, James Madison proposed a set of constitutional amendments.84 While there was some support for Madison's

put forth as to why it was not thoroughly discussed is that it had been a long hot summer in Philadelphia and the Framers were anxious to finish their work. N.B. LASSON, supra note 50, at 86. As for practical reasons enunciated against adopting a bill of rights, Roger Sherman argued that whatever powers were not specifically delegated to the federal government were not exercisable by it. 2 M. FARRAND, supra, at 588, 618. Such an argument, however, fails to account for the "potentialities and possibilities" of the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18. N.B. LASSON, supra note 50, at 85 n.23. See infra note 84.

77. N.B. LASSON, supra note 50, at 83.
78. George Mason and Edmund Randolph of Virginia and Elbridge Gerry of Massachusetts failed to sign. Id. at 88-89 & n.39. Perhaps not coincidentally, Virginia and Massachusetts called for amendments to the Constitution when ratification was proposed in their legislatures. Id. at 96 n.62.
79. North Carolina and Rhode Island failed to ratify it. Id.
80. Massachusetts, South Carolina, New Hampshire, New York and Virginia. Id. In Pennsylvania and Maryland there were strong minority factions that demanded amendments to the Constitution. Id. Professor Lasson concludes that despite the "realization of the benefits of union and the inexpediency of disunion, [the] Constitution would never have been ratified even then but for the tacit understanding that it would be amended so as to embody the customary guaranties of personal liberty." Id. (emphasis in original).
81. Id.
82. On April 8, 1789, seven days after a quorum had been attained in the House of Representatives, James Madison proposed an import duty statute. I ANNALS, supra note 32, at 106-07. Until 1794, the Senate met in secret so there is no official record of their debates.
83. Id., passim.
84. In his speech to the House of Representatives proposing the amendments, Madison stated:

I believe that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power; nor ought we to consider them safe, while a great number of our fellow-citizens think these securities necessary.

Id. at 450. Madison specifically addressed the dangers of general warrants and the possibility of their issuance under the necessary and proper clause of the Constitution:
proposal,\textsuperscript{85} it was protested that this was not the proper time to consider such amendments\textsuperscript{86} because the organization of the government was a more pressing concern.\textsuperscript{87} On July 28, 1789, the bill providing for the means of collecting import duties was passed by Congress.\textsuperscript{88} Three days later, President Washington signed it into law. It was not until August 13 that the House appointed a committee to debate the proposed constitutional amendments.\textsuperscript{89} On September 25, almost two months after the passage of the import duty bill, twelve amendments were adopted and submitted to the states for ratification.\textsuperscript{90} The fourth amendment, proscribing unreasonable searches, seizures, and the issuance of warrants without probable cause, was one of these.\textsuperscript{91}

\textit{The Border Search Exception}

The border search exception traces its judicial genesis directly to the Supreme Court's decision in \textit{Boyd v. United States}.\textsuperscript{92} In dic-

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\item It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, in the same manner as the powers of the State Governments under their constitutions may to an indefinite extent. . . . The General Government has a right to pass all laws which shall be necessary to collect its revenues; the means for enforcing the collection are within the discretion of the Legislature: may not general warrants be considered necessary for this purpose. . . . If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government. \textit{Id.} at 455-56.
\item See, \textit{e.g.}, remarks of Thomas Sumter, \textit{id.} at 466 ("I consider the subject of amendments of such great importance to the Union, that I shall be glad to see it undertaken in any manner.").
\item See, \textit{e.g.}, remarks of James Jackson, \textit{id.} at 461-62 ("There are . . . a number of important bills on the table which require despatch; but I am afraid, if we enter on this business [of amending the Constitution], we shall not be able to attend to them for a long time."). Even Thomas Sumter, despite his endorsement of constitutional amendments, was in favor of postponing deliberation on them until a later date. \textit{id.} at 466.
\item See \textit{supra} note 86; remarks of Elbridge Gerry, \textit{1 ANNALS, supra} note 32, at 462 ("I consider it improper to take up this business [of amending the constitution], when our attention is occupied by other important objects. We should despatch the subjects now on the table, and let this lie over until a period of more leisure for discussion and attention.").
\item \textit{1 ANNALS, supra} note 32, at 699.
\item \textit{Id.} at 730-44.
\item \textit{Id.} at 951. See \textit{J. LANDYNISKI, supra} note 50, at 42 n.111. The first two amendments proposed to the states were not ratified. These sought to (1) "regulate the number of representatives," and (2) "prohibit changes in the salaries of members of Congress from going into effect before an intervening election." \textit{Id.}
\item The fourth amendment was submitted to the states as proposed amendment number six. \textit{J. LANDYNISKI, supra} note 50, at 42 n.111.
\item 116 U.S. 616 (1886). This note examines only the judicially determined basis for
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tum, Justice Bradley noted that

[t]he 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 . . . 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 [fourth] amendment.*

Thus, the Supreme Court took the juxtaposition of two acts—passage in July 1789 of the regulations for collecting import duties and the passage of the Bill of Rights two months later—to be the Framers' imprimatur on the reasonableness of warrantless searches of ships and vessels by customs officials. This analysis has been nearly universally accepted by the judiciary.

In *Carroll v. United States,* Chief Justice Taft built upon the *Boyd* dictum. In *Carroll,* a case involving prohibition agents' authority to stop and search automobiles suspected of carrying prohibited liquor, Chief Justice Taft wrote that

[j]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding

excepting border searches from fourth amendment requirements—history. Thus, while Congress may have the authority under the commerce clause, U.S. Const. art. I, § 8, cl. 3, to provide for searches without even reasonable suspicion, this note addresses only what courts have said is the basis for this exception.

93. 116 U.S. at 623 (emphasis added) (footnote omitted).
94. See supra note 88 and accompanying text.
95. See supra notes 89-91 and accompanying text.
96. *Boyd,* 116 U.S. at 623. See also United States v. Ramsey, 431 U.S. 606, 616-17 (1977) (reaffirming the analysis in *Boyd*).
97. See, e.g., United States v. Ramsey, 431 U.S. 606, 618 (1977); United States v. Gliozzi, 402 F.2d 8, 12 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969); Witt v. United States, 287 F.2d 389, 391 (9th Cir.), cert. denied, 366 U.S. 950 (1961); cases cited infra note 102. But see United States v. Ramsey, 538 F.2d 415, 418 n.5 (D.C. Cir. 1976) (argument that warrantless search is permissible in border setting rejected because (1) long history of warrantless search will not create exception to fourth amendment; and (2) argument that travelers have less strong expectation of privacy and, therefore, warrantless search is acceptable, is circular because it assumes existence of search as justification for it), rev'd, 431 U.S. 606 (1977).
98. 267 U.S. 132 (1925).
99. *Id.* at 134.
liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. *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.* But those lawfully within the country . . . have a right to free passage without interruption or search unless there is . . . probable cause for believing that their vehicles are carrying contraband or illegal merchandise.100

One commentator has noted that this dicta became a self-fulfilling prophecy.101 It has been the law in the circuit courts for decades,102 and in 1977 was held to be the law of the land by the Supreme Court in *United States v. Ramsey.*103

**Analysis of the Historical Justification of the Border Search Exception**

Since the justification of the border search exception is historical in nature, two issues are immediately raised: whether Justice Bradley's interpretation of the actions of the first Congress is accurate; and, if so, whether subsequent interpretation of Justice Bradley's analysis is accurate. If the answer to either is no, the historical and, therefore, constitutional justification authorizing the border search exception is called into question.104

It is important to note that Justice Bradley simply took, in a vacuum, the temporal relationship of the two acts of Congress,105 and drew his conclusion,106 without any analytical review of the surrounding circumstances. If the relationship of these acts is to carry any weight, however, they must be viewed in perspective.

100. *Id.* at 153-54 (emphasis added).
104. *See id.* at 616-17. Historical precedent has been recognized as a justification for upholding a long-utilized practice in some circumstances, but has not been permitted to justify unconstitutional acts in others. *See e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967) (long history of warrantless housing inspections does not justify exception to fourth amendment warrant requirement).
105. *See supra* text accompanying notes 92-96.
First, the history of the adoption of the two acts indicates that the passage of the revenue bill, before the Bill of Rights, occurred simply because the new government needed immediate funding.\(^{107}\) The urgency of the need for the revenue bill is evidenced by the response that James Madison received when he proposed the constitutional amendments;\(^{108}\) it was deemed imperative by the other members of the House that the organization and operation of the government not be stayed by what promised to be a long debate on the structure and wording of the proposed amendments.\(^{109}\) This indicates that Congress did not consider whether the methods providing for collection of the import duties were necessarily "reasonable," since the parameters of a reasonable search had not yet been debated.

