Protecting the U.S. Perimeter: Border Searches Under the Fourth Amendment

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Summary

The Fourth Amendment requires that a search or seizure conducted by a governmental agent be reasonable and supported by probable cause. The Supreme Court has interpreted the Fourth Amendment to include a presumptive warrant requirement on all searches and seizures conducted by the government. Any violation of these requirements could result in the suppression of any information derived therefrom. The Supreme Court, however, has also recognized situations that render obtaining a warrant impractical or against the public's interest and has accordingly crafted various exceptions to the warrant and probable cause requirements of the Fourth Amendment.

Few exceptions to the presumptive warrant and probable cause requirements are more firmly rooted than the "border search" exception. Derived from the sovereign right to stop and examine persons and property crossing into the country, border searches allow customs officials the flexibility to inspect incoming individuals and their belongings and to interdict incoming contraband without having to inform a magistrate before the search.

Border searches can also occur in places other than the actual physical border. Two different legal concepts authorize such searches: (1) searches at the functional equivalent of the border; and (2) extended border searches. These concepts allow federal officers to conduct border searches even in situations when it is not feasible to conduct the search at the actual point of entry (e.g., examining a person upon arrival at a U.S. airport rather than during a mid-flight crossing into the country).

Courts have determined that border searches usually fall into two categories—routine and non-routine—though this analysis may no longer apply to searches of vehicles or personal property. Generally, the distinction between "routine" and "non-routine" turns on the level of intrusiveness. Routine border searches are reasonable simply by virtue of the fact that they occur at the border and consist of only a limited intrusion, while non-routine searches generally require "reasonable suspicion" and vary in technique and intrusiveness.

This report first outlines the statutes authorizing certain federal officers to conduct warrantless searches: 19 U.S.C. § 482 for customs officials and Immigration and Nationality Act (INA) § 287 (codified in 8 U.S.C. § 1357) for immigration officers. It then addresses the scope of the government's constitutional authority to search and seize persons and property at the border. It also describes the varying levels of suspicion generally required for each type of border search as interpreted by the courts. Finally, this report lists several bills before the 111th Congress that address border searches: two of which, H.R. 239 (the Securing our Borders and our Data Act of 2009) and H.R. 1726 (the Border Security Search Accountability Act of 2009), address border searches of laptops and other electronic storage devices. H.R. 1900 would provide emergency deployments of federal officers to the border and would authorize funds to local law enforcement to stem the illegal trafficking of firearms into Mexico. S. 205, H.R. 495, and H.R. 1448 would also authorize funds for Bureau of Alcohol, Tobacco, Firearms, and Explosives agents to interdict the illegal trafficking of firearms to Mexico.

This report does not address interior searches and seizures performed by immigration personnel since they are not traditional "border searches."

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Introduction

The United States' border policy seeks to balance the promotion of legitimate cross-border commerce and travel with its sovereign right to protect itself from terrorist activities, unlawful migration, and contraband. When formulating security initiatives regarding the border, officials must ensure that their search and seizure policies comply with the Fourth Amendment, which states: "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…." The Supreme Court has construed this language to impose a presumptive warrant requirement on all searches and seizures conducted by governmental authority. However, the Court has also recognized exceptions to the Fourth Amendment's warrant and probable cause requirements. One such exception is the "border search" exception. Based on the inherent authority of a sovereign nation to regulate who and what comes within it borders, this exception renders border searches *per se* reasonable under the Fourth Amendment simply because they occur at the border. Because they are considered *per se* reasonable, border searches can usually be conducted without a warrant or probable cause.

Federal courts have grouped border searches into two categories: routine and non-routine. Routine searches usually intrude into an individual's privacy in very limited ways. They generally consist of document checks, patdowns, or the emptying of pockets, and do not need to be justified by any suspicion of wrongdoing. Similarly, a government agent generally does not need suspicion of criminal activity before he may conduct limited inspections of cars and personal property at the border.

On the other hand, government officials may conduct certain "non-routine" searches at the border only if they have at least a "reasonable suspicion" that the searched individual is smuggling contraband or conducting other illegal activities. "Reasonable suspicion" means an officer has a particularized and objective basis for suspecting the searched individual of wrongdoing.[1] Certain non-routine search procedures are perceived to intrude and have the potential to be embarrassing or destructive. In order to prevent their excessive use, courts have held that border agents must have at least a "reasonable suspicion" of wrongdoing before they may conduct destructive searches of inanimate objects, prolonged detentions, strip searches, body cavity searches, X-ray searches, and the like. Whether reasonable suspicion is required is a fact-intensive totality of the circumstances test determined on a case-by-case basis.

Although there was some federal circuit precedent to require more than reasonable suspicion to justify some acutely intrusive forms of non-routine border searches, the Supreme Court has since warned against developing further gradations of suspicion beyond reasonable suspicion.[2] Thus, federal courts generally appear to apply only the reasonable suspicion standard when reviewing a non-routine border search.

The Ninth Circuit appears to have refocused the border search analysis to presume that searches at the border do not require reasonable suspicion. Thus, the fact-intensive analysis used to determine whether reasonable suspicion is required may no longer be a central consideration in

[1] The reasonable suspicion standard requires less suspicion of wrongdoing than probable cause, the normal standard required for a Fourth Amendment search or seizure. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968).

