



# Border Searches of Laptop Computers and Other Electronic Storage Devices

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## Summary

As a general rule, the Fourth Amendment of the U.S. Constitution requires government-conducted searches and seizures to be supported by probable cause and a warrant. Federal courts have long recognized that there are many exceptions to these requirements, one of which is the border search exception. The border search exception permits government officials to conduct “routine” searches based on no suspicion of wrongdoing whatsoever. On the other hand, when warrantless border searches are particularly invasive, and thus “non-routine,” they are permissible only when customs officials have, at a minimum, a “reasonable suspicion” of wrongdoing.

The federal courts that have addressed this issue have held that the border search exception applies to searches of laptops at the border. Although the Supreme Court has not directly addressed the degree of suspicion needed to search laptops at the border without a warrant, the federal appellate courts that have addressed the issue appear to have concluded that reasonable suspicion is not needed to justify such a search. The Ninth Circuit, in *United States v. Arnold*, explicitly held that reasonable suspicion is not required to conduct a warrantless search of a laptop at the border.

A bill introduced in the 111<sup>th</sup> Congress, the Securing our Borders and our Data Act of 2009 (H.R. 239), would impose more rigorous standards for laptop searches than those the federal courts have determined are constitutionally required. Another bill introduced in the 111<sup>th</sup> Congress, the Border Security Search Accountability Act of 2009 (H.R. 1726), would mandate that the Commissioner of Customs and Border Protection promulgate a rule with respect to the scope of and procedural and record keeping requirements associated with border security searches of electronic devices.

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## Introduction

A developing issue in the law of search and seizure is whether the Fourth Amendment of the U.S. Constitution permits warrantless searches of the content of laptop computers and other electronic storage devices at U.S. borders. The federal courts that have addressed this issue have held that the border search exception to the Fourth Amendment applies to these searches, making warrantless searches permissible. Although most of these courts did not make explicit the degree of suspicion needed to initiate such a search, the United States Court of Appeals for the Ninth Circuit was the first to rule that the Fourth Amendment does not require reasonable suspicion, or, for that matter, any suspicion of wrongdoing at all, to justify a warrantless search of laptops at the border.

## Border Search Exception

The Fourth Amendment mandates that a search or seizure conducted by a government agent must be “reasonable.”<sup>1</sup> As a general rule, courts have construed Fourth Amendment “reasonableness” as requiring probable cause<sup>2</sup> and a judicially granted warrant.<sup>3</sup> Nonetheless, the Supreme Court has recognized several exceptions to these requirements, one of which is the border search exception.<sup>4</sup>

The border search exception to the Fourth Amendment allows federal government officials to conduct searches at the border without a warrant or probable cause. Although Congress and the federal courts have long assumed, at least implicitly, the existence of a border search exception,<sup>5</sup> the Supreme Court did not formally recognize it until it decided *Ramsey v. United States* in 1977.<sup>6</sup> In *Ramsey*, the Supreme Court approved the search of several suspicious envelopes (later found to contain heroin) conducted by a customs official pursuant to search powers authorized by statute.<sup>7</sup> The Court determined that the customs official had “reasonable cause to suspect”<sup>8</sup>

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<sup>1</sup> U.S. Const. Amend. IV.

<sup>2</sup> The Supreme Court has interpreted *probable cause* to mean “a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). *See also* *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

<sup>3</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches 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.”).

<sup>4</sup> For a more expansive treatment of the border search exception to the Fourth Amendment, see CRS Report RL31826, *Protecting the U.S. Perimeter: Border Searches Under the Fourth Amendment*, by Yule Kim.

<sup>5</sup> *See* Act of July 31, 1789, ch. 5 §§23-24, 1 Stat. 29, 43 (authorizing customs officials “full power and authority” to enter and search “any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed ...”); *Carroll v. United States*, 267 U.S. 132, 153-154 (1925) (“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.”). *Accord* *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971); *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>6</sup> 431 U.S. 606, 619 (1977).

<sup>7</sup> *Id.* at 622.