Second, at the time that the import duty bill—the Act of July 31, 1789—was passed, it was apparent that some constitutional amendments would be proposed.\(^{110}\) Juxtaposing this with the fact that debate on these amendments had not yet taken place, reveals a likelihood that Congress was aware that the subsequent amendments might affect this statute. Thus, while the language of the Act of July 31, 1789\(^{111}\) may indicate Congress' belief in the reasonableness of such searches, it does so only for the point in time of the passage of the statute. Since debate on the parameters of an unreasonable search had not yet occurred, it cannot be said that such searches were considered reasonable by Congress after debate and passage of the Bill of Rights.\(^{112}\) It is logical, rather, to infer that the subsequent debate and passage of the Bill of Rights was implicitly meant to

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\(^{107}\) See supra notes 86-87.

\(^{108}\) See id.

\(^{109}\) Id.

\(^{110}\) While there were protests that James Madison had chosen an inopportune time to introduce the proposed amendments, many of these same protestors acknowledged the need for such amendments. Id. See supra note 80.

\(^{111}\) See supra note 31.

\(^{112}\) The force of this argument is somewhat negated when it is observed that similar provisions were adopted by the Second and Fourth Congresses. See Act of Aug. 4, 1790, ch. 35, §§ 48-51, 1 Stat. 145, 170; Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315; Act of Mar. 2, 1799, ch. 22, §§ 68-71, 1 Stat. 627, 677, 678. It should be observed, however, that import duties were the sole means of raising revenue available to Congress at this time. Thus, the perspective these first congresses brought to enacting these statutes is far different from the perspective that is brought to the use of the border search exception today: First, there are now many other means of raising revenue; and second, the potential for criminal liability has become far greater today than was possible in the latter part of the 18th Century. Thus, what the first congresses may have deemed "reasonable" is far different from what is applicable today.
modify all prior legislation adopted by Congress.\textsuperscript{113}

Third, the \textit{Writs of Assistance Case}\textsuperscript{114} focused attention directly on the power of customs officials to undertake searches without specifying who or what was to be searched or the cause or foundation for the search, and without swearing an oath or affirmation upon application for the writ.\textsuperscript{115} It was these objectionable prerogatives that directly led both to the various states including provisions in their constitutions prescribing a right to be free from unreasonable searches and seizures,\textsuperscript{116} and to the belief that the absence of a similar provision in a federal bill of rights was one reason that the Constitution was fatally flawed.\textsuperscript{117}

In addition, it must be noted that the potential of the necessary and proper clause of the Constitution\textsuperscript{118} was only beginning to be examined.\textsuperscript{119} One of the major arguments against the need for a bill of rights was the belief that unless the Constitution specifically granted authority to act, the federal government was not empowered to do so.\textsuperscript{120} James Madison pointed out, however, that the potential scope of the necessary and proper clause might permit the exercise of unauthorized federal power and, therefore, that a mechanism for controlling the power of the federal government was required.\textsuperscript{121} In light of such concerns, it is difficult to accept that Congress, in passing the Act of July 31, 1789, was authorizing the specific powers of

\begin{enumerate}
\item In United States v. Ross, 102 S. Ct. 2157 (1982), Justice Stevens, writing for the Court, stated: "The legislation [enacted by Congress from 1789 to 1799] authorized customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it concealed goods subject to duty. The same legislation required a warrant for searches of dwelling places." \textit{Id.} at 2162 n.6 (emphasis added) (citations omitted). Such a reading of the first customs statutes is contrary to their past interpretation by the judiciary. \textit{See}, \textit{e.g.}, United States v. Ramsey, 431 U.S. 606, 621-22 (1977). According to the Ramsey Court, the interpretation that probable cause was \textit{not} required for an incoming border search under these statutes has been the justification for the border search exception. Therefore, Justice Stevens's conclusion that these statutes did require probable cause destroys the validity of the exception. Furthermore, Justice Stevens's conclusion appears more historically accurate.

\item Paxton's Case (1761), \textit{in J. Quincy, Reports of Massachusetts Bay, 1761-1772 51.}

\item \textit{See supra} notes 50-67 and accompanying text.

\item \textit{See supra} notes 74-75 and accompanying text.

\item \textit{See supra} notes 76-81 and accompanying text.

\item U.S. Const. art. I, § 8, cl. 18.

\item \textit{See supra} notes 76, 84. For example, if Congress may pass all laws "necessary and proper," it is superfluous to specifically grant Congress the authority to punish counterfeiting of securities and coins as the Constitution does, U.S. Const. art. I, § 8, cl. 6. \textit{See N.B. Lasson, supra} note 50, at 85 n.23.

\item \textit{See} 2 M. FARRAND, \textit{supra} note 76, at 588, 618.

\item \textit{See supra} note 84.
\end{enumerate}
the discredited writs of assistance. It is improbable that Congress would ignore the lessons of recent history\textsuperscript{122} and restore, even in limited circumstances, the power of the writs of assistance with their objectionable prerogatives. It seems more probable that a very qualified grant of power was contemplated, given the history of the writs of assistance and the limited interpretation of the necessary and proper clause acceptable at the time.

Finally, it must be noted that the wording of the fourth amendment, both as proposed by James Madison on June 8,\textsuperscript{123} six weeks before passage of the Act of July 31, 1789, and as accepted by the House drafting committee in late August,\textsuperscript{124} tied the question of reasonableness directly to the issuance of a warrant based upon probable cause.\textsuperscript{125} The House specifically rejected a proposal to amend the wording of the amendment to what we know it to be today.\textsuperscript{126}

122. In addition to the Writs of Assistance Case, the colonists' recent history included a riot that resulted when John Hancock's ship was seized under a writ of assistance for nonpayment of customs duties. N.B. Lasson, supra note 50, at 72. Professor Lasson notes that Hancock's ship was eventually scuttled by an angry mob because of its use by the Crown to carry out seizures of other vessels "on unfounded suspicions." \textit{Id.} at 72 n.71 (emphasis added). This indicates that not only is the fourth amendment's prohibition of unreasonable searches intended to cover homes and personal effects, but also vessels at sea. Furthermore, the Supreme Court has held that the fourth amendment "protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967).

123. Madison's proposed fourth amendment read as follows:
The rights of the people to be secured in their persons; their houses, their papers and their other property, from all unreasonable searches and seizures, \textit{shall not be violated by warrants issued without probable cause}, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

\textit{1 ANNALS, supra note 32, at 452 (emphasis added).}

124. The House debates resulted in the following phraseology:
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, \textit{shall not be violated by warrants issued without probable cause}, supported by oath or affirmation, and particularly describing the places to be searched, or the persons or things to be seized.

\textit{Id. at 783 (emphasis added). See also N.B. Lasson, supra note 50, at 101.}

125. \textit{See supra notes 123-24.}

126. \textit{1 ANNALS, supra note 32, at 783. In the record of the House debates, the motion to change the wording to "and no warrant shall issue" is noted as having "lost by a considerable majority."} \textit{Id.} Professor Lasson notes that the proponent of this rewording, Egbert Benson, was the chairman of the committee later designated to arrange the amendments. Professor Lasson hypothesizes that after Benson failed to get this change adopted by the full House, Benson slipped the reworded amendment into the package his committee reported. N.B. Lasson, \textit{supra note 50}, at 102 n.84. It should be noted that Benson proposed the change because he felt that the accepted language did not go far enough. \textit{1 ANNALS, supra note 32, at 783. Whatever the reason for the mistake, the Senate accepted the wording as Benson proposed it, the House later passed the same version, and this was what was ratified by the states. N.B. Lasson, \textit{supra note 50, at 102-03.}
The Framers, therefore, intended that probable cause be the minimum prerequisite for a reasonable search.127 This indicates, moreover, that the fourth amendment does not establish dual modes for analyzing searches and seizures, with the first clause preeminent over the second.128 Rather, if there is no probable cause, a search is unreasonable.129 To argue otherwise is to eviscerate the warrant requirements spelled out in the second clause.

In light of the foregoing, if Justice Bradley was correct that the Framers believed warrantless searches of incoming vessels were reasonable,130 this belief must have been based upon something more than the nature of the search. Instead, a belief that such searches are reasonable must have been based upon the circumstances of the search—that goods subject to forfeiture are contained in a moveable vessel “where they readily could be put out of reach of a search warrant.”131 Thus, an “exigent circumstances” doctrine was apparently, albeit implicitly, recognized by the first Congress, and later acknowledged by Chief Justice Taft in Carroll v. United States.132 Absent some exigent circumstance, such as a ship that can sail out of port on a moment’s notice, a warrant based upon probable cause is re-

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127. See United States v. Rabinowitz, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting) (historical analysis of fourth amendment results in conclusion that Framers intended probable cause to be minimum prerequisite for reasonable search).