[2] *See infra* "Non-Routine Searches."

analyzing border searches. Rather, the Ninth Circuit, at least, begins with the presumption that most border searches do not require any suspicion of wrongdoing to be justified. If, however, the case at issue involves (1) an intrusive search of the body, (2) a particularly destructive search of property, or (3) a search conducted in a particularly offensive manner, the presumption would be rebutted and "reasonable suspicion" would be required.

Statutory Authorization to Conduct Border Searches

Two statutory provisions confer border search powers on agents of the United States: 19 U.S.C. § 482, which allows customs officials to conduct searches of persons, vehicles, and mail at the border; and Immigration and Nationality Act (INA) § 287, which gives immigration officers broad powers to interrogate, detain, and search individuals and vehicles. Both statutes have been interpreted such that these agents may conduct searches and arrests at the border without warrant or probable cause. However, the exercise of these powers still must comport with the requirements of the Fourth Amendment.[3]

Customs Officials

Section 482 of Title 19 of the U.S. Code authorizes customs officials to conduct searches for unlawfully imported materials.[4] This provision specifically confers upon those customs officials who are authorized to board and search sea vessels the additional power to search "any vehicle, beast, or person" where they suspect they will discover goods subject to U.S. duties or goods whose importation is outlawed by the United States.[5] Federal courts have interpreted this to mean that customs officials are empowered to search vehicles for aliens, as well as contraband.[6] A customs official who exercises this authority to conduct a border search need not have a warrant or probable cause.[7] However, border searches must still be "reasonable" in light of the circumstances.[8]

Furthermore, customs officials may also search "any trunk or envelope, wherever found," in which they have "reasonable cause to suspect"[9] there is merchandise imported contrary to law.[10] The U.S. Supreme Court has interpreted "any trunk or envelope" to include all international mail

[3] Many of the nation's border security agencies or functions have been transferred to the Department of Homeland Security. *See* P.L. 107-296. When discussing case law, this report uses agency names as used in the case law, even if the agency may no longer have responsibilities at the border.

[4] Act of July 18, 1866, ch. 201, § 3, 14 Stat. 178; R.S. § 3061 (codified at 19 U.S.C. § 482).

[5] 19 U.S.C. § 482.

[6] United States v. Rivera, 595 F.2d 1095 (5th Cir. 1979); United States v. Bilir, 592 F.2d 735 (4th Cir. 1979).

[7] United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968); United States v. Berard, 281 F. Supp. 328 (D. Mass. 1968).

[8] United States v. Montoya de Hernandez, 473 U.S. 53, 539 (1985) ("Having presented herself at the border for admission, and having subjected herself to the criminal enforcement powers of the Federal Government, respondent was entitled to be free from unreasonable search and seizure."). *See also* United States v. Bilir, 592 F.2d 735 (4th Cir. 1979); United States v. Bowman, 502 F.2d 1215 (1974).

[9] Normally, reasonable cause is synonymous with probable cause. *See* Black's Law Dictionary 1219 (7th Ed. 1999). However, the Supreme Court interpreted "reasonable cause to suspect" to be a less stringent requirement than probable cause. United States v. Ramsey, 431 U.S. 606, 612-13 (1977). Thus, in this context, "reasonable cause to suspect" is more likely equivalent to "reasonable suspicion."

[10] 19 U.S.C. § 482(a).

entering the United States.[11] This means customs officials need not have probable cause, nor must they procure a warrant, to commence a search of a piece of international mail.[12] However, even though a customs official may conduct a border search of incoming international mail, the search is still "subject to the substantive limitations imposed by the Constitution," which is to say the Fourth Amendment's reasonableness requirement.[13]

Immigration Officers

Section 287 of the Immigration and Nationality Act (INA) expressly confers upon immigration officers[14] broad powers to question and detain individuals without warrant either at the border or in the interior of the United States. For example, immigration officers may, without warrant, interrogate aliens about their right to be within the United States.[15]

They may also conduct some searches without a warrant. The INA expressly authorizes immigration officers, within "a reasonable distance" from the external boundary of the United States, to search any land-based vehicle or conveyance, and any vessel within U.S. territorial waters.[16] Immigration officers can also access without warrant any private lands located within 25 miles of the U.S. border, but not dwellings, for the purpose of patrolling for aliens illegally entering the United States.[17] Moreover, the statute authorizes immigration officers to search, without warrant, a person and the personal effects in his possession, if the person seeks admission to the United States and the officer has reasonable cause to suspect that a search would disclose grounds for denying admission.[18]

Furthermore, immigration officers may arrest without warrant:

- any alien who, in the presence of the officer, is attempting to enter the United States in violation of the federal immigration laws;[19]

[11] *Ramsey*, 431 U.S. 606.

[12] *Id.* at 612-13.

[13] *Id.* at 619.

[14] Although the statute speaks of "immigration officers," the Department of Homeland Security (DHS) designates by regulation those classes of DHS agents who actually wield these powers. *See* 8 C.F.R. § 287.5 for a list of officers who are authorized to wield the powers described in this section. Typically, both Border Patrol agents and Immigration and Customs Enforcement agents are empowered to wield all of these powers.

[15] INA § 287(a)(1), 8 U.S.C. § 1357(a)(1) (authorizing any officer or employee "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States" without obtaining a warrant). *See also* 8 C.F.R. § 287.5 (authorizing all immigration officers to exercise this power).