<sup>8</sup> “Reasonable cause to suspect” appears to be equivalent to “reasonable suspicion,” which is simply a particularized and objective basis for suspecting the particular person of wrongdoing. *See* *Terry v. Ohio*, 392 U.S. 1, 21 (1978).

suspicious activity when searching the envelopes.<sup>9</sup> This standard, while less stringent than probable cause, was sufficient justification.<sup>10</sup> The border search exception has subsequently been expanded beyond persons, objects, and mail entering the United States, to cover individuals and objects departing from the United States<sup>11</sup> and to apply in places deemed the “functional equivalent” of a border, such as international airports.<sup>12</sup>

As the border search exception has further developed in case law, lower federal courts have recognized two different categories of border searches: routine and non-routine. This distinction is based on language in *United States v. Montoya de Hernandez*, where the Supreme Court determined the level of suspicion needed to justify “a seizure of an incoming traveler for purposes other than a routine border search.”<sup>13</sup> In that case, customs officials detained a traveler whom they suspected of smuggling drugs.<sup>14</sup> The customs officials eventually obtained a court order authorizing a rectal examination, which produced a balloon containing cocaine.<sup>15</sup> The Court held that, even though the detention “was beyond the scope of a routine customs search and inspection,” the customs officials’ “reasonable suspicion” that the suspect was smuggling drugs provided sufficient justification for the search.<sup>16</sup> Federal courts have since interpreted this case to stand for the proposition that “reasonable suspicion” (i.e., a particularized and objective basis for suspecting wrongdoing) is required to justify similarly invasive searches.<sup>17</sup>

Although the Court in *Montoya de Hernandez* focused on a “non-routine” detention of a traveler at the border, lower federal courts, interpreting *dictum* in that case, began distinguishing unusually intrusive searches from “routine” searches.<sup>18</sup> These courts thereby expanded the border search exception by concluding that a customs official may conduct “routine” warrantless searches of persons or effects without any reason for suspicion.<sup>19</sup> The Supreme Court further

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<sup>9</sup> 431 U.S. at 614.

<sup>10</sup> *Id.* at 619 (“This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless ‘reasonable’ has a history as old as the Fourth Amendment itself.”).

<sup>11</sup> See *United States v. Berisha*, 925 F.2d 791, 795 (5<sup>th</sup> Cir. 1991) (extending the border search exception to routine outbound searches); *United States v. Stanley*, 545 F.2d 661, 667 (9<sup>th</sup> Cir. 1976), *cert. denied*, 436 U.S. 917 (1978); *United States v. Ezeiruaku*, 936 F.2d 136, 143 (3<sup>d</sup> Cir. 1991); *United States v. Duncan*, 693 F.2d 971, 977 (9<sup>th</sup> Cir. 1982); *United States v. Ajlouny*, 629 F.2d 830, 834 (2<sup>d</sup> Cir. 1980).

<sup>12</sup> See *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-273 (1973); *United States v. Hill*, 939 F.2d 934, 936 (11<sup>th</sup> Cir. 1991); *United States v. Gaviria*, 805 F.2d 1108, 1112 (2<sup>d</sup> Cir. 1986). In the context of international airports, the border search exception only applies to searches of persons and effects on international flights, whereas the administrative search exception, which applies to routine searches with purposes unrelated to law enforcement, is used to justify searches of persons and effects on domestic flights. See *United States v. Davis*, 482 F.2d 893, 908-912 (9<sup>th</sup> Cir. 1973).

<sup>13</sup> 473 U.S. 531, 541 (1985) (“We have not previously decided what level of suspicion would justify a seizure of an incoming traveler for purposes other than a routine border search.”).

<sup>14</sup> *Id.* at 535.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 541 (“We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.”).

<sup>17</sup> See *United States v. Flores-Montano*, 541 U.S. 149, 154 *citing Terry*, 392 U.S. at 21 (“And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”).

<sup>18</sup> *Montoya de Hernandez*, 473 U.S. at 538 (“Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant, and first-class mail may be opened without a warrant on less than probable cause.”).

<sup>19</sup> See *United States v. Ezeiruaku*, 936 F.2d 136 (3<sup>d</sup> Cir. 1991); *Berisha*, 925 F.2d 791. See also *United States v.* (continued...)

developed this doctrine in *United States v. Flores-Montano*, in which it held that the disassembly and examination of an automobile gasoline tank at the border did not have to be justified by any suspicion of wrongdoing.<sup>20</sup> The Court concluded that the gasoline tank search was no more intrusive than a routine vehicle search because there was no heightened expectation of privacy surrounding the contents of a gasoline tank; this conclusion was reached even though the search involved a time-consuming disassembly of the vehicle.<sup>21</sup> *Flores-Montano* illustrates that extensive, time-consuming, and potentially destructive warrantless searches of objects and effects can be conducted without any reasonable suspicion of wrongdoing.