129. See Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring) (“[I]t is by now axiomatic that the Fourth Amendment’s proscription of ‘unreasonable searches and seizures’ is to be read in conjunction with its command that ‘no Warrants shall issue, but upon probable cause.’ ”); Chimel v. California, 395 U.S. 752, 762 (1969) (fourth amendment prescribes heavy reliance upon warrant clause as means of protecting right to be free from unreasonable searches). In the border setting, however, the contention that the two clauses are to be read separately has more force. See infra notes 135-38 and accompanying text.

130. Boyd v. United States, 116 U.S. 616, 623 (1886). Justice Bradley also implies that the fourth amendment does not apply to the Act of July 31, 1789 because it is merely a forfeiture statute and no criminal sanctions apply. Id. Chief Justice Taft utilizes a similar argument in Carroll v. United States, 267 U.S. 132, 154-55 (1925). As Judge Prettyman notes, however, “[t]o say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.” District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949), aff’d on other grounds, 339 U.S. 1 (1950). See Frank v. Maryland, 359 U.S. 360, 376-82 (1939) (Douglas, J., dissenting), overruled by Camara v. Municipal Court, 387 U.S. 523 (1967).


required to make a reasonable search. Exigent circumstances, however, excuse merely the warrant, not the probable cause, requirement.\textsuperscript{133} Thus, a search that is unreasonable is one where probable cause is absent. The \textit{Carroll} Court explicitly recognized this distinction.\textsuperscript{134} Chief Justice Taft, however, carved out for border searches an entirely different exception to the warrant requirement: Incoming travelers may be reasonably searched absent even probable cause.\textsuperscript{135} Chief Justice Taft was applying the historical interpretation of the fourth amendment to searches of automobiles in transit, by reading the amendment’s two clauses together and refusing to permit only the reasonableness test to determine the validity of a search.\textsuperscript{136} According to this historical interpretation, however, when he exempted incoming travelers from the fourth amendment’s probable cause protection, Chief Justice Taft necessarily deprived them of the normally inherent right to be free from unreasonable searches and seizures.\textsuperscript{137} Incoming travelers, under Chief Justice Taft’s analysis, are, therefore, exempt from any of the fourth amendment’s protections.

Since such a result could not have been Chief Justice Taft’s intention, subsequent border search decisions have necessarily done two things. First, they have bifurcated the clauses of the fourth amendment, thereby creating an additional test of warrantless searches and seizures: A search and seizure may be constitutionally permissible, absent even probable cause, so long as it is reasonable.\textsuperscript{138} Second, they have attenuated the requirement of reasonableness based upon the policy consideration enunciated by Chief Justice Taft in \textit{Carroll}.\textsuperscript{139} Moreover, by declaring the basis of the border search exception to be historical, and not exigent, in nature,\textsuperscript{140} the reasonableness of a border search in nearly all circumstances, whether exigent or not, and whether there is probable cause or not, is accepted as fact.\textsuperscript{141} Such a reworking and misapplication of fourth

\textsuperscript{133} Id. at 153-54.
\textsuperscript{134} Id. at 154.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} The fourth amendment is worded so that it affirms, not creates, the right to be free from unreasonable searches. \textit{See supra} note 6.
\textsuperscript{138} \textit{See}, \textit{e.g.}, United States \textit{v}. Villamonte-Marquez, 652 F.2d 481 (5th Cir. 1981), \textit{cert. granted}, 102 S. Ct. 2902 (1982); United States \textit{v}. Asbury, 586 F.2d 973 (2d Cir. 1978); Henderson \textit{v}. United States, 390 F.2d 805 (9th Cir. 1967).
\textsuperscript{139} \textit{See} cases cited \textit{supra} note 48.
\textsuperscript{141} Even the most intrusive examples of border searches have been held reasonable. \textit{E.g.}, Blefare \textit{v}. United States, 362 F.2d 870 (9th Cir. 1966) (search of defendant's stomach by
amendment precepts is an egregious contradiction of the intention of the Framers.

An exemption from the probable cause and warrant requirements makes the judicial task of guarding against excesses carried out by law enforcement officials far more difficult. This is so because searches carried out without judicial supervision, but under the banner of reasonableness, provide little guidance to judges, juries or law enforcement officials.\textsuperscript{142} Without a judicial determination of probable cause in advance of the search, the history and experience that led to the fourth amendment is ignored. Therefore, the safeguards meant to be afforded by the amendment are similarly ignored.

In noting the unique character of the fourth amendment, Justice Jackson once wrote:

Only occasional and more flagrant abuses [of fourth amendment rights] come to the attention of the courts, and then only where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. . . . There may be, and I am convinced that there are, many unlawful searches of . . . innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear. . . .

. . . We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection. . . .

. . . There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.\textsuperscript{143}

Merely because someone or something is entering the country is no reason to dispense with the safeguards ordinarily provided by the fourth amendment. By abdicating responsibility for overseeing

\textsuperscript{142} See, e.g., Blegacy v. United States, 362 F.2d 870 (9th Cir. 1966); cases cited supra note 48.

searches and seizures in the border area, courts ignore the insight of Justice Jackson's observations, in addition to the history of both the amendment and the border search exception themselves. To do so is patently dangerous where there looms the possibility of criminal penalties.\textsuperscript{144} In the context of export or departure searches, this abdication becomes particularly troublesome.\textsuperscript{145}

\textit{Practical Application of Exceptions to Fourth Amendment Requirements}

The border search exception has also been justified from a practical standpoint: It enables customs officials to effectively carry out their duties of preventing contraband from entering the country and collecting duties where appropriate.\textsuperscript{146} Thus, the public policy that calls for the collection of duties and prevention of smuggling necessarily requires a constitutionally permissible technique for achieving acceptable results. It has been argued that no investigatory technique, other than that utilized by customs officials under the aegis of the border search exception, would achieve any, let alone acceptable, results.\textsuperscript{147}

While the Supreme Court has not analyzed the efficacy of searches carried out under the principles of the border search exception, it has analyzed certain administrative searches.\textsuperscript{148} The Court has held that the requirement of a search warrant is not too onerous to inhibit the agencies' functions and purposes.\textsuperscript{149} Administrative

\textsuperscript{144} See infra note 156.
\textsuperscript{145} See infra notes 251-54, 301-12 and accompanying text.
\textsuperscript{146} See United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969):

Realization of customs officials' special problems has resulted not only in the courts' giving the broadest interpretation compatible with our constitutional principles in construing the statutory powers of customs officers . . . but also has resulted in the application of special standards when the legality of a stop, search, and seizure made by a customs official at or near our borders or international port has been challenged.

Id. at 12 (citations omitted).
\textsuperscript{147} Id.
\textsuperscript{149} See, e.g., Camara v. Municipal Court, 387 U.S. 523, 533 (1967) (“The question is not . . . whether [fire, housing and sanitation] inspections may be made, but whether they may be made without a warrant . . . It has nowhere been urged that [these] . . . inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement.”).
search warrants are issued, however, upon a different standard of probable cause than that required in criminal investigations since the particularity and specificity requirements of the fourth amendment are often not able to be satisfied in this context. In Camara v. Municipal Court, a case involving building inspections, for example, the Supreme Court held that the agency need only show that some reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced . . . will not necessarily depend upon specific knowledge of the condition of the particular dwelling. . . . If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.

The Camara Court noted that “nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations.” Since the border search exception is not based on exigent circumstances, this qualification should not have application to border searches. Moreover, the legitimacy of the administrative search depends upon its less intrusive invasion of privacy and the possible imposition of relatively light penalties. In comparison, while the stated “primor-
dial purpose” of the routine border search is to uncover contraband and not to gather evidence for criminal prosecution,157 where the search reveals contraband such as narcotics or weapons, the person searched, along with any conspirators, faces heavy penalties.168 The different standard of probable cause required for issuing administrative search warrants is not, and should not be made, applicable to an area where the possibility of criminal prosecution is likely.169

This difficulty with the lesser probable cause standard of the administrative search has been examined by the courts in other contexts. In United States v. Davis,160 the Ninth Circuit utilized an administrative search rationale to uphold the validity of routine war-

calls for, in addition to forfeiture of any unlawfully imported merchandise, a fine of $10,000, imprisonment for up to five years, or both. 18 U.S.C. § 542 (1976), calls for, in addition to forfeiture of any merchandise introduced into the United States by a fraudulent or false invoice, a fine of $5,000, imprisonment for up to two years, or both, for each item unlawfully imported. See infra note 224. See generally 19 U.S.C. § 1595(a) (1976) (seizure of unlawfully imported goods); 21 U.S.C. § 881 (1976) (forfeiture of narcotics); 22 U.S.C. § 401(a) (1976) (forfeiture of munitions).

