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Constitutional Law--Border Searches--Extractions from Body [*Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966)]

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CONSTITUTIONAL LAW — BORDER SEARCHES — EXTRACTIONS FROM BODY

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

The reasonableness of searches to extract evidence from within the body poses a difficult judicial question. This is particularly true of border searches which involve the recovery of contraband concealed within the various body cavities.

In *Blefare v. United States*,[1] the Ninth Circuit Court of Appeals was confronted with this very question when it reviewed a conviction for the illegal importation of narcotics which was based on evidence obtained by scientifically compelling the defendant to regurgitate. The pertinent facts of the case are as follows. Federal agents learned that Blefare had admitted smuggling heroin into the United States and that he was presently in Mexico. Various ports of entry along the Mexican border were alerted, and three weeks later customs agents stopped Blefare and a companion attempting to cross the border. After the men were taken to a search room and disrobed, narcotics agents noticed needle marks on the arms of both men and subsequently accused them of carrying narcotics in their stomachs or rectums. Both men denied this, stating that they would not object to being examined by a doctor, although no indication was given as to the nature or the extent of the proposed examination. They were then taken twelve miles from the border where a doctor administered a rectal probe on each without result. But after a saline solution was given to induce vomiting, Blefare was seen to have vomited and re-swallowed an object. At this point the doctor attempted to insert a plastic tube containing an emetic through Blefare's nose, down his throat, and into his stomach. When Blefare objected to this, three agents held him still, and the doctor inserted the tube. Within a few seconds, Blefare vomited two packets of heroin.[2]

At trial the doctor testified that the packets had been obtained in a medically approved manner, alternatives to the method used having been rejected as being less sound. The doctor also testified that, had the packets not been removed, Blefare might have died within a short time because the gastric juices of his stomach would have destroyed the heroin's rubber covering. Blefare testified that he intended to remove the heroin by self-induced vomiting.[3]

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[1] 362 F.2d 870 (9th Cir. 1966).

[2] *Id.* at 871-73.

[3] *Id.* at 872-74.

On appeal the defendant contended that the heroin packets were seized in violation of the fourth amendment and were thus inadmissible as evidence at trial.[4] The circuit court considered two main issues: whether the detention of the defendant was incident to a border search and whether the subsequent recovery of the packets from the defendant's stomach was a reasonable search and seizure.[5]

In order to fully understand the reasoning employed by the court in affirming the conviction and holding the recovery of the packets to be incident to a reasonable border search, it should be recalled that border searches have long been considered sui generis.[6] No probable cause is needed to search those entering the country;[7] mere suspicion on the part of a customs agent is sufficient.[8] The United States Supreme Court has analyzed the basis for this distinction:

> The two [searches] . . . differ *toto cœlo.* In the one case, the government is entitled to the possession of the property; in the other it is not. . . . [T]he seizure of goods forfeited for a breach of the revenue laws . . . has been authorized by . . . our own revenue acts from the commencement of the government.[9]

Although border searches may be made on mere suspicion, they must be conducted in a reasonable manner.[10] In this respect alone are they similar to ordinary searches.[11]

Authorization for border searches by customs agents upon mere suspicion is set forth specifically by statute.[12] This authorization

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[4] *Id.* at 871.

[5] *Id.* at 874.

[6] See Carroll v. United States, 267 U.S. 132 (1925); Taylor v. United States, 352 F.2d 328 (9th Cir. 1965); Lane v. United States, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964); Denton v. United States, 310 F.2d 129 (9th Cir. 1962); Witt v. United States, 287 F.2d 389 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961); Barrera v. United States, 276 F.2d 654 (5th Cir. 1960).

[7] See, *e.g.*, Carroll v. United States, *supra* note 6; King v. United States, 348 F.2d 814 (9th Cir. 1965); Bible v. United States, 314 F.2d 106 (9th Cir.), *cert. denied*, 375 U.S. 862 (1963); Denton v. United States, *supra* note 6; Witt v. United States, *supra* note 6; Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959).

[8] Witt v. United States, 287 F.2d 389 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961); Cervantes v. United States, 363 F.2d 800 (9th Cir. 1959) (dictum). See note 12 *infra.*

[9] Boyd v. United States, 116 U.S. 616, 623 (1886).

[10] Marsh v. United States, 344 F.2d 317 (5th Cir. 1965); Lane v. United States, 321 F.2d 573 (5th Cir. 1963).

[11] *Ibid.*

[12] 14 Stat. 178 (1886), 19 U.S.C. § 482 (1964), which provides that any customs officer may, on mere suspicion, search any person or vehicle entering the United States.

continues until there has been a complete entry,[13] for a party must not only cross the border but also become a part of the interior of the United States.[14] The circumstances of the entry and not the distance from the border thus appear to govern the susceptibility of a party to a border search.

