

Land Border Search Authority

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- Does the term “border” have a definition?
 - Does the law depend on statutes or just case law?
- How deeply into the U.S. does it extend?
- Does a border law enforcement officer (LEO) need any degree of suspicion that something untoward is afoot before s/he may search?
- How destructive may the search be?
 - Can vehicles be drilled into?

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- Can an airport in the middle of the country be considered a border port of entry?
- Can *any* Federal LEO conduct a border search?
- What “kinds” or “types” of borders are recognized in the law?
- May a border search be conducted of someone/something *leaving or exiting* the US?
- We *won't* be covering aircraft or watercraft* *interdictions*.

– *Except for one sailboat!

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Resources

- U.S. Customs & Border Protection (CBP) webpage discussing its border search authority: <https://www.cbp.gov/travel/cbp-search-authority> (accessed 9/15/20).
- Federal Law Enforcement Training Centers (FLETC), Office of Chief Counsel, *Legal Division Reference Book* (2017), pp. 69-75: Stops at the Border. https://www.fletc.gov/sites/default/files/2017%20Reference%20Book_MSD_Final.pdf (accessed 6/5/18).
- FLETC *Legal Division Handbook* (2017), pp. 422-428: Border Searches. https://www.fletc.gov/sites/default/files/2017%20Student%20Handbook%20Final_KA.pdf (accessed 6/5/18).

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Resources (cont'd)

- *FBI Law Enforcement Bulletin* (Aug. 2004), pp. 22-32: U.S. Land Border Search Authority. <https://leb.fbi.gov/file-repository/archives/aug04leb.pdf/view> (accessed 6/5/18).

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Acronyms/Terms

<i>Cert.</i>	<i>Certiorari</i> – Supreme Court writ directing lower court to send it the lower court’s records of the case, <i>i.e.</i> , it means the Supreme Court has agreed to hear the matter.
C.F.R.	Code of Federal Regulations
Cir.	Circuit
<i>Et seq.</i>	Latin <i>et sequens</i> - meaning “and the following one(s)”
F.2d, F.3d	Federal Reporter, 2d & 3d Series (decisions of the U.S. Courts of Appeal)
IAD	Dulles International Airport
INA	Immigration and Nationality Act (8 U.S.C. § 1101 <i>et seq.</i>)
LAX	Los Angeles International Airport
LEO	Law enforcement officer
Pax	passenger(s)

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Acronyms/Terms (cont’d)

PC	Probable cause
S. Ct.	Supreme Court/Supreme Court Reporter
Slip op.	Slip opinion – free-standing paginated court decision printed before being incorporated into and thus paginated differently when included as part of a bound volume of opinions.
U.S.	U.S. Reports (Supreme Court opinions)
U.S.C.	U.S. Code
§	Section
§§	Sections

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INA § 287(a)(3) [8 U.S.C. § 1357(a)(3)]: “Any officer of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . (3) within a **reasonable distance** from and external boundary of the United States, to board and search for aliens any . . . conveyance or vehicle . . .”

19 U.S.C. § 1581: “Any officer of the customs may at any time go on board of any . . . vehicle . . . at any other authorized place, without as well as within his district, and . . . examine, inspect, and search the . . . vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such . . . vehicle, and use all necessary force to compel compliance.”

19 U.S.C. § 1582: “The Secretary of the Treasury may prescribe regulations for the search of persons and baggage . . . and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.”

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- 6 U.S.C. §§ 552(d) and 557 together say that references to legacy agencies/departments about the functions of the Department of Homeland Security (DHS) “shall be deemed to refer to the Secretary, other official, or component of [DHS] to which such function is so transferred.” § 557.

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- 8 C.F.R. § 287.1(a)(2): **reasonable distance** means “100 air miles from any external boundary.”
- 19 C.F.R. § 162.5:
 - “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, inspecting, and searching the vehicle or aircraft.*”
- 19 C.F.R. § 162.6:
 - “*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.”
- “It cannot be questioned that Congress has plenary [*i.e.*, absolute] power to police the borders of the United States.” *United States v. Glasser*, 750 F.2d 1197, 1201 (3rd Cir. 1984), *cert. denied*, 471 U.S. 1018 (1985).