As a further comparison, contrast the preceding penalties with those specified in the Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43, the presumed statutory precursor to the border search exception. Boyd v. United States, 116 U.S. 616, 623 (1886). For the text of the Act, see supra note 31. The Act was nothing more than a forfeiture statute; no criminal sanctions were imposed for violation.

157. E.g., Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966), cert. denied, 385 U.S. 977 (1967) (“the primordial purpose of a search by Customs officers is not to apprehend persons, but to seize contraband property unlawfully imported or brought into the United States”).

158. See supra note 156.

159. For an example of how administrative searches can be subverted into a general search for evidence of crime, see United States v. Davis, 482 F.2d 893, 909 n.43 (9th Cir. 1973) (noting that in 1972 over 80% of arrests stemming from airline passenger searches carried out as part of anti-bijacking program were for offenses other than air piracy). While the Davis court was wary of unlimited use of evidence found during airline passenger searches, see infra text accompanying note 164, in border searches there is no question as to the legitimacy of the evidence's admissibility. However, the extent to which the border search can also be utilized as what would ordinarily be considered an unlawful general search was revealed in United States v. Holtz, 479 F.2d 89 (9th Cir. 1973). In his dissenting opinion, Judge Ely noted that 84% of those women stripped and searched at a border crossing during a certain period were not carrying any contraband. Id. at 94 (Ely, J., dissenting). Since the personal intrusion and the expectation of privacy are the same in both the border and airport settings, it is anomalous to allow the policy considerations supporting the search to justify the use of the evidence in one setting and not the other. See infra text accompanying notes 169-73. The broad policy considerations supporting the border search should not legitimize the use of evidence that might be excluded if it were found during a search carried out in a setting with a narrower policy interest, i.e., airline passenger searches. There is no plausible distinction between the interest in preventing air piracy from the interest in preventing the importation of contraband.

160. 482 F.2d 893 (9th Cir. 1973).
rantless searches of persons and luggage boarding an airplane.\footnote{161} The \textit{Davis} court noted that

\begin{quote}
\text{[t]he essence of [the cases validating administrative searches] is that searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched.}\footnote{162}
\end{quote}

The court further noted that “[o]f course, routine airport screening searches will lead to discovery of contraband and apprehension of law violators. This practical consequence does not alter the essentially administrative nature of the screening process, however, or render the searches unconstitutional.”\footnote{163} The court, however, sounded a warning to overzealous officials: “There is an obvious danger . . . that the screening of passengers and their carry-on luggage for weapons and explosives will be subverted into a general search for evidence of crime. If this occurs, the courts will exclude the evidence obtained.”\footnote{164}

The \textit{Davis} court emphasized the fact that air travelers have the option not to board the plane rather than submit to a search.\footnote{165} It is this implied “consent” that makes the search constitutionally permissible and obviates the need for a warrant.\footnote{166} Thus, a “compelled” search “would be [a] criminal [investigation] subject to the warrant and probable cause requirements of the Fourth Amendment.”\footnote{167}

Arguably, people entering the country also “consent” to a search of their person and effects. Nevertheless, there is a significant difference between the two contexts that cuts against the value of the \textit{Davis} analysis in the border setting:\footnote{168} The fundamental purpose in conducting an airport search is relatively narrow—the prevention of

\begin{itemize}
\item \footnote{161. \textit{Id.} at 908-12.}
\item \footnote{162. \textit{Id.} at 908.}
\item \footnote{163. \textit{Id.}}
\item \footnote{164. \textit{Id.} at 909 (citations omitted).}
\item \footnote{165. \textit{Id.} at 910-11.}
\item \footnote{166. \textit{Id.} at 913.}
\item \footnote{167. \textit{Id.} at 911-12.}
\item \footnote{168. The \textit{Davis} analysis is confined to intracontinental flights since for intercontinental flights the border search exception would subsume the more limited purpose airport search. \textit{See supra} note 159. For a discussion of the differences between the airport and border searches, see \textit{infra} text accompanying notes 168-72.}
\end{itemize}
air piracy, therefore, the screening process seeks to detect only a relatively narrow category of items—those that might be used to commit air piracy. The Davis court held that if it is determined that an airport search was conducted on pretext, any evidence of criminal activity obtained during the search, beyond air piracy, will not be permitted to be used against the defendant. In the border setting, however, the purpose of the search is far broader—the confiscation of any contraband or dutiable goods on which no duty has been paid. Such breadth makes subsequent judicial determination that a border search was conducted on pretext almost impossible. Accordingly, the courts have no ability, under a Davis-type test, to curb overzealous customs officials. This is because, under the Davis test, evidence of criminal misdeeds will only be excluded upon a showing that the search was conducted on pretext. The broad purpose for conducting a search in the border setting, however, eliminates the likelihood of proving pretext. As a result, the possibility of suppressing evidence that was obtained under pretext is practically nonexistent.

The Fourth Circuit upholds routine warrantless airport screenings on a different basis. In United States v. Epperson, the court analogized the use of metal detectors to the “stop and frisk” search permitted by the Supreme Court in Terry v. Ohio since “the search [was] for the sole purpose of discovering weapons and preventing air piracy, and not for the purpose of discovering weapons and precriminal events.” The Epperson court reasoned that “the danger [of air piracy] is so well known, the governmental interest so overwhelming, and the invasion of privacy so minimal, that the warrant requirement is excused by exigent national circumstances.” Thus, the search “is reasonably related in scope to the circumstances which justified the interference in the first place.”

In Terry, however, the justification for the “stop and frisk”

169. See Davis, 482 F.2d at 908.
170. See id.
171. Id. at 909.
172. See supra notes 2-4, 26-28, 157 and accompanying text.
173. 482 F.2d at 909.
175. 392 U.S. 1 (1968).
176. Epperson, 454 F.2d at 771.
177. Id.
178. Id. (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).
search was primarily the police officer's self-protection. Moreover, the right to conduct such a search was dependent upon the officer's possession of specific, articulable facts sufficient to satisfy a reasonably prudent person that the individual is in fact armed and dangerous. Additionally, the frisk "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." Thus, the officer is entitled only "to conduct a carefully limited search of the outer clothing of . . . [legitimately stopped persons] in an attempt to discover weapons which might be used to assault him."

Such a rationale obviously fails in most border settings. Border searches are conducted on an indiscriminate basis and cover more than the area immediately accessible to the entrant. Moreover, in most border searches, the safety of the customs official and those nearby is rarely at issue. The rationale for a Terry search is, therefore, absent.

In the Fifth Circuit, routine warrantless searches of persons at airline boarding gates are upheld upon yet another rationale. In United States v. Skipwith, the court of appeals directly analogized airport searches to border searches. After balancing the necessity of the search in terms of the possibilities of harm to the public from air piracy, the "likelihood that the search will be effective in averting the potential harm," and the degree and nature of the intrusion into the privacy of the traveler's person and effects which the search entails, the court concluded "that the standards for initiating a search of a person at the boarding gate should be no more stringent than those applied in border crossing situations." Air travelers are, therefore, "subject to a search based on mere or unsupported suspicion."

The Skipwith court was concerned, however, as was the Davis

179. Terry, 392 U.S. at 29.
180. Id. at 20-24.
181. Id. at 27.
182. Id. at 26.
183. Id. at 30.
184. 482 F.2d 1272 (5th Cir. 1973).
185. Id. at 1275.
186. Id.
187. Id.
188. Id.
189. Id. at 1276.
190. Id.
court, with the possibility of airport searches becoming a pretext for more general searches of criminal culpability. The concurring judge was in favor of the dissent’s proposition that to prevent potential abuse, contraband other than that which could be used to commit air piracy—the purpose for the search—should not be used as evidence against the traveler. The Fifth Circuit’s practice of strict adherence to precedent, however, was cited in the concurrence as the reason this rule was not being adopted. Of course, as stated earlier, the broad purpose and scope of border searches would nullify the intended benefits of such a rule. Since it is unlikely that a border search could be shown to have been conducted on pretext, any such rule excluding evidence of criminal misdeeds discovered during a border search, though based on a legitimate desire to prevent searches that abuse fourth amendment rights, would be of no practical consequence.