[16] INA § 287(a)(3), 8 U.S.C. § 1357(a)(3). This statute also authorizes searches without warrant "within a reasonable distance from any external boundary of the United States." *Reasonable distance* is defined by 8 C.F.R. § 287.1(a)(2) to mean "within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the chief patrol agent of CBP, or the special agent in charge of ICE." *External boundary* is defined by 8 C.F.R. § 287.1(a)(1) to mean "the land boundaries and the territorial sea of the United States extending 12 nautical miles from the baselines of the United States determined in accordance with international law."

[17] *Id.*

[18] INA § 287(c), 8 U.S.C. § 1357(c).

[19] INA § 287(a)(2), 8 U.S.C. § 1357(a)(2) (authorizing any officer or employee "to arrest any alien who in [the officer's] presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens" or "arrest any alien in the United States, if [the officer] has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest").

- any alien who the officer has a reason to believe is an alien currently within the United States in violation of the federal immigration laws;[20]
- any person for any felony regulating the admission or removal of aliens;[21]
- any person for any offense against the United States committed in the presence of the officer;[22] or
- any person for any felony if the officer has reasonable grounds to believe the person committed the felony, the arrest was made while the officer was performing duties relating to the enforcement of the federal immigration laws, there is a likelihood that the suspect would escape before a warrant can be obtained, and the officer is properly certified to make those types of arrests.[23]

Section 287 does not impose any specific limitations on any of the immigration officer's powers to search, interrogate, or arrest aliens without warrant.[24] Nonetheless, an immigration officer's powers to search, interrogate, or arrest aliens without warrant are still subject to constitutional constraints, including the Fourth Amendment requirement that all searches and seizures (i.e., interrogations and arrests) be reasonable.[25] As discussed below, the "reasonableness" of a search, interrogation, or arrest varies depending on the circumstances, which include the justifications for the search, the scope, place, and manner of the search, and whether an appropriate exception to the Fourth Amendment applies.

The Fourth Amendment

The Fourth Amendment mandates that a search or seizure conducted by a government agent must be reasonable and that probable cause must support a warrant.[26] Although the Supreme Court has interpreted this to mean that a warrant is presumptively required along with a need for

[20] *Id.*

[21] INA § 287(a)(4), 8 U.S.C. § 1357(a)(4) (authorizing any officer or employee "to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest").

[22] INA § 287(a)(5)(A), 8 U.S.C. § 1357(a)(5)(A).

[23] INA § 287(a)(5)(B), 8 U.S.C. § 1357(a)(5)(B). *See also* 8 C.F.R. § 287.5(c)(4).

[24] *See* Zepeda v. INS, 753 F.2d. 719, 725-26 (9th Cir. 1983) (agreeing with the government's argument that § 287 authorized the interrogation of aliens under the fullest extent permissible under the Fourth Amendment). *See also* Babula v. INS, 665 F.2d 293 (3d Cir. 1981).

[25] United States v. Brignoni-Ponce, 422 U.S. 873 (1975). *See also* United States v. Rogers, 436 F. Supp. 1 (E.D. Mich. 1976) (holding that the Fourth Amendment prohibits identification stops by roving patrols that are not based on articulable suspicion of illegal activity); Illinois Migrant Council v. Pilliod, 531 F. Supp. 1011 (N.D. Ill. 1982) (holding that the Fourth Amendment prohibits INS from conducting investigatory seizures based only on reasonable suspicion that a person seized is an alien).

[26] U.S. Const., Amend. IV.

individualized suspicion of wrongdoing,[27] the Court has also recognized "specifically established exceptions" to the warrant and probable cause requirements of the Fourth Amendment.[28]

However, before taking these exceptions into consideration, a Fourth Amendment analysis begins with this inquiry: (1) whether the government action was sufficiently intrusive to constitute a "search" or "seizure" and (2) whether the intrusion was "reasonable" in light of the circumstances.[29]

Searches

A search triggers Fourth Amendment protections when (1) the individual personally held an expectation of privacy in the searched object or place and (2) society is willing to recognize that expectation as reasonable.[30] In order for the expectation of privacy to be deemed reasonable, there must be some property law or social norm that signifies that the searched object or place is closed from public intrusion.[31] For example, where the government uses a remote surveillance device not generally available for public use to explore physical activities within a "constitutionally protected area" (e.g., a home), and that area would have been otherwise undetectable without some sort of physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.[32]

Seizures

Property or individuals may be seized. The Supreme Court has described a seizure of property as "some meaningful interference with an individual's possessory interests in that property."[33] An individual is "seized" when, in light of all the circumstances surrounding the incident, a government official makes a person reasonably believe that he is not at liberty to leave the official's presence.[34] A seizure of a person, therefore, can include full arrests, investigatory detentions, checkpoint stops for citizenship inquiries, and detentions of a person against his will. However, if a person consents to be interviewed by an officer, that interview is not a "seizure."[35]

Detaining a suspect after a consensual interview does not violate the Fourth Amendment if, during the course of the interview, the officer finds sufficient cause to suspect that the person

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[27] 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.").

[28] Camara v. Municipal Court, 387 U.S. 523, 539-540 (1967).

[29] *See* Walter v. United States, 447 U.S. 649, 656 (1980) (noting that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment).