In summary, Supreme Court precedent currently indicates that federal border officers do not need any suspicion of wrongdoing to support most border searches. An exception arises, however, with respect to highly intrusive, non-routine searches. These searches require “reasonable suspicion.”<sup>22</sup> Yet, the precise level of intrusion that would render a border search non-routine is undefined in the case law.<sup>23</sup> Typically, this question is dealt with in a fact-specific manner on a case-by-case basis.<sup>24</sup> Nonetheless, *Flores-Montano* indicates that, unlike a search of a person’s body, intrusiveness may not be a dispositive factor when determining whether the search of a vehicle or personal effects requires reasonable suspicion. Thus, it appears that in most cases, courts are likely to uphold that even very invasive searches of personal property can be conducted without a warrant and be based on no suspicion whatsoever.<sup>25</sup>

## Judicial Developments on Laptop Searches

With the advent of portable computing, it is now common practice for travelers to store their data on laptop computers, compact discs, and other electronic storage devices and to travel with them across the U.S. border. In response, customs officials have been searching and seizing such devices. The issue confronting federal courts is whether the border search exception applies to electronic storage devices, and if it does, what degree of suspicion is needed to justify a warrantless search.

The Supreme Court has yet to address this issue. Most lower federal courts, however, have concluded that searches of laptops, computer disks, and other electronic storage devices fall under

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(...continued)

Chaplinksi, 579 F.2d 373 (5<sup>th</sup> Cir. 1978); *United States v. Lincoln*, 494 F.2d 833 (9<sup>th</sup> Cir. 1974); *United States v. Chavarria*, 493 F.2d 935 (5<sup>th</sup> Cir. 1974); *United States v. King*, 483 F.2d 353 (10<sup>th</sup> Cir. 1973).

<sup>20</sup> 541 U.S. 149, 154 (2004).

<sup>21</sup> *Id.* (“It is difficult to imagine how the search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile’s passenger compartment.”).

<sup>22</sup> *See id. citing Terry*, 392 U.S. at 21 (“And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”).

<sup>23</sup> *See id.* at 541 n. 4.

<sup>24</sup> *Id.* (requiring “reasonable suspicion” for the detention of a traveler at the border, beyond the scope of a routine customs search and inspection). *See also Henderson v. United States*, 390 F.2d 805 (9<sup>th</sup> Cir. 1967) (holding that strip searches may be conducted only upon a real suspicion); *United States v. Adekunle*, 980 F.2d 985 (5<sup>th</sup> Cir. 1992), on reh’g, 2 F.3d 559 (5<sup>th</sup> Cir. 1993) (requiring reasonable suspicion to justify a strip search); *United States v. Asbury*, 586 F.2d 973, 975-976 (2<sup>d</sup> Cir. 1978) (requiring reasonable suspicion for strip searches); *Rivas v. United States*, 368 F.2d 703 (9<sup>th</sup> Cir. 1966) (requiring a clear indication of the possession of narcotics to justify an alimentary canal search).

<sup>25</sup> *Flores-Montano*, 541 U.S. at 152.

the border search exception, which means neither a warrant nor probable cause is necessary to support the search.<sup>26</sup> Nonetheless, these courts have not explicitly established the degree of suspicion required to justify a warrantless search of a laptop at the border; rather, courts have avoided the issue by finding that reasonable suspicion supported the particular searches before them.<sup>27</sup> Even in the one instance a court held that a laptop search was routine, it also found that reasonable suspicion supported the search.<sup>28</sup> The one exception to this trend is *United States v. Arnold*, in which the Ninth Circuit explicitly held that reasonable suspicion was not needed to support a warrantless border search of laptops and other electronic storage devices.<sup>29</sup> Because laptop border search cases are a developing area of case law, a full understanding of this issue requires a closer look at the facts of these cases and the approaches the courts used in their analyses.