A Suggested Resolution

The foregoing analyses do not mean that all evidence uncovered during a border search must be admissible against the entrant. It is quite possible to fashion a rule that permits customs officials sufficient discretion in performing their duties, while, at the same time, affording some protection for the individual’s right to privacy.

Disinterested judicial review of the facts is the citizen’s usual protection from overzealous and emotionally involved law enforcement officials; for this reason, the Framers included the warrant requirement in the fourth amendment. This protection should not be wholly discarded merely because someone or something is entering the country. If it is, customs officials are left with unbridled discretion and authority. Instead, the judiciary should, as the fourth amendment requires, retain some degree of supervision over searches

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191. United States v. Davis, 482 F.2d 893 (9th Cir. 1973).
192. 482 F.2d at 1279 (Simpson, J., concurring); id. at 1280-81 (Aldrich, J., dissenting).
See supra text accompanying notes 164, 171.
193. 482 F.2d at 1280-81 (Aldrich, J., dissenting).
194. Id. at 1279 (Simpson, J., concurring).
195. Id. (Simpson, J., concurring). According to the Skipwith court, United States v. Moreno, 475 F.2d 44 (5th Cir. 1973), and United States v. Legato, 480 F.2d 408 (5th Cir. 1973), approve the use of any contraband discovered in an airport search conducted for air piracy purposes, as the basis for conviction of possession of the contraband. 482 F.2d at 1278; id. at 1279 (Simpson, J., concurring).
196. See supra notes 157, 172 and accompanying text.
198. Id.
and seizures. In the case of a routine border search, no more than "mere suspicion" should be required since the intrusion is minimal in comparison to the significant governmental interest. In contrast, any search other than routine—be it of a person's body, a sealed container, or whatever—crosses the threshold of significant governmental intrusion on privacy. At that point, the ordinary probable cause standard should apply, requiring the official to articulate, before the search, specific facts as to why a search should be conducted. If the official fails to do this, exclusion of any culpatory evidence is the only remedy. In certain circumstances, a warrant may even be easily obtainable. For example, a warrant may be procured by telephone, a container could be impounded or a person easily followed, while the facts are presented to an impartial magistrate.

The scope and consequences of the border search have broadened considerably over that envisioned by the first Congress, when it, arguably, exempted incoming goods from fourth amendment protection. As a result, there is a need to place the threshold for warrantless border searches at a standard higher than simple reasonableness. Given the possibility and severity of criminal penalties resulting from evidence discovered during border searches, fourth amendment protection in the form of probable cause as the minimum requirement for a border search is a must.

199. "Routine" is the normal superficial examination of persons, baggage and containers. See United States v. Asbury, 586 F.2d 973, 975 (2d Cir. 1978).


201. The exclusionary rule, see Weeks v. United States, 232 U.S. 383, 398 (1914), is a concept designed to deter law enforcement officials from breaching the constitutional rights of citizens, because the fourth amendment would be of little value "[i]f letters and private documents [could] . . . be seized and held and used in evidence against a citizen accused of an offense." Id. at 393.

The exclusionary rule has, since its inception, been criticized. E.g., People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.) ("[S]hall the criminal . . . go free because the constable has blundered?"). The Supreme Court has called for reargument during the 1982 term in Illinois v. Gates, 51 U.S.L.W. 3415 (U.S. Nov. 30, 1982) (No. 81-430), to decide whether there should be a good faith exception to the exclusionary rule. The commentators on the rule are numerous. See sources cited in J.W. Hall, Jr., supra note 101, at § 20.1.


205. See supra text accompanying notes 92-103.

206. See supra note 156.
THE EXPORT SEARCH AS PART OF THE BORDER SEARCH EXCEPTION

In contrast to the rules governing incoming or import searches, probable cause has generally been a requirement for warrantless export or departure searches conducted by customs officials.207 In United States v. Ajlouny,208 however, the Second Circuit held that a container located on a pier, within a customs area, and marked for shipment abroad, was amenable to a routine border search absent even reasonable suspicion.209 In so holding, the court of appeals, despite its denial to the contrary,210 made new law founded upon dictum,211 inapposite cases,212 and a misreading of prior holdings.213 To compound the error, the court undertook neither an analysis of the basis of the border search exception, nor how the export search could be considered akin to the import search and, therefore, within the ambit of the border search exception.

The Facts of Ajlouny

In the spring of 1978, Paul Ajlouny resigned his position as vice-president of the Kinney Mechanical Maintenance Division of the National Kinney Corporation, to enter into a joint venture in the Middle East with National Kinney.214 In early April, customs officials began an investigation of Ajlouny, based upon information provided by the New York Telephone Company, as to alleged illegal use of a “blue box”215 to make calls abroad.216 As part of their surveil-

207. See United States v. Marti, 321 F. Supp. 59, 63 (E.D.N.Y. 1970); People v. Esposito, 37 N.Y.2d 156, 159-60, 332 N.E.2d 863, 865-66, 371 N.Y.S.2d 681, 684-85 (1975); supra notes 35-38 and accompanying text; see also Samora v. United States, 406 F.2d 1095, 1098 (5th Cir. 1969) (customs officials “were entitled to detain [defendant’s] car, make a reasonable search and seize the [contraband],” since search was based on probable cause). Contra United States v. Stanley, 545 F.2d 661, 667 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978) (emphasizing similarity of purpose, rationale and effect, between incoming and outgoing border crossing searches); see infra text accompanying notes 285-93.


209. Id. at 834-35.

210. The court insisted that it was simply following precedent within the circuit. Id. at 834 & n.3. But see infra text accompanying notes 259-300.

211. See infra note 284 and accompanying text.

212. See infra text accompanying notes 282-84.

213. See infra text accompanying notes 259-300.

214. Brief for Appellant at 3, United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980).

215. "[A] blue box is a device that simulates tones used by the telephone company, thereby permitting long-distance calls to be made without generating any records and hence without incurring charges." Ajlouny, 629 F.2d at 832 n.1. The indictment filed against Ajlouny charged one count of transportation of stolen property in foreign commerce, see infra
lance of Ajlouny, two customs officials observed him and others apparently under his supervision, loading a twenty foot cargo container in the public parking lot of a shopping center.217 The customs officials learned that the container, leased by Ajlouny, was to be loaded from a pier in Brooklyn, New York, onto a steamship bound for Doha, Qatar on April 17.218 On Friday, April 14, the container was moved by truck to the Brooklyn pier so that it could be loaded onto the steamship the following Monday.219

On the morning of April 17, the customs officials proceeded to the Brooklyn pier, determined that the container was ready for loading on board the steamship, and, admittedly, without probable cause,220 broke into it, removing the contents to the Customs House seizure room.221 The bulk of the contents of the container included industrial cleaning equipment, tools, books, golf clubs and other per-

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note 224 and accompanying text, and 136 counts alleging violations of 18 U.S.C. § 1343 (1976), the wire fraud statute, due to the alleged illegal use of a blue box. The jury was unable to reach a decision on the wire fraud charges, and a mistrial was declared on those counts. 

Brief for Appellant, supra note 214, at 1-2; see Brief for Appellee at 8, United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980).

216. 629 F.2d at 832-33. See Brief for Appellee, supra note 215, at 8.

217. Brief for Appellant, supra note 214, at 4; Brief for Appellee, supra note 215, at 9; see 629 F.2d at 833.

218. Brief for Appellee, supra note 215, at 9; see 629 F.2d at 833.


220. Brief for Appellant, supra note 214, at 4; see 629 F.2d at 833. The Government contended, and the court apparently gave weight to the fact, that Ajlouny had lied on the shipping documents when he claimed the container’s contents was air conditioning equipment. The Government contended that Ajlouny had no apparent reason for shipping air conditioners to Qatar. Brief for Appellee, supra note 215, at 10 n.*. Such a contention ignores the fact that Ajlouny’s position with National Kinney encompassed the supervision of air conditioning units in various commercial buildings and that he had resigned this position to enter into a joint venture with National Kinney in the Middle East. See Brief for Appellant, supra note 214, at 2-3. This contention by the Government would, therefore, appear to buttress Ajlouny’s claim that the customs agents lacked probable cause to search the container. The court of appeals, however, in its statement of the facts, reiterated that the shipping documents indicated that the contents of the container was supposed to be air conditioning equipment, and that the subsequent search did not reveal any such equipment. 629 F.2d at 833. If there was admittedly no probable cause, the court should not have found it necessary to infer that the customs agents had some basis for searching the container, however inaccurate or incorrect this basis may have been. It appears that the court may be inferring that it was reasonable for the agents to conduct the search. The reasonableness of a border search, however, is purportedly the fact that someone or something is crossing the border; customs officials, therefore, need not have any other basis for conducting the search. See cases cited supra note 11. The court may have been troubled by its own extension of the border search exception to export searches and, therefore, implicitly relied upon the impression that these agents had some basis for conducting the search.