In *Blefare* the majority, concurring, and dissenting opinions all found the heroin packets to be the product of a border search.[15] What occurred twelve miles from the border was incidental to the initial detention of the defendant at the port of entry.[16] A complete entry had never been effected.

Since the court found this to be a border search, the remaining question to be considered was the reasonableness of the means employed to compel the defendant to vomit the two packets of heroin.[17]

The leading case concerning the reasonableness of a search to recover contraband concealed within the body cavities is *Rochin v. California.*[18] In that case, police went to the dwelling house of the defendant and forced open the door to his room. Upon entering they saw him push two capsules into his mouth, and after unsuccessfully attempting to extract these capsules, the police took the defendant to a hospital where a doctor forced a tube down his throat to induce vomiting. Two morphine capsules were expelled and used as evidence. In reversing the conviction and condemning the entire procedure as "conduct that shocks the conscience"[19] the Supreme Court stated:

> Illegally breaking into the privacy of the petitioner, the struggle to open up his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend

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[13] United States v. Yee Ngee How, 105 F. Supp. 517 (N.D. Cal. 1952):

> A "completed entry" is claimed by petitioner by virtue of the fact that he was allowed to leave the ship and enter San Francisco on the day previous to this search. Had the petitioner or his possessions been searched while he was off the ship and within the city, the situation would have been different; but this was not done. Once petitioner returned to the ship on which were located his living quarters, and where his baggage had been left, he recrossed the barrier. When he again left the ship . . . he was, for the purposes of customs inspection, a person coming into the United States . . . . *Id.* at 522-23.

[14] *Ibid.*

[15] 362 F.2d at 874, 880-81.

[16] *Id.* at 874.

[17] *Id.* at 874, 880.

[18] 342 U.S. 165 (1952).

[19] *Id.* at 172.

> even hardened sensibilities. They are methods too close to the rack and the screw . . . .[20]

In only two other cases has the Supreme Court considered the reasonableness of searches to extract evidence from within the body. In *Breithaupt v. Abram*,[21] decided after *Rochin*, the Court held that the extraction of a sample of blood for a test was not analogous to *Rochin* so as to "shock the conscience."[22] In *Schmerber v. California*,[23] the Court has recently affirmed its decision in *Breithaupt* with respect to the extraction of a blood sample.[24]

Before *Rochin* the lower courts had held, with few exceptions,[25] that nonconsensual searches of a suspect's rectum or stomach to recover narcotics were reasonable, and despite the *Rochin* decision, lower courts have continued to uphold the reasonableness of these procedures with respect to both border and general searches.[26] The most important of these cases decided after *Rochin* was *Blackford v. United States*,[27] wherein narcotics were recovered by means of a rectal probe. The court distinguished *Rochin* by stressing the lack of aggravating circumstances and the fact that this type of examination was medically proper and was painless except when the defendant refused to cooperate. The search was therefore held to be reasonable.[28] Since *Blackford*, the lower federal courts have continually upheld the reasonableness of such searches.[29]

In *Blefare* the majority, concurring, and dissenting opinions drew varying conclusions from an analysis of these background cases. The majority opinion relied heavily on federal appellate decisions which had upheld the reasonableness of rectal probes and the use of emetics to induce vomiting.[30] It was emphasized that,

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[20] *Ibid.*

[21] 352 U.S. 432 (1957).

[22] *Id.* at 436-37.

[23] 384 U.S. 757 (1966).

[24] *Ibid.*

[25] United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949).

[26] See, *e.g.*, Lane v. United States, 321 F.2d 573 (5th Cir. 1963) (stomach); Denton v. United States, 310 F.2d 129 (9th Cir. 1962) (rectum); Barrera v. United States, 276 F.2d 654 (5th Cir. 1960) (stomach); Murgia v. United States, 285 F.2d 14 (9th Cir. 1960), *cert. denied*, 376 U.S. 946 (1964) (rectum); Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958) (rectum).

[27] 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958).

[28] *Ibid.*

[29] See Lane v. United States, 321 F.2d 573 (5th Cir. 1963); Denton v. United States, 310 F.2d 129 (9th Cir. 1962); Barrera v. United States, 276 F.2d 654 (5th Cir. 1960); Murgia v. United States, 285 F.2d 14 (9th Cir. 1960), *cert. denied*, 376 U.S. 946 (1964).