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- What kinds or types of borders recognized in US law?
 - 1. Actual border, 2. functional equivalent, 3. extended border.
- 1. **ACTUAL BORDER**– the legal demarcation line between two countries and the easiest type to understand.
 - Searches here are either considered to be an exception to the 4th Amendment warrant/probable cause (PC) requirement (leaving them subject only to the Amendment’s reasonableness standard) or
 - A kind of search wholly outside the 4th Amendment.
 - No PC or, indeed, no suspicion of any kind is legally required for a routine search. *United States v. Cardona*, 769 F.2d 625, 628 (9th Cir. 1985).

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- *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 & 538 (1985):
 - “Since the founding of our Republic, Congress has granted the Executive plenary [*i.e.*, absolute] authority to *conduct routine searches and seizures* at the border without probable cause or a warrant in order to regulate the collection of duties and to prevent the introduction of contraband into this country.
 - “[T]he Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior.”

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- “Routine” search at actual border – the following can be searched just because a person or item is seeking to transit a US border.
 - A traveler’s luggage, conveyance, outer clothing, purse, wallet, and pockets are subject to suspicionless inspection. *United States v. Braks*, 842 F.2d 509, 514 (1st Cir. 1978).
 - “Searches at the border designed to protect the United States by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.” *United States v. Henry*, No. 2016-0026, slip op. at 8-9 (D. V.I. Jan. 23, 2018).
 - Removal, inspection, and reattachment of a vehicle gas tank – 12 hr. non-destructive process. *United States v. Flores Montano*, 541 U.S. 149 (2004). Approx. 81 lbs. of marijuana seized. UPHHELD.

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- When inspecting luggage, border LEOs may:
 - Scratch the exterior to determine if the luggage shell vibrates (lack of vibration would be abnormal);
 - Flex the luggage exterior (lack of flex would be abnormal);
 - Heft the luggage to see whether it is equally weighted (unexplained weight might suggest a hidden compartment containing contraband).
- *United States v. Johnson*, 991 F.2d 1287, 1292-93 (7th Cir. 1993).

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- What about electronic devices that hold enormous amounts of very personal information such as cell phones, laptops, & flash drives?
- *Riley v. California*, 134 S.Ct. 2473 (2014): warrant required to search cell phone seized incident to an arrest.
- But what happens in border searches?
- Answer: it depends upon which circuit you're in.
 - 11th Circuit: *No suspicion* at all needed to forensically search electronic devices at the border, *i.e., suspicionless.* *United States v. Touset*, 890 F.3d 1227 (11th Cir. 2018).
 - 4th & 9th Circuits: At least reasonable suspicion.

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- Cell phones, laptops, & flash drives (cont'd):
 - 4th Circuit: *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018).
 - Kolsuz held at IAD trying to board a flight to Turkey when weapons parts were found in his luggage. "Agents took possession of his smartphone and subjected it to a month-long, off-site forensic analysis, yielding nearly a 900-page report."
 - Kolsuz: this is a non-routine search but even so, the privacy interest in smartphone data is so weighty that this type of forensic (as opposed to manual examination in and about the airport) examination requires a PC-based search warrant.
 - 4th Cir.: Although we agree with Kolsuz that the forensic search of a smartphone is non-routine and that such a search must therefore . . .

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- Cell phones, laptops & flash drives (cont'd):
- 4th Circuit: *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018)(cont'd):
 - . . . be based upon some level of "individualized suspicion," such as *reasonable suspicion*, we decline to specify what that level should be because the LEOs relied on predominant case law saying that only *reasonable suspicion* was required and the LEOs should not be penalized for that reliance.
 - 9th Circuit: *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 899 (2014).
 - When Cotterman came across US-Mexico border, his laptop seized based on 15-yr. old child molestation conviction.