221. Brief for Appellant, supra note 214, at 4; see 629 F.2d at 833.
sonal effects which were eventually returned to Ajlouny. The customs officials, however, also discovered teletype and telephone equipment, and retained custody of this claiming that it was stolen property.

Later that day, the customs agents obtained an arrest warrant charging Ajlouny with transporting stolen merchandise in foreign commerce, in violation of 18 U.S.C. § 2314. Prior to trial, Ajlouny moved on fourth amendment grounds to suppress all evidence obtained from the search of the container. The motion was denied and the evidence was introduced. After a jury trial in the United States District Court for the Eastern District of New York, Ajlouny was found guilty. He appealed, contending that the search of the container was conducted without a search warrant, probable cause or even reasonable suspicion and was, therefore, unlawful under the fourth amendment. The Government, while conceding that the search was not based on probable cause, contended nevertheless that the border search exception applied to the search of Ajlouny's container and that probable cause was not required. In a unanimous decision, the Second Circuit affirmed the conviction, holding that a container located on a pier, within a customs area, and marked for shipment abroad was amenable to a routine border search; although even reasonable suspicion was lacking, the imminent crossing of the border, by itself, made the search reasonable and, therefore, was not violative of Ajlouny's fourth amendment rights.

223. Id.; Brief for Appellee, supra note 215, at 10; see 629 F.2d at 833.
224. Brief for Appellee, supra note 215, at 11. 18 U.S.C. § 2314 (1976) reads, in relevant part: "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both."
226. Id. at 1004; see 629 F.2d at 833.
227. 629 F.2d at 832. Ajlouny was sentenced to two years in jail and fined $10,000.
228. 629 F.2d at 833.
229. Id.
230. Id. at 834.
231. Id. at 834-35. Certiorari to the United States Supreme Court was denied. 449 U.S. 1111 (1981).
Analysis of Ajlouny

In denying Ajlouny's motion to suppress the evidence seized from the search of the container, the court of appeals reasoned as follows: The border search exception permits routine searches of incoming persons and their effects absent probable cause;232 recent Supreme Court dictum condones the routine warrantless search of outgoing persons and their effects as not violative of fourth amendment rights;233 an earlier Second Circuit decision, relying in part upon this dictum, held "squarely that the border search exception applies to items leaving as well as entering the country,"234 and since the "application of the border search exception depends upon the nexus between goods and a border crossing, regardless of the circumstances under which the property . . . will move across the border,"235 there was an appropriate nexus under the circumstances of this case to include the search of Ajlouny's container within the ambit of the border search exception.236 There are, however, significant problems with each step of this reasoning process.

First, an argument can be made against the historical justification for the validity of the border search exception itself.237 Assuming, however, that the historical basis is valid, legislative history238 and case law239 indicate that this justification is exclusively concerned with goods or people coming into the country. The first revenue statute240 was concerned with the collection of duties on dutiable imports.241 Export or departure searches are nowhere mentioned in the Act of July 31, 1789242 or the House debates on this subject.243 In Boyd v. United States,244 Justice Bradley was concerned with showing that the warrantless search for and seizure of goods subject

232. 629 F.2d at 833-34.
233. Id. at 834 (citing California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974)). See infra note 284.
234. 629 F.2d at 834 (citing United States v. Swarovski, 592 F.2d 131 (2d Cir. 1979)). See infra text accompanying notes 259-300.
235. 629 F.2d at 834.
236. Id.
237. See supra text accompanying notes 104-29.
238. 1 ANNALS, supra note 32, passim.
241. 1 ANNALS, supra note 32, passim.
242. For the text of the Act, see supra note 31.
243. 1 ANNALS, supra note 32, passim.
244. 116 U.S. 616 (1886).
to duty was considered reasonable by the first Congress. Export or departure searches were not determinative in his analysis. In *Carroll v. United States*, Chief Justice Taft sought to demonstrate how exigent circumstances might permit waiver of the warrant requirement so long as probable cause was present. His dictum as to the permissibility of searching international travelers relates explicitly to those persons coming into the country. Moreover, Chief Justice Taft specifically excluded persons and goods already in the country from the exception, on the explicit basis that searches in that situation would be unreasonable. Thus, even if the historical argument for the validity of the border search exception is accepted, its original proponents were explicitly concerned only with imports. It is fundamentally implausible to extend a rule which has history as its primary justification to an area in which that history is irrelevant.

Second, the “primordial purpose” of the border search exception is to seize contraband or dutiable imports on which no duty has been paid—not to gather evidence of criminal misconduct against the person searched. In an export search, however, the gathering of evidence must obviously be the primary consideration since the governmental interest in keeping contraband out of the country is unquestionably irrelevant in this circumstance. The *Ajlouny* court’s summary conclusion that it need only look at the “nexus between goods and a border crossing” fails to provide any analysis or propound any other governmental interest which might support the application of the border search exception to export searches.

It is this gathering of evidence of criminal culpability that distinguishes export searches, as exemplified by *Ajlouny*, from routine incoming border searches. For example, in *Ajlouny*, the goods in question were telephone communications equipment, lawfully available throughout the world. When the customs service seized the equipment, they were not concerned with what the goods were; they

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245. *Id.* at 623. See *supra* text accompanying note 93.
247. *Id.* at 153-54.
248. *Id.* at 154. See *supra* text accompanying note 100.
249. 267 U.S. at 154. See *supra* text accompanying note 100.
252. *Id.*
253. See *supra* text accompanying notes 35-41.
254. 629 F.2d at 834.
255. *Id.* at 833.
were only concerned that the equipment was allegedly stolen. In a routine import search, however, the customs official is looking at what the goods actually are. In Aijouny, the search was not even routine, because the customs agents had been observing the container for more than ten days. If there was a reasonable suspicion that a criminal offense had been, was being, or was about to be, committed, then a search warrant would have undoubtedly been authorized during those ten days. Since, however, the Government conceded that there was no probable cause to support a warrant, the search at the Brooklyn pier could only have been intended to find such evidence.

Third, United States v. Swarovski, the authority cited by the Aijouny court as holding "squarely" that the border search exception applies to export as well as import searches, did not, upon close analysis, do so. In Swarovski, the existence of probable cause for the warrantless search was conceded by all the parties. Swarovski only concerned the question of whether a warrantless export search was reasonable under the unique circumstances of that particular case. The existence of probable cause was never in dispute.

In Swarovski, the defendant was attempting to export a camera designed to be used as a gunsight camera in a military fighter plane. Exporting such an item required a State Department export license; Swarovski’s company was so advised when it ordered the camera. On the appropriate form, Swarovski’s representative stated that Austria was to be the camera’s final destination. When the State Department refused to issue the license without further information as to the ultimate consignee, Swarovski’s representative had the camera

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256. See Brief for Appellant, supra note 214, at 4; Brief for Appellee, supra note 215, at 10.

257. See supra text accompanying note 146.

258. Brief for Appellant, supra note 214, at 4; Brief for Appellee, supra note 215, at 9-10.

259. 592 F.2d 131 (2d Cir. 1979).

260. Aijouny, 629 F.2d at 834.

261. This argument was made by Aijouny. See Brief for Appellant, supra note 214, at 36-40.

262. See Brief for Appellant at 18, United States v. Swarovski, 592 F.2d 131 (2d Cir. 1979) (“[I]t is undisputed that the agents had probable cause . . . as early as two weeks before [Swarovski’s] arrest.”). See infra text accompanying notes 264-72.