[30] Blefare v. United States, 362 F.2d 870, 874-75 (9th Cir. 1966).

as distinguished from *Rochin*, here there was no illegal entry into the defendant's home; no brutality was involved; and the vomiting was induced through the best possible scientific methods.[31] The majority, citing *Blackford v. United States*[32] which also distinguished *Rochin* on these grounds, found that it was the circumstances which led up to the compelled regurgitation and not the vomiting itself that shocked the Court in *Rochin*.[33] The court stressed that in the instant case the vomiting had been effected through proper medical procedure.[34] It found the search to be reasonable and sustained the conviction.[35]

The concurring opinion sought to further distinguish *Rochin* by citing *Breithaupt v. Abram*[36] to support its contention that the *Rochin* Court considered the *means employed* rather than the *actual regurgitation of evidence* to be the controlling factor as to the reasonableness of the search.[37]

The dissenting judge found the procedure utilized in *Blefare* to be shocking and unreasonable.[38] He emphasized that none of the Fifth or Ninth Circuit decisions cited by the majority were controlling because none had involved the forcing of a tube down the nose of a suspect and into his stomach.[39] It was further asserted that *Rochin* could not be distinguished, for the only *significant* factual difference in the two cases was said to be that in *Rochin* a tube was inserted into the defendant's mouth, whereas in the instant case it was inserted into the defendant's nose.[40] The

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[31] *Id.* at 875-76.

[32] 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958).

[33] 362 F.2d at 875-76.

[34] *Id.* at 876.

[35] *Ibid.*

[36] 352 U.S. 432 (1957).

[37] 362 F.2d at 876.

[38] *Id.* at 880.

[39] *Id.* at 881 n.1 (dissenting opinion).

[40] *Id.* at 881-82 n.2 (dissenting opinion).

> The process did not involve the use of a pump in the sense of a mechanical device for the forcible propulsion of liquid; hence, the majority opinion carefully emphasizes, "There was no pump."
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> A similar method of gravitational flow of an emetic through a tube was under consideration in Rochin . . . . There, however, there was less abusive variation, inasmuch as the tube was placed through the mouth of the victim rather than being forced through the nostrils as here. Nevertheless, the Justices of the Supreme Court have repeatedly referred to the process as "stomach pumping" . . . . *Ibid.*

dissent found that in *Rochin* it was the extreme bodily intrusion itself that shocked the Court.[41]

The dissenting opinion recognized the practical dilemma present in this case. It conceded that the concern for effective border control of narcotics smuggling appeared to give customs authorities no workable alternative. But the dissent was nonetheless appalled at the ramifications of the majority opinion:

> Holding it to be so now vests in all border officials . . . absolute . . . discretion to engage in such drastic search procedure upon what might be shown to have been the merest whim . . . . [S]uspicion alone might legally justify the "stomach pumping" . . . of any . . . alien or citizen . . . .
>
> Is there another available avenue which is bounded by due regard for both the public's interest and the individual's right? I believe that there is . . . .[42]

The dissent proceeded to point out that the instant search had progressed beyond that of a traditional border inquiry and had become one incident to a border arrest. The policy considerations for exempting border searches from normal search and seizure requisites thus became less relevant, while at the same time concern for the rights and dignity of the suspect should have been intensified.[43] To accomplish this end the dissent proposed that authorities be required to obtain warrants before such severe and accusatory searches into the body are made: "That customs officials should seek judicial authorization, where time permits, before engaging in extremely unusual invasions of the human body would appear to be a wholly reasonable requirement . . . which would protect the constitutional rights of individuals . . . . and not significantly thwart . . . regulation of border traffic."[44] It should be noted that the dissent did not rule out the possibility that a warrant could have authorized the mode of search employed in the instant case so as to have made it reasonable.[45]

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[41] *Id.* at 882-83.

> I cannot believe that in *Rochin* the Supreme Court was shocked by the fact that . . . the officers were in the dwelling wrongfully or that they had forced their way into Rochin's room. Such procedures may be improper, but they are quite frequently followed by well meaning police officers . . . . Surely, they are not . . . "methods too close to the rack and screw." *Ibid.*

[42] *Id.* at 886.

[43] *Id.* at 884 (dissenting opinion).

[44] *Id.* at 888.