### *United States v. Ickes*

One of the first federal appellate cases to discuss searches of laptops at the border is *United States v. Ickes*.<sup>30</sup> In *Ickes*, a customs official, without a warrant, searched the defendant's van near the Canadian border after discovering during a routine search a videotape that focused excessively on a young ballboy during a tennis match.<sup>31</sup> His suspicions raised, the official requested the assistance of a colleague. They then proceeded to conduct a more thorough search in which they uncovered marijuana paraphernalia, a photo album containing child pornography, a computer, and several computer disks.<sup>32</sup> Other customs officials proceeded to examine the contents of the computer and disks, all of which contained additional child pornography.<sup>33</sup> The defendant later filed a motion, which was denied by the trial court, seeking to suppress the contents of the computer and disks on both First and Fourth Amendment grounds.<sup>34</sup>

The Fourth Circuit held that the search of the defendant's computer and disks did not violate either the Fourth or First Amendment. Regarding the Fourth Amendment challenge, the court noted that the border search exception applied in this case.<sup>35</sup> The court concluded by opining that

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<sup>26</sup> See, e.g., *United States v. Ickes*, 393 F.3d 501, 505 (4<sup>th</sup> Cir. 2005); *United States v. Romm*, 455 F.3d 990, 997 (9<sup>th</sup> Cir. 2006); *United States v. Irving*, 452 F.3d 110, 123 (2<sup>d</sup> Cir. 2006) ("An airport is considered the functional equivalent of a border and thus a search there may fit within the border search exception."); *United States v. Furukawa*, No. 06-145, slip op. (D. Minn., November 16, 2006), 2006 U.S. Dist. LEXIS 83767; *United States v. Hampe*, No. 07-3-B-W, slip op. (D. Me., April 18, 2007), 2007 U.S. Dist. LEXIS 29218.

<sup>27</sup> See, e.g., *Irving*, 452 F.3d at 124 ("Because these searches were supported by reasonable suspicion, we need not determine whether they were routine or non-routine."); *Furukawa*, slip op. at \*1-2 ("[T]he court need not determine whether a border search of a laptop is 'routine' for purposes of the Fourth Amendment because, regardless, the magistrate judge correctly found the customs official had a reasonable suspicion in this case.").

<sup>28</sup> *Ickes*, 393 F.3d at 507 (noting that the computer search did not begin until the customs agents found marijuana paraphernalia and child pornography which raised a reasonable suspicion); *Hampe*, slip op. at \*4-5 (holding that even though the laptop search did not implicate any of the serious concerns that would characterize a search as non-routine, the peculiar facts of the case gave rise to reasonable suspicions).

<sup>29</sup> 533 F.3d 1003, 1008 (2008) ("We are satisfied that reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage device at the border.").

<sup>30</sup> 393 F.3d 501 (4<sup>th</sup> Cir. 2005).

<sup>31</sup> *Id.* at 502.

<sup>32</sup> *Id.* at 503.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 505.

“[a]s a practical matter, computer searches are most likely to occur where—as here—the traveler’s conduct or the presence of other items in his possession suggest the need to search further,” indicating that the court believed that such searches will typically occur only when a customs official has reasonable suspicion.<sup>36</sup>

The court also rejected the defendant’s contention that the First Amendment bars the border search exception from being applied to “expressive” materials. The court stated that a First Amendment exception would “create a sanctuary for all expressive materials—including terrorist plans,” and that it would cause an excessive amount of administrative difficulties for those who would have to enforce it.<sup>37</sup>

### ***United States v. Romm***

The Ninth Circuit has also addressed this issue in *United States v. Romm*.<sup>38</sup> The defendant in that case had arrived at an airport in British Columbia when a Canadian customs agent, after discovering that he had a criminal history, searched the defendant’s laptop.<sup>39</sup> During the search, the Canadian customs agent uncovered child pornography sites in the laptop’s “internet history”; the defendant was consequently denied entry into Canada and flown to Seattle.<sup>40</sup> The Canadian authorities informed U.S. Immigration and Customs Enforcement (ICE) of the contents of the defendant’s laptop. When the defendant arrived in Seattle, ICE detained the defendant and convinced him to allow ICE agents to examine his laptop without a warrant.<sup>41</sup> ICE agents then used a forensic analysis, which recovered deleted child pornography from the laptop. The defendant later filed a motion to suppress the evidence obtained from his laptop, which the trial court denied.<sup>42</sup>