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Cell phones, laptops & flash drives (cont'd):

- 1st Circuit: *Alasaad v. Mayorkas*, Nos. 20-1077 & 20-1081 (1st Cir. Feb. 9, 2021)
 - “[B]asic border searches of electronic devices are routine searches that may be performed without reasonable suspicion.” At 3.
 - “[A]dvanced searches of electronic devices at the border do not require a warrant or probable cause.” *Id.*
- *What’s an advanced search?*
 - Connecting an external device wirelessly or with a wire “to review, copy, and/or analyze” the contents of the device in question. CBP Directive No. 33-40-049A.
- *Basic search?* Anything not an advanced search.

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- 9th Circuit: *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 899 (2014)(cont'd)
 - Examination at the border turned up nothing so it was sent about 170 mi. away for a forensic exam which revealed kiddie porn – hundreds of photos. A significant number involved Cotterman molesting a girl 7-10 yrs. old.
 - Court: *Reasonable suspicion* was required but it, in fact, existed.
 - Results of laptop’s forensic exam ruled admissible.

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- “Non-Routine” search at actual border requires *reasonable suspicion* which can be defined as:
 - “A particularized and objective basis for suspecting the particular person of smuggling contraband.” *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993).
 - Examples of non-routine searches:
 - “Types of border search of an individual’s person that have been consistently held to be non-routine are strip-searches and body-cavity searches.” *United States v. Braks*, 842 F.2d 509, 512-13 (1st Cir. 1988).
 - Detaining someone for x-rays & monitored bowel movements.

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- Detaining someone for x-rays & monitored bowel movements (cont'd) – *United States v. Gonzalez-Rincon*, 36 F.3d 859 (9th Cir. 1994), cert. denied, 514 U.S. 1008 (1995):
 - In March 1993 Gonzalez arrived at LAX from Bogota, Colombia, via Mexico City. Unlike other pax, she was wearing a bulky overcoat & had only 1 piece of luggage but said she was visiting the U.S. for 15 days.
 - Her passport bore a different name, listed a Calif. address, & she paid cash on Mar. 5 for a flight the same day. She appeared nervous & perspired profusely.
 - She said she was a portrait photographer but could not describe the camera she used other than to say it was a “very big” Canon.

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- Detaining someone for x-rays & monitored bowel movements – *United States v. Gonzalez-Rincon*, 36 F.3d 859 (9th Cir. 1994) (cont'd):
 - She said she was arriving to attend her sister’s wedding but then admitted that her sister was already married. She didn’t have her sister’s phone number.
 - Because she was pregnant, she was *not x-rayed* & she failed to eliminate anything as the result of a monitored bowel movement so a *dr. examined Gonzalez’s anal cavity* and felt a hard object whereupon Gonzalez admitted she was carrying cocaine in her rectum. Eventually, she expelled 73 balloons containing approx. 2.2 lbs. of cocaine!

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- Detaining someone for x-rays & monitored bowel movements – *United States v. Gonzalez-Rincon*, 36 F.3d 859 (9th Cir. 1994) (cont'd):
 - At trial, Gonzalez moved to suppress the results of the anal cavity examination claiming the customs inspectors had no *reasonable suspicion* that she was an alimentary canal [*i.e.*, tubular passage extending from mouth to anus] smuggler because strip search revealed nothing initially.
 - Court: Too bad, so sad: “The ingestion of drug-filled balloons has become a common smuggling device for smugglers from countries such as Colombia, a principal source of narcotics.”
 - Held: “The customs inspectors *reasonably suspected* Gonzalez of attempting to smuggle narcotics across our nation’s border.”

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- Length of detention once reasonable suspicion is established:
 - **16 hrs.** unsuccessfully waiting for a bowel movement before an order secured from a U.S. Magistrate Judge to x-ray & perform rectal exam was OK. *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985).

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- "Non-Routine" search at actual border (cont'd):
 - Drilling/destructive/disruptive. *Reasonable suspicion* required to:
 - Drill into a traveler's bag because it had an unusual bottom.
 - Drilling into a vessel to reveal cocaine hidden in a secret compartment.
 - Drilling into a metal cylinder arriving at an international airport.
 - Inserting a long, thin metal probe in the drain valve of an electrical transformer.