[45] *Id.* at 887. "It is not unreasonable to assume that a magistrate might have agreed that, in the absence of feasible alternatives . . . the use of the stomach tube . . . would not have constituted unreasonable intrusion." *Ibid.*

The present state of the law with respect to the issues presented in *Blefare* remains in doubt. The majority opinion appears to have distinguished *Rochin* to the point of insignificance.[46] The plain meaning of the words in *Rochin* and the recognition that, at the time this opinion was handed down, the Supreme Court had not yet bound the states to apply the exclusionary rule makes it extremely difficult to accept the conclusion of the majority in *Blefare* that illegal entry, manhandling, or anything short of forced extraction of evidence from the stomach of Rochin had shocked the Court. Also, there is no suggestion in *Rochin* that the Court held the search shocking because of improper medical procedure. On the contrary, there is every indication that the procedure was medically sound.[47] Thus, the assertion that so much of the majority and concurring opinions was based upon the proper use of the emetic is a non sequitur. Moreover, the *Blefare* opinions stressed that the authorities had no practical alternative, yet this is exactly what the police had asserted in *Rochin*.[48]

Finally, as was discussed earlier,[49] the majority opinion parallels *Blackford v. United States*,[50] which distinguished *Rochin* in exactly the same manner. The rationale of *Blackford* in distinguishing *Rochin* has been questioned. As has been stated: "Inherent . . . throughout the opinion, there is a pragmatic approach to the case which goes farther to justifying the decision then [*sic*] the legal acrobatics used to define the law."[51] Another writer has concluded that the "Court would seemingly reject the reasoning of [*Blackford*] . . . for although forcibly removing narcotics from one's rectum may not be as brutal as pumping out one's stomach, it is certainly more *shocking* to the conscience."[52]

The suggestion in the *Blefare* dissent that searches which invade the body must be made pursuant to a warrant whenever pos-

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[46] See 9 LOYOLA L. REV. 130, 132 (1958). There it is suggested that the *Blackford* decision (followed by the court in *Blefare*) would have made the search of Rochin a reasonable one. Both the *Blefare* and *Blackford* decisions are based on the fact that the procedure employed was medically proper. Yet there is every reason to believe that the procedure in *Rochin* was medically proper.

[47] In *Rochin* the Supreme Court made no reference to any improper medical procedure. The entire "search" was performed in a hospital by a physician. If the Court had found the procedure to have been medically improper, it is unlikely that the Court would have neglected to mention such a relevant fact.

[48] See Rochin v. California, 342 U.S. 165 (1952).

[49] See text accompanying notes 32-34 *supra*.

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

[51] 21 GA. B.J. 269, 271 (1959).

[52] 9 MERCER L. REV. 220, 221-22 (1957). (Emphasis added.)

sible is certainly an imaginative and practical proposal. Although the Supreme Court stated in *United States v. Rabinowitz*[53] that the practicality of obtaining a warrant was no longer the *sole test* of the reasonableness of a search, it did not reject the question of practicality as *a relevant consideration.*[54] Furthermore, the recent Supreme Court decision in *Schmerber v. California*[55] recognized the feasibility of procuring a warrant as a most relevant consideration in determining the reasonableness of invading the body to extract evidence: "The importance of informed, detached and deliberate determination of the issue whether or not to invade another's body in a search . . . is great."[56] In *Schmerber* the Court concluded that the arrest of the intoxicated driver after an automobile accident afforded the police no opportunity to obtain a warrant either before or after the arrest because the amount of alcohol in the body diminishes shortly after the cessation of drinking.[57] *Schmerber* thus supports the dissent's contention that the extreme intrusion into Blefare's body without a warrant was not justified since the agents had ample opportunity to present the situation to an impartial magistrate both before and after the search.[58]

Constitutional guarantees should not be interpreted so as to frustrate effective law enforcement by allowing criminals to conceal or destroy evidence within their bodies. Nevertheless, one cannot accept the opinion of the majority in *Blefare* that the Constitution permits regurgitation to be compelled by forcing a tube into the stomach of a suspect merely because the procedure employed was medically acceptable. This position seems particularly untenable when applied to border searches, where the law has granted customs agents almost unlimited discretion. Thus, the dissent's proposed

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[53] 339 U.S. 56 (1950).

[54] *Id.* at 65-66.

[55] 384 U.S. 757 (1966).

[56] *Id.* at 770.

[57] *Ibid.*

[58] The Canadian authorities had informed American agents of Blefare's operations three weeks before his arrest. During that entire period customs agents at the Mexican border had been alerted for Blefare's return from Tiajuana, where he was suspected of obtaining narcotics. There was thus ample opportunity and probable cause to procure a warrant before Blefare crossed the border. Likewise, after Blefare had reached the border at 11:00 p.m., he was taken twelve miles into San Diego to be searched. A warrant could easily have been obtained there, for the danger of the heroin being liberated in the stomach by gastric juices was reported at trial to have been within a two-day period. The search was completed approximately two hours after Blefare had been detained. 362 F.2d at 871-72.