The Ninth Circuit held that the forensic analysis used by the ICE agents fell under the border search exception.<sup>43</sup> The court noted that airport terminals were “the functional equivalents” of a border, allowing customs agents to conduct routine border searches of all deplaning passengers.<sup>44</sup> The court then stated that all passengers deplaning from an international flight are subject to “routine” border searches.<sup>45</sup> Because the defendant failed to brief the argument that the First



defendant failed to brief his argument, the court's determination that the search was "routine" had no precedential effect.<sup>48</sup>

### *United States v. Arnold*

In *United States v. Arnold*, another Ninth Circuit case, the court, apparently disregarding the traditional routine/non-routine distinction used in most border search cases, expressly held that reasonable suspicion was not required to support the warrantless laptop border search at issue.<sup>49</sup> Here, the defendant had returned from the Philippines when he underwent secondary questioning at the airport after having passed through the first customs checkpoint.<sup>50</sup> The customs agent, without a warrant, ordered the defendant to "turn on the computer so she could see if it was functioning."<sup>51</sup> While the defendant's luggage was being inspected, another customs agent searched the laptop's contents and found pictures of nude adult women.<sup>52</sup> The defendant was then detained for several hours while special agents from ICE conducted a more extensive search of the laptop and discovered material they believed to be child pornography.<sup>53</sup>

The Ninth Circuit first stated that warrantless "searches of closed containers and their contents can be conducted at the border without particularized suspicion under the Fourth Amendment."<sup>54</sup> Nonetheless, the court noted that the Supreme Court has recognized two situations where reasonable suspicion is required to conduct a search of personal property: (1) when the search is destructive, and (2) when the search is conducted in a particularly offensive manner.<sup>55</sup> Outside of these two situations, reasonable suspicion is not required to search property, regardless of the nature of the property being searched. Thus, the Ninth Circuit refused to take into consideration any special qualities of laptops that may distinguish them from other containers, such as a laptop's capability of storing large amounts of private data. Indeed, the court did not find the search of a laptop to be intrinsically "offensive" simply because a laptop had a large storage capacity.<sup>56</sup> Instead, the court treated border searches of laptops no differently from border searches of any other type of personal property.<sup>57</sup>

The Ninth Circuit, in its analysis, rejected the use of an "intrusiveness analysis." An intrusiveness analysis would require a customs officer to evaluate the potential intrusiveness of each search he wished to conduct on a case-by-case basis in order to determine whether reasonable suspicion would be needed to justify the search.<sup>58</sup> The court instead adopted a categorical approach to warrantless border searches: so long as the search is of a physical object rather than a person's body, reasonable suspicion is not required if the search is not physically destructive or particularly offensive.

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<sup>48</sup> *Id.* (declining to consider the issue because arguments not raised by a party in its opening briefs are deemed waived).

<sup>49</sup> 533 F.3d 1003 (9<sup>th</sup> Cir. 2008).

<sup>50</sup> *Id.* at 1005.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1007.

<sup>55</sup> *Id.* at 1007-1008.

<sup>56</sup> *Id.* at 1009.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1008.

The Ninth Circuit also refused to apply a “least restrictive means” test to evaluate the constitutionality of a border agent’s chosen method of conducting the search.<sup>59</sup> Thus, under the court’s analysis, a border agent seemingly can conduct a search without having to determine whether a less intrusive means is available. The argument in favor of this categorical approach is that it appears easier for border agents to follow. On the other hand, the breadth of the Ninth Circuit’s ruling apparently allows border agents, so long as they avoid searching a person’s body, almost total discretion in determining both when, and in what manner, they may search personal property.

Finally, the Ninth Circuit refused to recognize a First Amendment protection of expressive materials searched at the border. Similar to the reasoning in *Ickes*, the court held that doing so could protect terrorist communications, create an unworkable standard for government agents, and contravene Supreme Court precedent.<sup>60</sup>

### *United States v. Seljan*

The majority opinion in *United States v. Seljan* reaffirmed *Arnold* by holding that an incidental search of a letter’s content at the border did not require reasonable suspicion.<sup>61</sup> However, a dissent by Judge Alex Kozinski argued that reasonable suspicion was required because a letter contains personal thoughts that the letter’s author would expect to be normally immune from search, especially absent suspicion of wrongdoing. Although the facts of this case only involve letters, the analyses of both the majority and dissenting opinions address the search of text, and thus would seem to apply to written communications generally, including electronic communications.