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- Somewhere between "routine" and "non-routine:"
 - Pat downs
 - Requests, for example, to raise a skirt to reveal an undergarment
 - Depending upon the Federal Circuit Court of Appeals, these may require some level of suspicion, albeit minimal.
 - Minimal suspicion required for pat down. *United States v. Vance*, 62 F. 3d 1152, 1156 (9th Cir. 1995).
 - *But* pat down "within the scope of routine customs practice unrestricted by the fourth amendment." *United States v. Oyekan*, 786 F.2d 832, 835 (8th Cir. 1986).

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- Somewhere between “routine” and “non-routine:”
 - Requests to reveal an undergarment (cont’ d):
 - Command to drop pants upheld after pat down revealed something abnormal: “This appears to be nothing more than a typical pat-down.” *United States v. Wilnot*, 563 F.2d 1298, 1300 (9th Cir. 1977).
 - Raising skirt to reveal undergarment. “A border search that is less intrusive than a strip search requires no level of suspicion on the part of customs officials.” *United States v. Braks*, 842 F.2d 509, 514 (1st Cir. 1988).

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- What kinds or types of borders recognized in US law? (cont’ d)
- 2. **FUNCTIONAL EQUIVALENT OF THE BORDER**– where travelers frequently enter/exit the country
 - The first place at which an entrant can practically be detained.
 - Airports in the country’s interior where *international* flights depart or first land. What if the pax left the arrival gate and was later found in the airport lobby?
 - *United States v. Ramos*, 645 F.2d 318 (5th Cir. 1981): Raymond Wayne Ramos arrived in Miami from Bogota late at night (11:30 PM) and was the first pax off the plane; he had a briefcase but no luggage explaining that it had been misdirected to Mexico.

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- *United States v. Ramos*, 645 F.2d 318 (5th Cir. 1981)(cont’ d):
 - A woman on the same flight was found to have a number of cocaine-filled plastic bags taped to her legs.
 - Mules are often accompanied to guarantee the “security” of the drug transportation, *i.e.*, so the mule is kept honest.
 - LEOs began checking the customs declarations of all the plane’s pax.
 - LEOs discovered that the woman’s home city was Tampa as was the home city of one “R. Ramos.”

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- *United States v. Ramos*, 645 F.2d 318 (5th Cir. 1981)(cont'd):
 - Inside the woman’s handbag was a sheet of paper listing 3 names including “W. Ramos.”
 - 30 mins. after Ramos passed through the “customs enclosure” he was located in the airport lobby. Although he had checked into the airport hotel part of the terminal complex, he had not yet gone to his room. He had on the same clothes and carried the same briefcase.
 - Ramos was patted down and, surprise, a package of cocaine was taped to his leg and another package was taped to his abdomen.
 - Issue: Was Ramos still at the functional equivalent of the border when stopped in airport lobby some 30 min. after deplaning?

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- *United States v. Ramos*, 645 F.2d 318 (5th Cir. 1981)(cont'd):
 - Answer: Yes!
 - Ramos had not been “assimilated into the mainstream of domestic activity;” he had not been “significantly removed physically or temporally from the border” and
 - “The evidence preponderate[d] that the contraband seized ha[d] actually crossed the border,” *i.e.*, it hadn’t been attached to Ramos’ leg since he deplaned in Miami.

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- 2. FUNCTIONAL EQUIVALENT OF THE BORDER— where travelers frequently enter/exit the country (cont'd):
 - An interior airport where international travelers first deplane— same search regime as ACTUAL BORDER. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).
 - An “established station near the border, at a point marking the confluence of two or more roads that extend from the border.” *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).
 - Fixed checkpoint, one 66 mi. north of Mexican border & one 65-90 mi. from the nearest points of the Mexican border. Suspicionless questioning about citizenship & immigration status UPHELD even if based on apparent ethnicity. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). But search of vehicle at fixed checkpoint requires PC. *United States v. Ortiz*, 422 U.S. 891 (1975).