[30] *Katz*, 389 U.S. at 361 (Harlan, J., concurring). *See also* Oliver v. United States, 466 U.S. 170, 177-78 (1984).

[31] Minnesota v. Carter, 525 U.S. 83, 88 (1998).

[32] Kyllo v. United States, 533 U.S. 27, 40 (2001).

[33] Sodal v. Cook County, 506 U.S. 56, 61 (1992) *quoting* United States v. Jacobsen, 466 U.S. 109, 113 (1984).

[34] Florida v. Bostick, 501 U.S. 429, 437 (1991) *citing* Michigan v. Chesternut, 486 U.S. 567, 573 (1988). *See also* United States v. Mendenhall, 446 U.S. 544 (1980); Brendlin v. California, 551 U.S. 249 (2007).

[35] INS v. Delgado, 466 U.S. 210, 216 (1984). *See also* Florida v. Royer, 460 U.S. 491 (1983) ("Interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.").

committed wrongdoing. But an officer cannot construe a person's refusal to be interviewed as sufficient cause to suspect wrongdoing.[36]

An immigration officer's questioning of an individual illustrates how an encounter which may appear to be a seizure is in fact not. Merely questioning an individual about his identity, regardless of whether he is aware he can leave the officer or refuse to cooperate by not answering, is not a seizure.[37] Therefore, such questioning need not be predicated on reasonable suspicion that the individual is an alien.[38] Nonetheless, if "the circumstances are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded," then the encounter may be deemed a seizure.[39] When the interview becomes a seizure, either through a formal arrest or when the circumstances are such that a reasonable person would understand he could not leave, the officer must, at a minimum, have "a reasonable suspicion, based on articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States."[40]

Reasonableness

Determining whether a government action is "reasonable" requires balancing the governmental interest justifying the intrusion against a person's legitimate expectation of privacy. When the government interest fails to justify its intrusion of a legitimate expectation of privacy, a violation of the Fourth Amendment occurs. This violation may result in any evidence derived from the unlawful search to be suppressed and excluded from a judicial proceeding. However, this "exclusionary rule" does not generally apply in proceedings involving the removal of aliens from the United States.[41]

The Definition of "Border"

Warrantless searches are *per se* unreasonable under the Fourth Amendment, unless an established exception applies. The border search is a well-recognized and long established exception to the Fourth Amendment's probable cause and warrant requirements. In general, the border is the point where entry into the United States is first made by land from the neighboring countries of Mexico or Canada, at the place where a ship docks in the United States after having been to a foreign

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[36] *Delgado*, 466 U.S. at 216.

[37] *Id.*; United States v. Rodriguez-Franco, 749 F.2d 1555, 1560 (11th Cir. 1985). *See also* 8 C.F.R. § 287.8(b)(1) ("An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.").

[38] *Zepeda*, 753 F.2d at 731. *See also* Cuevas-Ortega v. INS, 588 F.2d 1274 (9th Cir. 1979); Cordon de Ruano v. INS, 588 F.2d 1274 (9th Cir. 1977).

[39] *Delgado*, 466 U.S. at 216. *See also Zepeda*, 753 F.2d at 730.

[40] 8 C.F.R. § 287.8(b)(2).

[41] INS v. Lopez-Mendoza, 468 U.S. 1032, 1046 (1984). *See also* Mapp v. Ohio, 367 U.S. 643, 648 (1961) (exclusionary rule in general). *But see* Almeida-Amaral v. Gonzales, 461 F.3d 231, 234 (2d Cir. 2006) ("The [Supreme] Court qualified [*Lopez-Mendoza*]'s ruling in two significant ways. First, it stated that its 'conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by [immigration] officers were widespread.' And, second, it explained that its holding did not necessarily pertain to circumstances involving 'egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.'").

port, and at any airport in the country where international flights first land. Authorities at these locations may search a person entering or leaving the country, an individual's automobile, baggage, or goods, and materials imported to and exported from the country.[42] Authorized by the First Congress,[43] the border search exception has a history older than the Fourth Amendment and derives from Congress's inherent authority to regulate commerce with foreign nations and to enforce immigration laws.[44] The Fourth Amendment does not require warrants or probable cause for most stops and searches at the border because the power to control who or what comes within a nation's borders is an inherent attribute of national sovereignty.[45]

Although border searches may generally be conducted without a warrant or probable cause, they must still be reasonable.[46] Federal courts have determined that border searches usually fall into two categories—routine and non-routine, the distinction generally turning on the intrusiveness of the search. Routine border searches are reasonable simply by virtue of the fact that they occur at the border and consist of only a limited intrusion, while non-routine searches generally require reasonable suspicion and vary in technique and intrusiveness. It should be noted, however, that the Supreme Court has arguably suggested that the routine/non-routine analysis may no longer be appropriate for searches of vehicles and personal property.[47]

Functional Equivalent of the Border

The border search exception extends to those searches conducted at the "functional equivalent" of the border. The "functional equivalent" of a border is generally the first practical detention point after a border crossing or the final port-of-entry.[48] Places such as international airports within the country and ports within the country's territorial waters or stations at the intersection of two or more roads extending from the border exemplify such functional equivalents.[49]

This doctrine addresses the problem posed by the impossibility of stopping an individual for inspection who is in mid-transit when crossing the physical border. By permitting searches at the functional equivalent of the border, the doctrine permits a search to be effected at the first practicable location, namely the port-of-entry. The reasoning is that the port-of-entry is, much like a border checkpoint, the place where an individual first enters the country, and thus a search for contraband at a port-of-entry is as effective as a search at the border.[50]

A search at the border's functional equivalent is constitutionally valid when: (1) a reasonable certainty exists that the person or thing crossed the border; (2) a reasonable certainty exists that there was no change in the object of the search since it crossed the border; and (3) the search was conducted as soon as practicable after the border crossing.[51] In general, when applying this test,

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[42] *See supra* "Statutory Authorization to Conduct Border Searches."