In this case, a customs official discovered a letter soliciting sex from a child while searching a package being mailed to the Philippines. The search of the letter’s contents was upheld even though the scope of the statute authorizing the search was limited to the interdiction of undeclared currency transported across the U.S. border.<sup>62</sup> Indeed, the *Seljan* majority specifically cited *Ramsey*, arguably the seminal case concerning the border search doctrine, in holding that “an envelope containing personal correspondence is not uniquely protected from search at the border.”<sup>63</sup> Moreover, the court found additional justification for the search by concluding that it was not unreasonable under the circumstances because the customs official did not “read” the contents of the letter. Rather, he merely “scanned” it with his eyes, which then gave rise to the reasonable suspicion of unlawful conduct that justified a more exacting examination of the letter’s contents.<sup>64</sup>

In contrast, Judge Kozinski, in his dissent, argued that the Fourth Amendment provides heightened protections for expressive materials at the border.<sup>65</sup> He made two arguments to support this proposition. The first is based on the Fourth Amendment’s text, which contains a specific prohibition against the unreasonable search and seizure of “papers.” Judge Kozinski

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1010.

<sup>61</sup> 547 F.3d 993 (9<sup>th</sup> Cir. 2008).

<sup>62</sup> *Id.* at 996.

<sup>63</sup> *Id.* at 1003.

<sup>64</sup> *Id.* at 1004.

<sup>65</sup> *Id.* at 1014 (Kozinski, J., dissenting).

argued that this specific prohibition signals the Framers' desire to insulate expressive content, and the personal thoughts contained therein, from unnecessary government search.<sup>66</sup> In support of this interpretation, Judge Kozinski cited *Entick v. Carrington*, an English common law case which would have been familiar to the Framers, which rejected "the government's claim of unrestrained power to search personal papers" and held that the searches and seizures of documents violated English common law.<sup>67</sup> According to his analysis, the prevailing view at the time of *Entick* was that a search of private papers was every bit as intrusive as a body search, which, if accurate, would indicate that the Framers intended individualized suspicion to be required to support a search of papers even at the border.<sup>68</sup> Second, Judge Kozinski also distinguished *Seljan* from past Supreme Court precedent by characterizing the border search exception as a means to facilitate the interdiction of smuggled contraband.<sup>69</sup> Thus, according to Judge Kozinski, the border search exception should be limited to the search of "containers," primarily for the purpose of uncovering contraband, and should not be applied to facilitate the search of expressive materials.<sup>70</sup>

## U.S. Customs and Border Protection Policy on Border Laptop Searches

U.S. Customs and Border Protection (CBP), the primary agency entrusted with border security, has disclosed a policy document which outlines the procedures to be used when conducting border searches of laptops. The policy, dated July 16, 2008, states that it is meant to provide guidance for CBP officers regarding "the border search of information contained in documents and electronic devices."<sup>71</sup>

The policy paper states that CBP officers who are conducting a warrantless border search of information, may, without any individualized suspicion of wrongdoing,<sup>72</sup> review and analyze "information transported by any individual attempting to enter, reenter, depart, pass through or reside in the United States." If necessary, these officers also have the discretion "to detain documents and electronic devices ... for a reasonable period of time" in order to conduct a thorough search. This information will only be returned, and copies destroyed, if it is determined after review of the information that there is no probable cause of wrongdoing.

Pursuant to this policy, individualized suspicion is not required if a CBP officer needs "to detain" information that must be translated or decrypted. If the information is not in a foreign language and is unencrypted, but otherwise technical in nature, a CBP officer may only detain the information for subject matter assistance if there is a reasonable suspicion of wrongdoing. If

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<sup>66</sup> *Id.* at 1017-1019 (Kozinski, J., dissenting).

<sup>67</sup> *Id.* at 1017 (Kozinski, J., dissenting) citing *Entick v. Harrington*, 19 Howell's State Trials 1029, 95 Eng. Rep. 807 (1765).

<sup>68</sup> *Id.* (Kozinski, J., dissenting).

<sup>69</sup> *Id.* at 1016. (Kozinski, J., dissenting).

<sup>70</sup> *Id.* at 1014-1015 (Kozinski, J., dissenting).