263. Swarovski, 592 F.2d at 133.

264. Id. at 132.

265. Id.
shipped to the company's headquarters in Tennessee.\textsuperscript{266} This obviated the license' requirement.\textsuperscript{267} The manufacturer, however, suspected that the camera was still destined for Austria. Accordingly, it notified customs officials who, with Postal Service cooperation, continuously monitored the shipment on its way to Swarovski in Tennessee.\textsuperscript{268} After receiving the camera, Swarovski traveled to New York and booked passage on a flight to Germany.\textsuperscript{269} When he failed to check in, customs officials determined that he had checked in on another overseas flight on Pan American Airways, whereupon the agents searched his baggage, found the camera, and arrested him.\textsuperscript{270} The district court judge found that

although warrantless, [the Customs official’s] seizure and search of Swarovski’s bags in the baggage area of JFK Airport . . . was a valid and reasonable search and seizure . . . based as it was on probable cause to believe that the bags contained a special purpose military camera about to be exported in violation of federal law.\textsuperscript{271}

In upholding Swarovski’s conviction, the court of appeals held that

[t]he warrantless searches of appellant’s luggage as he was about to depart the country did not violate his Fourth Amendment rights . . . Appellant’s contention that customs officials can make such a search only when the person whose effects are being searched is entering the United States is not the law.\textsuperscript{272}

Review of the authorities that the Swarovski court relied upon to support this contention\textsuperscript{273} reveals the court’s limited examination

\begin{itemize}
  \item \textsuperscript{266} United States v. Swarovski, 557 F.2d 40, 42 (2d Cir. 1977), cert. denied, 434 U.S. 1048 (1978). This earlier appeal concerned the question of whether New York law permitted Swarovski’s arrest by customs officials. The arrest was held valid and Swarovski pleaded guilty to violating export laws while reserving by stipulation his right to appeal the conviction. The later appeal, the one we are concerned with here, attacked the validity of the warrantless search of his luggage.
  \item \textsuperscript{267} Id.
  \item \textsuperscript{268} Id.
  \item \textsuperscript{269} Id.
  \item \textsuperscript{270} Id.
  \item \textsuperscript{271} Id. (emphasis added).
  \item \textsuperscript{272} Id. at 133 (emphasis added) (citations omitted).
  \item \textsuperscript{273} Id. (citing California Bankers Ass’n v. Shultz, 416 U.S. 21 (1974); United States v. Asbury, 586 F.2d 973 (2d Cir. 1978); United States v. Stanley, 545 F.2d 661 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978); Samora v. United States, 405 F.2d 1095 (5th Cir. 1969); United States v. Chabot, 193 F.2d 287 (2d Cir. 1951); 22 U.S.C. § 401(a) (1976)).
\end{itemize}
and analysis. These authorities included *United States v. Asbury*, which upheld a warrantless search of an incoming person because the search was based on probable cause; \(^{274}\) 22 U.S.C. § 401(a), \(^{276}\) which courts have expressly requires probable cause to conduct a warrantless search; \(^{277}\) *United States v. Chabot*, \(^{278}\) which found "sufficient cause" to authorize a more thorough search of an automobile being taken out of the country where the automobile was in an obvious state of disrepair, was heavily weighted down in the rear without any apparent cause, and had fenders that sounded peculiar when tapped; \(^{279}\) *Samora v. United States*, \(^{280}\) where the court found there was probable cause to believe that arms were intended for export in violation of federal laws, thus upholding a warrantless search

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\(^{274}\) 586 F.2d 973 (2d Cir. 1978).

\(^{275}\) Id. at 976-77.

\(^{276}\) 22 U.S.C. § 401(a) (1976) provides:

Whenever an attempt is made to export or ship from or take out of the United States any arms or munitions of war or other articles in violation of law, or whenever it is known or there shall be probable cause to believe that any arms or munitions of war or other articles are intended to be or are being or have been exported or removed from the United States in violation of law, the Secretary of the Treasury, or any person duly authorized for the purpose by the President, may seize and detain such arms or munitions of war or other articles and may seize and detain any vessel, vehicle, or aircraft containing the same or which has been or is being used in exporting or attempting to export such arms or munitions of war or other articles. All arms or munitions of war and other articles, vessels, vehicles, and aircraft seized pursuant to this subsection shall be forfeited.

\(^{277}\) E.g., *United States v. Marti*, 321 F. Supp. 59, 63 (E.D.N.Y. 1970). See also *Samora v. United States*, 406 F.2d 1095, 1098 (5th Cir. 1969) ("Under 22 U.S.C.A. § 401 the customs agents were entitled to detain the car, make a reasonable search and seize the arms. . . . There was probable cause to believe that arms were intended to be exported or taken out of the United States.") (citations omitted). Though the language of § 401 speaks only of seizures, it has been held to implicitly authorize searches as well. *Id.; Marti*, 321 F. Supp. at 63.

In *Ajlouny*, the court acknowledged that § 401 requires probable cause to conduct seizures, but did not agree that § 401 requires probable cause for a search. 629 F.2d at 835-36. But see *id.* at 835 n.5 (dictum that structure of statute may permit reading that even certain seizures do not require probable cause). More importantly, the *Ajlouny* court indicated that a routine border search is not covered by the probable cause requirement of § 401. *Id.* at 836. If this is so, the border search exception may not only be used to thwart traditional constitutional protections, but may also be employed to circumvent specific statutory requirements. This raises serious questions concerning separation of powers that are beyond the scope of this article.

\(^{278}\) 193 F.2d at 287 (2d Cir. 1951).

\(^{279}\) *Id.* at 290-91. The *Chabot* court cited 22 U.S.C. § 401 (1976) in noting that no search warrant was required to search Chabot's car. 193 F.2d at 291. This indicates that even though the court spoke of "reasonable cause," the standard it was establishing was akin to the probable cause standard set out in § 401.

\(^{280}\) 406 F.2d 1095 (5th Cir. 1969).
of departing travelers;\textsuperscript{281} and \textit{California Bankers Ass'n v. Shultz},\textsuperscript{282} which is totally inapposite in that it deals with statutory reporting requirements in foreign financial transactions.\textsuperscript{283} The \textit{Ajlouny} court itself noted that the authority of \textit{California Bankers Ass'n} was dictum.\textsuperscript{284}

\textit{United States v. Stanley}\textsuperscript{285} is the only authority that \textit{Swarovski} cited in which a court upheld a warrantless search despite finding insufficient probable cause for what was claimed to be an export search.\textsuperscript{288} \textit{Stanley}, however, is more amenable to a traditional import border search analysis. In \textit{Stanley}, the defendants were charged with illegally \textit{importing} marijuana after an apparently aborted attempt to dock and remove the contraband at a pier.\textsuperscript{287} The defendants were apprehended, however, as they were leaving United States territorial waters. Because it did not appear that the defendants had entered the United States from international waters before heading out again,\textsuperscript{288} the court felt obliged to extend the border search exception to cover export or departure searches.\textsuperscript{289} It has been theorized that

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\textsuperscript{281} Id. at 1098.
\textsuperscript{282} 416 U.S. 21 (1974).
\textsuperscript{283} Id. at 30-44.
\textsuperscript{284} 629 F.2d at 834. In \textit{California Bankers Ass'n}, the Court stated:

\begin{quote}
Of primary importance . . . is the fact that the information required by the foreign reporting requirements pertains only to commercial transactions which take place across national boundaries. Mr. Chief Justice Taft, in his opinion for the Court in \textit{Carroll v. United States}, 267 U.S. 132 (1925) observed:

"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." \textit{Id.}, at 154.

This settled proposition has been reaffirmed as recently as last Term. . . . If reporting of income may be required as an aid to enforcement of the federal revenue statutes, and if those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment, we see no reason to invalidate the Secretary's regulations here.
\end{quote}

\textsuperscript{285} 416 U.S. 62-63. Note that this dictum relies upon Chief Justice Taft's further dictum concerning persons entering the country. Chief Justice Taft makes no mention of searching those leaving the country.

\textsuperscript{286} 545 F.2d 661 (9th Cir. 1976), \textit{cert. denied}, 436 U.S. 917 (1978).
\textsuperscript{287} Id. at 667.
\textsuperscript{288} Id. at 663-64.
\textsuperscript{289} Id. at 664-65. The facts indicated that the defendant's ship entered the harbor at midnight and left the following morning. \textit{Id.} at 664.

\textsuperscript{289} The district court determined that there was insufficient evidence to warrant a finding that the defendant's boat had recently entered United States territory from international waters. \textit{Id.} Ordinarily, a border crossing must be demonstrated by more than reasonable suspicion or probable cause. \textit{United States v. Niver}, 689 F.2d 520, 526 (5th Cir. 1982). Instead, there must be a showing of "reasonable certainty," \textit{Id.} (quoting \textit{United States v. Ivey}, 546
because of the resemblance to a traditional incoming search, "the court may have assumed that the case involved more important government interests than a strictly outgoing search." This is because of the traditional incoming searches, the search involved more important government interests than a strictly outgoing search.

Whatever the reason, the Stanley court, even while noting that "[n]o case had been found" where the border search exception was applied to an exit search, unnecessarily made a sweeping extension of the border search exception. Additionally, the existence of probable cause here was a close question; one member of the three judge panel felt there was probable cause to conduct the search.

The precedents relied upon by the Swarovski court in concluding that a warrantless export search may be constitutionally valid—a statute that requires probable cause, three cases where probable cause was found, one case that should not be considered an export search and where probable cause was also a close question, and inapposite Supreme Court dictum—coupled with the fact that probable cause was not at issue, makes it clear that Swarovski


291. 545 F.2d at 665.