[43] Act of July 31, 1789, ch.5 §§ 23-24, 1 Stat. 29, 43 (current version at 19 U.S.C. §§ 482, 1582).

[44] United States v. Ramsey, 431 U.S. 606, 619 (1977) (*citing* U.S. Const., Art. I, § 8, cl. 3).

[45] *See Ramsey*, 431 U.S. at 616.

[46] Marsh v. United States, 344 F.2d 317, 324 (5th Cir. 1965).

[47] United States v. Flores-Montano, 541 U.S. 149 (2004). *See infra* "Searches and Seizures of Vehicles."

[48] Thirty-First Annual Review of Criminal Procedure; Border Searches, 90 Geo. L.J. 1087, 1190 (2002) (9th Cir. 1973).

[49] Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973).

[50] *See* United States v. Hill, 939 F.2d 934, 936 (11th Cir. 1991).

[51] *Id.* at 937.

courts have given the "border" a geographically flexible reading because people can enter the country at points other than the actual border.[52]

Extended Border Search

The border search exception may also allow warrantless searches beyond the border or its functional equivalent. Under the "extended border search" doctrine, government officials may conduct a warrantless search beyond the border or its functional equivalent if (1) the government officials have a reasonable certainty[53] that a border was crossed or there exists a "high degree of probability" that a border was crossed; (2) they also have reasonable certainty that no change in the object of the search has occurred between the time of the border crossing and the search; and (3) they have "reasonable suspicion" that criminal activity was occurring.[54] This three-part test ensures that a significant temporal nexus still exists between the search and the suspect's border crossing.[55]

The extended border search doctrine has gained wide acceptance among the federal courts because they deem that it strikes a sensible balance between the legitimate privacy interests of the individual and the societal interests in the enforcement of border security laws.[56]

The Distinction between the Functional Equivalent of a Border and the Extended Border Search Doctrines

Although a search at the border's functional equivalent and an extended border search require similar elements, the extended border search entails a potentially greater intrusion on a legitimate expectation of privacy. Thus, an extended border search always requires a showing of "reasonable suspicion" of criminal activity, while a search at the functional equivalent of the border may not require any degree of suspicion whatsoever.

Another difference is that an extended border search takes place after the first point in time when an individual might have been stopped within the country.[57] For example, in *United States v. Teng Yang*, the Seventh Circuit upheld an extended border search that occurred at an international airport but after the defendant had already undergone an initial inspection at the designated U.S. border inspection site.[58] The court determined that "[i]t is the enforcement of the customs laws

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[52] *Id.* at 936 ("Because people can enter the country at points other than along the actual border, courts look to whether the point of entry is the functional equivalent of the border. Places such as international airports within the country and ports within the country's territorial waters exemplify such functional equivalents.").

[53] *Reasonable certainty*, in the context of this test, has been defined as a standard which requires more than probable cause, but less than proof beyond a reasonable doubt. United States v. Cardenas, 9 F.3d 1139, 1148 (5th Cir. 1993).

[54] S*ee, e.g.*, United States v. Delgado 810 F.2d 480, 482 (5th Cir. 1987). In *Delgado*, smugglers used a foot-bridge to transfer narcotics to delivery trucks on a farm near El Paso, Texas. The court upheld an extended border search conducted on a farm road near and leading from the border, but not at the official border checkpoint.

[55] United States v. Teng Yang, 286 F.3d. 940, 946 (7th Cir. 2002).

[56] *See, e.g.*, *Teng Yang*, 286 F.3d. 940; United States v. Sahanaja, 430 F.3d 1049 (9th Cir. 2005); United States v. Espinoza-Seanez, 862 F.2d 526 (5th Cir. 1989); United States v. Caicedo-Guarnizo, 723 F.2d 1420 (9th Cir. 1984); United States v. Garcia, 672 F.2d 1349 (11th Cir. 1982); United States v. Bilir, 592 F.2d 735 (4th Cir. 1979).

[57] United States v. Niver, 689 F.2d 520, 526 (5th Cir. 1982).

[58] 286 F.3d. 940 (7th Cir. 2002).

combined with the mandate of protecting the border of the United States that permits the extension of the search rights of border authorities to allow non-routine searches in areas near our nation's borders."[59]

Types of Searches and Seizures at the Border

Courts have historically analyzed border searches based on whether they are "routine" or "non-routine." However, this type of division may no longer be appropriate for vehicular searches. And at least one court appears to have extended this analysis to searches of electronic storage devices and other containers.

The following sections examine how federal courts generally analyze border searches of persons, vehicles, and electronic storage devices.