<sup>71</sup> Policy Regarding Border Search of Information (July 16, 2008). Customs and Border Protection Policy Document. Available at [http://www.customs.gov/linkhandler/cgov/travel/admissibility/search\\_authority.ctt/search\\_authority.pdf](http://www.customs.gov/linkhandler/cgov/travel/admissibility/search_authority.ctt/search_authority.pdf).

<sup>72</sup> Presumably, an *individualized suspicion* standard is synonymous with or perhaps even weaker than a *reasonable suspicion* standard. This is because the Supreme Court has rebuked the use by lower federal courts of standards of suspicion other than *probable cause* or *reasonable suspicion*. See *Montoya de Hernandez*, 473 U.S. at 541.

assistance from another agency is required, CBP should receive it within 15 days of the detention of the information. If more time is required, CBP can extend the detention for seven-day terms. If, upon review of the information, a CBP officer determines that there is probable cause of wrongdoing, the CBP officer may retain the originals and all copies of the relevant information. Absent probable cause, the CBP officer may only retain information related to immigration matters.

The policy also includes special provisions applicable to certain categories of information. Business information, for example, should be treated as business confidential information and CBP officers should take reasonable care to protect it from unauthorized disclosure. These special provisions provide protections analogous to protections of paper documents. CBP officers also may not read correspondences contained in sealed “letter class” mail without an appropriate search warrant or consent. However, correspondence transmitted by private courier, such as Federal Express or UPS, is not considered to be mail and may be searched without individualized suspicion. There is also a provision which states that CBP officers should first seek advice from the U.S. Attorney’s office or the Associate/Assistant Chief Counsel of CBP before conducting a search of information claimed by the border-crosser to be covered by attorney-client privilege.

CBP has characterized the policy paper as an “internal policy statement” that creates no private right. To the extent that CBP’s characterization of this document as an internal policy statement is correct, an individual who alleges a violation of this policy by a CBP officer would not have a cause of action available under the Administrative Procedure Act (APA) to seek redress.<sup>73</sup>

## Conclusion

It is arguable that there is a higher expectation of privacy surrounding the contents of laptops than other types of physical property, such as vehicle interiors. Even when a vehicle search involves an onerous and time-consuming inspection of a gasoline tank, some would argue that the expectation of privacy surrounding the vehicle and its contents does not appear to be as high as the expectation of privacy regarding the contents of a laptop, which often contains private thoughts or other forms of privileged information. On the other hand, laptop searches are not as intrusive as strip or body-cavity searches, where the expectation of privacy surrounding one’s body is clearly higher.<sup>74</sup> Although the Ninth Circuit in *Arnold* has analogized laptop searches to all other searches of personalty, other federal circuits may agree with Judge Kozinski in holding that the government owes greater deference to the privacy interest surrounding laptops.

In addition to privacy interests, courts have taken a range of other concerns into account when determining whether reasonable suspicion must justify a warrantless border search. For example, when courts have conducted border search analyses, they have frequently considered potential harms resulting from illegal materials smuggled into the United States through laptops and electronic storage devices. As stated in *Ramsey*, “The border search exception is grounded in the

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<sup>73</sup> While CBP characterizes this statement as a policy statement, it is conceivable that some might argue that this document is a substantive rule that could only be put into effect through notice and comment rulemaking procedures. Such substantive rules are reviewable under the APA. For more information on the distinction between policy statements and substantive rules, see Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 94 (4<sup>th</sup> ed. 2006).

<sup>74</sup> *Chase*, 503 F.2d 571 (strip searches require reasonable suspicion); *Montoya de Hernandez*, 473 U.S. 531 (alimentary canal search justified by reasonable suspicion).

recognized right of the sovereign to control ... who and what may enter the country.”<sup>75</sup> Laptops can present a challenge to the nation’s ability to control what enters its borders because the vast and compact storage capacity of laptops can be used to smuggle illegal materials. In light of this, courts have held that routine searches of laptops at the border may be justified because of the strong government interest in preventing the dissemination of child pornography and other forms of “obscene” material that may be contained in laptops.<sup>76</sup> Another justification may be to facilitate searches of laptops owned by suspected terrorists, which may contain information related to a planned terrorist attack.<sup>77</sup>

On the other hand, if customs officials can conduct laptop border searches without the need for reasonable suspicion, there is the potential for customs officials to conduct targeted searches based on justifications prohibited by the Constitution. For example, if a customs official could conduct a search without providing cause, it may be more difficult to detect unlawful bases for the searches because the official would not need to explain why he conducted the search. Such concerns suggest that resolving the issues surrounding laptop border searches will involve striking a careful balance between national security and civil liberties.