292. The Stanley court could have easily determined that the customs officials had a reasonable certainty that the defendant's ship had entered the United States from abroad, based on the facts that it had foreign markings, was rigged for conditions not found where the ship was stopped, and was the only ship in the area that had never been seen before. Id. at 663-64. While this might be considered stretching the concept of "reasonable certainty," this is surely preferable to extending the border search exception to export searches when defendants are charged with unlawfully importing contraband. See supra note 289. See also Recent Development, supra note 290, at 1654:

The rule in Stanley should have been that customs agents may conduct border searches upon reasonable belief that a ship recently has crossed from international into territorial waters without completing entry into the United States. . . [A]n outgoing border crossing should not suspend the government's right to search within customs waters as long as the connection with the original inward crossing remains.

293. 545 F.2d at 667 (Kilkenny, J., concurring).


295. United States v. Ashbury, 586 F.2d 973 (2d Cir. 1978); Samora v. United States, 406 F.2d 1095 (5th Cir. 1969); United States v. Chabot, 193 F.2d 287 (2d Cir. 1951). See supra text accompanying notes 274-75, 278-81.


298. See supra text accompanying notes 261-72.
determined only the validity of a warrantless export search. The Ajlouny court's conclusion that Swarovski authorizes export searches on less than probable cause is a thorough misreading of it and prior case law.

The Ajlouny opinion is inherently wrong because it begins with an incorrect premise—export and import searches are the same because they are supported by similar policy considerations—and then compounds this error by applying inapplicable case law in an attempt to support this premise. The illogic of the Ajlouny opinion is apparent. Ordinarily, law enforcement officials are no more permitted to use pretext to avoid fourth amendment constraints than they are able to rely upon an exigency that could be easily avoided. The fact that Ajlouny's outgoing container had been

299. See Brief for Appellant, supra note 214, at 36-38. The Ajlouny court claimed it could read Swarovski as broadly as it did, because Swarovski upheld a warrantless export search without discussing exigent circumstances. Ajlouny, 629 F.2d at 834 n.3. The Ajlouny court construed this omission to mean that Swarovski implicitly held that "probable cause is no more required for a departure search than is a warrant." Id. A discussion of exigent circumstances in Swarovski would only have been necessary, however, had the issue of probable cause been in dispute. Instead, Swarovski was attacking the validity of a warrantless export search, conceding the fact that probable cause existed. He contended that probable cause had existed for two weeks prior to the search in question, a search warrant should have been obtained during these two weeks, and the failure to do so made the search invalid. Brief for Appellant at 18-34, United States v. Swarovski, 592 F.2d 131 (2d Cir. 1976). The district court had held, however, that because Swarovski might never have left the country and, therefore, would not have violated the export license laws, probable cause did not arise until it became clear that he was attempting to leave, i.e., when he arrived at the airport for an overseas flight. United States v. Swarovski, No. 75-795, slip op. at 28 (E.D.N.Y. Nov. 5, 1976). It was the exigency of the impending flight from the country, coupled with the existence of probable cause, that made the search in Swarovski valid. Id. Swarovski conceded as much when he argued that the search was invalid, not because there was no unanticipated exigency but because probable cause had existed for two weeks before the search and a warrant had not been obtained. The district court's holding that probable cause arose at the airport disposed of the question of the validity of the search. The court of appeals agreed that the warrantless search was valid. 592 F.2d at 133. It requires a disingenuous reading of Swarovski to hold that its failure to discuss exigent circumstances permits an export search on something less than probable cause.

300. 629 F.2d at 834 & n.3.
301. See supra text accompanying notes 238-58.
302. See supra text accompanying notes 259-300.
304. Nelson v. State, 609 P.2d 717, 719 (Nev. 1980) ("The police may not . . . create the emergency situation which they advance as the predicate for their warrantless entry."); see also United States v. Ross, 102 S. Ct. 2157, 2180 (1982) (Marshall, J., dissenting) ("[P]olice . . . cannot rely on an exigency that they could easily have avoided.").
brought into contact with a border was a mere pretext for rendering the border search exception applicable; there was no nexus between the search and the border—merely a coincidence. If a search is impermissible when conducted inland, as the search in Ajlouny would have been, it should not be transformed into a permissible one at the border, absent some exigent circumstance coupled with probable cause. The imminent crossing of the border may satisfy the exigency requirement, but it should not be used as a pretext for applying the border search exception. If probable cause is not present for a search, then it should not be waived as a requirement when the item to be searched reaches the border.

Requiring probable cause is reasonable since it would not lead to practical difficulties of law enforcement and would protect the traveler’s reasonable expectation of privacy. Unless a person gives law enforcement officials probable cause to believe that a criminal offense has occurred, is occurring, or is about to occur, that person should not lose the right to proceed on his or her way without official interference. Prosecutorial expediency, by itself, has never been a sufficient justification for the deprivation of constitutional rights. Ajlouny, however, stands for just such a proposition. When the court’s opinion is stripped to its essentials, prosecutorial expediency is all that remains. Given the inability to secure advance pro-

305. It is indisputable that, absent the connection with the border, the search of Ajlouny’s container would have been invalid. See, e.g., Katz v. United States, 389 U.S. 347, 357 (1967) (“searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions” (citations omitted)).

306. See supra text accompanying notes 202-04. If exigencies do not permit obtaining a warrant, probable cause will provide a basis for permitting the law enforcement official to secure the object of the search. See, e.g., United States v. Chadwick, 433 U.S. 1 (1977) (lawfulness of seizure of locked footlocker assumed; however, warrantless search of contents impermissible).

307. Probable cause provides a basis for judicial evaluation of the law enforcement official’s action. See supra text accompanying notes 142-44.

308. See, e.g., Mincey v. Arizona, 437 U.S. 385, 393 (1978) (“the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment”). See also United States v. Ross, 102 S. Ct. 2157, 2181 n.13 (1982) (Marshall, J., dissenting) (“Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most ‘efficient’ form of government?”); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (“The needs of law enforcement stand in constant tension with the Constitution’s protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.”).

309. See supra text accompanying notes 238-300.
tection from abuse of fourth amendment rights.\textsuperscript{310} Prosecutorial expediency is a particularly dangerous justification for encroaching on such rights. And yet, after Ajlouny, any person leaving the country may be stopped and have his or her person and effects searched, for no reason whatsoever.\textsuperscript{311} Such arbitrary power is, in the words of Chief Justice Taft, “intolerable and unreasonable”\textsuperscript{312} in the face of fourth amendment prohibitions.

CONCLUSION

Exploratory searches of outgoing persons or goods at the border have no more validity than if the same search were to occur inland. Whatever validity the import search exception has, its justification is not automatically applicable to export searches. Whatever governmental interest exists for keeping certain goods out of the country, it is not the same as that for keeping some goods inside the country. Given the broad purpose for conducting a border search,\textsuperscript{313} United States v. Ajlouny\textsuperscript{314} brings us full circle to the Writs of Assistance Case,\textsuperscript{315} when James Otis, Jr. characterized the writ of assistance as the worst instrument of arbitrary power because it “placed the liberty of every man in the hands of every petty officer.”\textsuperscript{316} Ajlouny resurrects this arbitrary power, a power so hated that its existence contributed to America’s fight for independence.\textsuperscript{317}

The Supreme Court once issued a prophetic warning about the fourth amendment: “[This amendment] should receive a liberal construction, so as to prevent stealthy encroachment upon or ‘gradual depreciation’ of the rights secured by [it], by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers.”\textsuperscript{318} Just such an encroachment has begun in the area of export searches, for which there is no valid support. Prosecutorial expediency has never justified such an egregious withering of constitutional protections. It should not be permitted to do so now.

\textit{Harris J. Yale}

\textsuperscript{310} See supra text accompanying note 143.
\textsuperscript{311} Ajlouny, 629 F.2d at 835-36.
\textsuperscript{312} Carroll v. United States, 267 U.S. 132, 153 (1925).
\textsuperscript{313} See supra text accompanying notes 157, 172.
\textsuperscript{314} 629 F.2d 830 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981).
\textsuperscript{315} Paxton’s Case (1761), in J. Quincy, Reports of Massachusetts Bay, 1761-1762
\textsuperscript{316} See supra text accompanying notes 59-67.
\textsuperscript{317} N.B. Lasson, supra note 50, at 60.
\textsuperscript{318} See supra text accompanying notes 53-75.
\textsuperscript{318} Gouled v. United States, 255 U.S. 298, 304 (1921).