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- 2. FUNCTIONAL EQUIVALENT OF THE BORDER— where travelers frequently enter/exit the country (cont'd):
 - Search of car by a roving patrol at least 20 mi. north of Mexican border NOT a functional equivalent. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). Need PC to search vehicle.
 - Roving patrol can stop vehicle “in the general area of the border for brief inquiry into their residence status” without PC if the “stopping officer is aware of *specific articulable facts*, together with rational inferences from those facts, that *reasonably warrant suspicion* that a vehicle contains illegal aliens.” i.e., **reasonable suspicion**. *United States v. Martinez-Fuerte*, 428 U.S. 543, 555-56 (1976). PC needed to search.

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- 2. FUNCTIONAL EQUIVALENT OF THE BORDER— where travelers frequently enter/exit the country (cont'd):
 - *Vessels* located in internal waters offering ready access to the open sea are subject to suspicionless boarding to check documentation. *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).
 - Patrolling customs officers in a ship channel connecting the Gulf of Mexico with Lake Charles, LA, came upon and boarded a 40’ sailboat 18 mi. from the Gulf coast for the purpose of checking its documentation. Once aboard the LEO saw burlap-wrapped bales that proved to be marijuana. A search of the sailboat revealed 5,800 lbs. of marijuana “stored in almost every conceivable place.” UPHELD.

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- 3. EXTENDED BORDER: *United States v. Cardenas*, 9 F.3d 1139 (5th Cir. 1993), cert. denied, 511 U.S. 1134 (1994).
 - Taxi took Cardenas & Lawal to the Juarez-El Paso, TX, pedestrian border checkpoint and then waited for them in El Paso.
 - Cardenas passed through easily but Lawal was evasive when questioned so he was pulled aside, patted down, and among other things, tape found & an opened box of razor blades which can be used to cut heroin & cocaine. When he was removing his shoes, Cardenas’ passport fell out of one of them.
 - Drug smugglers often travel in pairs and split up to go through customs.
 - Lookout immediately began for Cardenas and 5 min. later she was found near a store not more than a block away from the border crossing.

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- 3. **EXTENDED BORDER:** *United States v. Cardenas*, 9 F.3d 1139 (5th Cir. 1993), *cert. denied*, 511 U.S. 1134 (1994)(cont'd).
 - While her purse was being searched, she was told that carrying drugs internally was dangerous at which point she began to cry, pointed to her waist, and said she was carrying drugs "here."
 - 5 plastic bags – 5.5 lbs. of heroin - found bound to her waist with a Lycra girdle and tape – the same kind that Lawal had had. Wholesale value of the heroin more than half a million \$\$\$.
- 3-part test for extended border search:
 - a. "Reasonable certainty"/"high degree of probability" that a border crossing took place;
 - b. **PLUS** that there has been no change in the condition of the person/vehicle, and

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- Test for extended border search (cont'd):
 - c. "Reasonable suspicion" that criminal activity afoot.
- NOTE: "Reasonable certainty" in a., above, is more than probable cause but less than proof beyond a reasonable doubt.
- Thus, the purpose of the extended border search doctrine is to enable "government officials to search persons or goods at some point after they have crossed the border where there is a reasonable suspicion of secreted contraband that can be shown to have been present at the time the border was crossed."

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- Which LEOs have authority to conduct border searches?

Generally, only those Federal officials with customs or immigration enforcement authority or those acting under their supervision.

To be valid a border search "must be executed either by a person statutorily authorized to conduct border searches or by an individual who by a delegation of authority is so empowered" but that delegation "must be clear." *United States v. Brown*, 858 F. Supp. 297, 300 (D. P.R. 1994).
- *United States v. Soto-Soto*, 598 F.2d 545 (9th Cir. 1979).
 - FBI agent checking for stolen vehicles as they entered from Mexico at the Calexico, Calif., port of entry.
 - Soto-Soto came through driving a late model Chevy pickup and the agent told him to park off to the side.

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- *United States v. Soto-Soto*, 598 F.2d 545 (9th Cir. 1979)(cont'd).
 - FBI agent lifted the hood to check the vehicle’s confidential serial number and in so doing, saw a number of packages that contained marijuana.
 - *FBI agent was not acting in coordination/cooperation with or under the direction of/designation by customs officials.*
 - “Congress and the courts have specifically narrowed the border searches to searches conducted by customs officials in enforcement of customs laws.” At p. 549.
 - The evidence was suppressed.

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The End