The Ninth Circuit, by equating the privacy interest implicated in personal information with that surrounding normal personal effects, has adopted a categorical approach to the border search doctrine. The court has concluded that the search of all personal property does not require reasonable suspicion unless the search is conducted in a manner that is destructive or particularly offensive.<sup>78</sup> So far, the Ninth Circuit is the only circuit to have explicitly stated that such searches do not require reasonable suspicion. Whether other federal circuits adopt this approach or, in the same vein as Judge Kozinski, give credence to the notion that a heightened expectation of privacy surrounds expressive materials, thus requiring reasonable suspicion before being searched, is an open question.

## Legislative Proposals

A bill introduced in the 111<sup>th</sup> Congress, the Securing our Borders and our Data Act of 2009 (H.R. 239), would prohibit laptop searches based solely on border search authority.<sup>79</sup> The legislation would establish “fundamental rules” prohibiting a federal border officer from searching or seizing a “digital electronic device” or “electronic storage media” based solely on the power of the United States to search and seize the effects of individuals seeking entry into the country. Instead, the legislation would allow such searches only in cases where border officers have reasonable suspicion that a device contains criminal evidence. Devices could be seized only if constitutional authority other than border search authority provided a justification. The bill would direct the Secretary of Homeland Security to promulgate rules regarding: maximum time periods during which border officers can detain devices; owners’ rights to retrieve detained devices; and

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<sup>75</sup> *Ramsey*, 431 U.S. at 611.

<sup>76</sup> *See, e.g., New York v. Ferber*, 458 U.S. 747, 765 (1982) (holding that child pornography does not enjoy First Amendment protections because the government has a compelling state interest in preventing the sexual abuse of children and that the distribution of child pornography is intrinsically related to that state interest).

<sup>77</sup> *See Ickes*, 393 F.3d at 506.

<sup>78</sup> *Arnold*, 533 F.3d at 1007-1008.

<sup>79</sup> The Securing our Borders and our Data Act of 2009, H.R. 239, 111<sup>th</sup> Cong. (2009).

strategies for maintaining the integrity of all information detained and shared with other government agencies.<sup>80</sup>

The Border Security Search Accountability Act of 2009 (H.R. 1726) would mandate that the Commissioner of Customs and Border Protection promulgate a rule with respect to the scope of procedural and record-keeping requirements associated with border security searches of electronic devices.<sup>81</sup> The rule would require that commercial information be handled in a manner consistent with all laws and regulations governing such information, that electronic searches be conducted in front of a supervisor, that a determination of the number of days such information could be retained without probable cause be made, that the individual whose information was seized be notified if the information is entered into an electronic database, that an individual receive a receipt if his device is seized during a border search, that an individual subject to a border search of an electronic device receive notice as to how he can report any abuses or concerns related to the search, that the rights of individuals with regard to border searches be posted at all ports of entry, that a privacy impact assessment of the rule be made, and that a civil rights impact assessment of the rule be made.<sup>82</sup>

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<sup>80</sup> This legislation is identical to a bill introduced during the 110<sup>th</sup> Congress. *See* Securing Our Borders and Our Data Act of 2008, H.R. 6702, 110<sup>th</sup> Cong. (2008). Another related bill introduced during the 110<sup>th</sup> Congress, H.R. 6588, would have prohibited laptop searches based on the United States' border search authority but permitted laptop searches conducted under any other federal authority. *See* Electronic Device Privacy Act of 2008, H.R. 6588, 110<sup>th</sup> Cong. (2008).

<sup>81</sup> Border Security Search Accountability Act of 2009, H.R. 1726, 111<sup>th</sup> Cong. (2009).

<sup>82</sup> This bill is similar to H.R. 6869, introduced in the 110<sup>th</sup> Congress, which would have directed the Department of Homeland Security to issue rules regarding the scope and procedural requirements associated with border security searches of electronic devices. *See* Border Security Search Accountability Act of 2008, H.R. 6869, 110<sup>th</sup> Cong. (2008).