Searches and Seizures of People

Routine Searches

In order to regulate the collection of duties and to prevent the introduction of illegal aliens and contraband into this country, Congress has granted the authority to conduct routine searches of persons and their personal belongings at the border without reasonable suspicion, probable cause, or a warrant.[60] A routine border search is a search that does not pose a serious invasion of privacy or offend the average traveler.[61] For example, a routine border search may consist of limited searches for contraband or weapons through a pat-down;[62] the removal of outer garments such as jackets, hats, or shoes, the emptying of pockets, wallets, or purses;[63] the use of a drug-sniffing dog;[64] the examination of outbound materials;[65] and the inspection of luggage.[66]

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[59] *Id.* at 947.

[60] *See, e.g.*, 8 U.S.C. § 1357(c) (authorizing immigration officials to search without a warrant persons entering the country for evidence which may lead to the individual's exclusion); 19 U.S.C. § 1496 (authorizing customs officials to search the baggage of person entering the country); 19 U.S.C. § 1582 (authorizing customs officials to detain and search all persons coming into the United States from foreign countries). *See also* United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985).

[61] United States v. Johnson, 991 F.2d 1287, 1291 (7th Cir. 1993).

[62] *See, e.g.*, United States v. Beras, 183 F.3d 22, 24 (1st Cir. 1999) (holding that a patdown of an international traveler's legs was not intrusive enough to qualify as non-routine).

[63] United States v. Sandler, 644 F.2d 1163, 1169 (5th Cir. 1981).

[64] United States v. Kelly, 302 F.3d 291, 294-95 (5th Cir. 2002) (sniff by a dog of a person at the border upheld as a routine border search); *cf. United States v. Garcia-Garcia*, 319 F.3d 726, 730 (5th Cir. 2003) (dog sniff of a person on a bus at an immigration checkpoint upheld and seen as analogous to a pat down).

[65] United States v. Kolawole Odutayo, 406 F.3d 386, 392 (5th Cir. 2005) (joining sister circuits in holding that the border search exception applies for all outgoing searches at the border).

[66] United States v. Okafor, 285 F.3d 842 (9th Cir. 2002) (finding an X-ray examination and subsequent probe of luggage a routine search because it requires no force, poses no risk to the bag's owner or to the public, causes no psychological fear, and does not harm the baggage); United States v. Lawson, 461 F.3d 697, 701 (6th Cir. 2006) (accepting the "commonsense conclusion that customs officers may x-ray an airline passenger's luggage at the border without reasonable suspicion").

It has long been established that border crossers' reasonable expectation of privacy is lower at the border because they generally expect border guards to search persons and property for contraband. Because this is common knowledge, border crossers are put on notice when approaching a border that a search may be imminent, and thus their privacy is "less invaded by [border] searches" when they occur.[67] Thus, routine searches do not violate the Fourth Amendment simply because they occur at the border.[68] Moreover, courts consider routine border searches to be permissible because they are administered to a class of people (international travelers) and are not used to target individuals.[69]

There is no established test that determines whether a particular search procedure is routine. However, the degree of intrusiveness or invasiveness associated with the particular technique is especially indicative of whether a search is routine. The First Circuit, for example, compiled a nonexhaustive list of six factors to be considered: (1) whether the search required the suspect to disrobe or expose any intimate body parts; (2) whether physical contact was made with the suspect during the search; (3) whether force was used; (4) whether the type of search exposed the suspect to pain or danger; (5) the overall manner in which the search was conducted; and (6) whether the suspect's reasonable expectations of privacy, if any, were abrogated by the search.[70]

Non-Routine Searches

Once a search of a person's body goes beyond a limited intrusion, a court may determine that a non-routine search has occurred. Non-routine border searches may include prolonged detentions, strip searches, body cavity searches, and some X-ray examinations.[71] Destructive searches of property can also qualify as non-routine.

At the very least, it appears courts require a government official to have a "reasonable suspicion" of illegal activity to conduct a non-routine border search.[72] The reasonable suspicion standard generally requires an officer at the border to have "a particularized and objective basis for

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[67] Gary N. Jacobs, Note, *Border Searches and the Fourth Amendment*, 77 Yale L.J. 1007, 1012 (1968). It should also be noted that the "reasonable person" test presupposes an innocent person who has nothing to conceal from customs. *Bostick*, 501 U.S. at 437.

[68] United States v. Odland, 502 F.2d 148 (7th Cir. 1974) *citing* Carroll v. United States, 267 U.S. 132, 153 (1925). Some courts have indicated a need for "mere suspicion" to conduct a routine border search, which usually requires at least some knowledge identifying an individual as a suspect. *See, e.g.*, Rodriguez-Gonzalez v. United States, 378 F.2d 256 (9th Cir. 1967) (also using the term *unsupported suspicion*). This standard, however, is an inaccurate articulation of the general rule that no suspicion is required. *See Odland*, 502 F.2d at 151 ("Any person or thing coming into the United States is subject to search by that fact alone, whether or not there be any suspicion of illegality directed to the particular person or thing to be searched."); Bradley v. United States, 299 F.3d 197, n.7 (3d Cir. 2002) (stating "mere suspicion" standard effectively overruled by *Montoya de Hernandez*).

[69] 77 Yale L.J. 1007, 1012 (1968).

[70] United States v. Braks, 842 F.2d 509, 511-12 (1st Cir. 1988). The *Braks* court concluded that only strip searches and body cavity searches are consistently non-routine.

[71] *See, e.g.*, United States v. Reyes, 821 F.2d 168, 170-71 (2d Cir. 1987) (strip search); United States v. Oyekan, 786 F.2d 832, 837 (8th Cir. 1986) (strip search); United States v. Adekunle, 2 F.3d 559, 562 (5th Cir. 1993) (continued detention and X-ray examination of alimentary canal); United States v. Rivas, 157 F.3d 364, 367 (5th Cir. 1998) (drilling of hole into body of automobile).

[72] *Montoya de Hernandez*, 473 U.S. at 541; United States v. Garcia-Garcia, 319 F.3d 726, 730 (5th Cir. 2003) (an alert by a drug sniffing dog provided reasonable suspicion to detain a bus long enough to investigate the reason for the dog's response).

suspecting the particular person" of wrongdoing.[73] For example, in *United States v. Forbicetta*, the court found reasonable suspicion to exist where Customs officials acted on the following objective facts: the suspect (1) arrived from Bogota, Colombia, (2) was traveling alone, (3) had only one suitcase and no items requiring Customs inspection, (4) was young, clean-looking, and attractive, and (5) was wearing a loose-fitting dress.[74] These factors taken together matched the "smuggling profile" for narcotic carriers in that area, and thus, the court concluded there was a sufficient basis to conduct the search.

The Supreme Court has not enumerated the factors that should be considered when determining whether a border search is routine or non-routine.[75] This task has generally been left to lower federal courts. However, in *United States v. Montoya de Hernandez*, the Supreme Court concluded that one such standard, a "clear indication" of suspicion (i.e., a suggestion that is free from doubt), was not required by the Fourth Amendment to justify a prolonged detention in an airport.[76] The Court determined that the use of the term "clear indication" in its past jurisprudence was only meant to indicate the necessity for particularized suspicion, "rather than as enunciating a third Fourth Amendment threshold between 'reasonable suspicion' and 'probable cause.'"[77] Federal courts now view the *Montoya de Hernandez* reasoning as both a warning against using suspicion standards other than reasonable suspicion for non-routine border searches and a specific disavowal of the use of the "clear indication" standard when analyzing a border search.[78] Although some courts had previously required a "clear indication" to justify especially intrusive border searches other than prolonged detentions,[79] courts generally construe the disavowal of this standard in *Montoya de Hernandez* to apply to other invasive border searches. "Reasonable suspicion" is the standard used to justify non-routine searches.

Prolonged Detentions

Prolonged detentions may be conducted in order to verify or dispel an agent's suspicion that a traveler has committed wrongdoing. In *Montoya de Hernandez*, someone from Bogota, Columbia, suspected of smuggling drugs in her alimentary canal, refused to consent to an X-ray examination. In an attempt to verify or dispel their suspicions that she was engaged in criminal activity, Customs officers detained Ms. Montoya de Hernandez for over 16 hours and told her she could not leave until she eliminated the contents of her alimentary canal into a wastebasket.

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[73] *See Montoya de Hernandez*, 473 U.S. at 541 *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.").

[74] 484 F.2d 645 (5th Cir. 1973). *But see* Reid v. Georgia, 448 U.S. 438, 441(1980) (rejecting the argument that arrival from a source location could, by itself, provide reasonable suspicion).

[75] See *Montoya de Hernandez*, 473 U.S. at 541 n.4.

[76] *Id.* at 541.

[77] *Id.* at 540.

[78] *See, e.g.*, United States v. Charleus, 871 F.2d 265, 268 n.2 (2d Cir. 1989); United States v. Oyekan, 786 F.2d 832, 837-39 (8th Cir. 1986); *Bradley v. United States*, 299 F.3d 197, 202-04 (3d Cir. 2002). United States v. Aguebor, 1999 U.S. App. Lexis 25, at *9 (4th Cir. January 4, 1999) (This unpublished opinion is cited merely as an example and is not intended to have precedential value.).

[79] *See, e.g.*, United States v. Ramos-Saenz, 36 F.3d 59, 61 (9th Cir. 1994) (requiring the higher "clear indication" standard for a body cavity search); United States v. Ek, 676 F.2d 379, 382 (9th Cir. 1982) (requiring a "clear indication" for X-ray search).

The Court determined "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."[80] The Court concluded that it was reasonable to detain Ms. Montoya de Hernandez for the period of time necessary to verify or dispel the suspicion of the agents in these circumstances. [81] Courts have reasoned that "an otherwise permissible border detention does not run afoul of the Fourth Amendment simply because a detainee's intestinal fortitude leads to an unexpectedly long period of detention."[82] However, the Fifth Circuit in *United States v. Adekunle* concluded that the government must, within a reasonable time (generally within 48 hours), seek a judicial determination that reasonable suspicion exists to detain a suspect for an extended period of time.[83]

There appear to be no "hard-and-fast time limits" that automatically transform what would otherwise be a routine search into a non-routine search, nor render a non-routine search conducted under the reasonable suspicion standard unconstitutional.[84] Rather, courts consider "whether the detention of [the traveler] was reasonably related in scope to the circumstances which justified it initially."[85] In order to provide perspective, the 16-hour detention in *Montoya de Hernandez* was considered a non-routine search (justifiable by reasonable suspicions),[86] while a one-hour vehicular search did not require reasonable suspicion.[87] The Second Circuit has characterized four- to six-hour-long detentions of individuals suspected of having terrorist ties as routine.[88]

Strip Searches

A strip search involves the removal of all or part of a suspect's clothing in order to effect a search. Because of the perceived offensiveness of the procedure due to the embarrassment it may inflict on the individual, reviewing courts generally require reasonable suspicion that the person is concealing contraband under his clothing before such a search is justified.[89] Often, in the course of a routine search, reasonable suspicion may arise to justify a subsequent strip search. For

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[80] *Montoya de Hernandez*, 473 U.S. at 541. *See also* United States v. Esieke, 940 F.2d 29 (2d Cir. 1991) (court upheld a detention of one and half days before first bowel movement and another two and half days until all balloons were expelled); United States v. Yakubu, 936 F.2d 936 (7th Cir. 1991) (16-hour detention upheld after refusal to be X-rayed).

[81] *Montoya de Hernandez* does not stand for a "detention until defecation" proposition. The court narrowly decided that the particular detention "was not unreasonably long" under "these circumstances." In fact, the agents expected Ms. Montoya de Hernandez to produce a bowel movement without extended delay because she had just disembarked from a 10-hour flight. 4 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment §10.5(b), 546 (3d ed. 1996 & Supp. 2003).

[82] *Esieke*, 940 F.2d at 35.

[83] 2 F.3d 559, 562 (5th Cir. 1993). The court opined that a formal determination is not necessary; rather, an informal presentation of the evidence supporting the government's suspicion before a neutral and detached judicial officer satisfies this requirement. Furthermore, the court concluded that the failure to obtain such a judicial determination within 48 hours shifts the burden to the government to demonstrate a *bona fide* emergency justifying the extended detainment.

[84] *See* Tabbaa v. Chertoff, 509 F.3d 89, 99 (2d Cir. 2007) (*quoting Montoya de Hernandez*, 473 U.S. at 543).

[85] *Tabbaa*, 509 F.3d at 99.

[86] *Montoya de Hernandez*, 473 U.S. at 535.

[87] *Flores-Montano*, 541 U.S. at 151.

[88] *Tabbaa*, 509 F.3d at 99.

[89] United States v. Chase, 503 F.2d 571 (9th Cir. 1974).

instance, in *United States v. Flores*, upon discovering 600 small undeclared emerald stones in the defendant's pockets during a routine search, Customs agents conducted a strip search and discovered an envelope of narcotics.[90] The court held that the prior discovery of the undeclared emeralds was sufficient to heighten suspicion to the level necessary to conduct the strip search.[91]

Body Cavity Searches

Narcotics and other contraband have often been smuggled in the body cavities of travelers, and searches into such cavities have become more commonplace. Body cavity searches may include inspections of the vagina or rectum, or the use of emetics.[92] Because of the extreme medical risks internal drug smuggling poses to the smuggler, courts have determined that body cavity searches and extraction of the drugs do not require the advance procurement of a search warrant from a magistrate.[93] Nevertheless, a border official must have reasonable suspicion that an individual is attempting to smuggle contraband inside his body for a court to uphold a warrantless body cavity search.[94]

Additionally, the manner in which the body cavity search is conducted must also be reasonable in light of the circumstances. Generally, conduct that "shocks the conscience" is inherently unreasonable.[95] Such conduct has included use of a stomach pump[96] and could potentially include medical procedures performed by nonmedical personnel.[97]

X-Ray Searches

X-ray searches of the body have also been used at the border. They raise Fourth Amendment concerns because individuals normally have a heightened expectation of privacy with respect to

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[90] 477 F.2d 608 (1st Cir. 1973).

[91] *Id.*

[92] *See, e.g.*, United States v. Ogberaha, 771 F.2d 655, 657 (2d Cir. 1985) (vagina); United States v. Pino, 729 F.2d 1357, 1358 (11th Cir. 1984) (rectum); United States v. Briones, 423 F.2d 742, 743 (5th Cir. 1970) (emetics).

[93] *See, e.g.*, United States v. Sosa, 469 F.2d 271 (9th Cir. 1972) (no warrant for rectal probe); United States v. Mason, 480 F.2d 563 (9th Cir. 1973) (no warrant for vaginal probe); United States v. Briones, 423 F.2d 742 (5th Cir. 1970) (no warrant for administration of an emetic). *But see* United States v. Holtz, 479 F.2d 89 (9th Cir. 1973) (Ely, J., dissenting); Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) (Ely, J., dissenting).

[94] *See, e.g.*, United States v. Ogberaha, 771 F.2d 658 (2d Cir. 1985); Swain v. Spinney, 117 F.3d 1, 7 (1st Cir. 1997) (only required reasonable suspicion for visual body cavity search); United States v. Gonzalez-Ricon, 36 F.3d 859, 864 (9th Cir. 1984) (noting in dictum that a body cavity search must be supported by reasonable suspicion). Due to the intrusiveness of alimentary canal searches, some courts had required a "clear indication" (a suggestion that is free from doubt) of alimentary canal smuggling to justify the search. *See, e.g.*, United States v. Ramos-Saenz, 36 F.3d 59, 61 (9th Cir. 1994) (affirming clear indication standard). But since the Supreme Court expressed its disapproval of suspicion standards other than "reasonable suspicion" in *Montoya de Hernandez*, courts have been unwilling to adopt the "clear indication" standard for body cavity searches. *See, e.g.*, United States v. Ogberaha, 771 F.2d 658 (2d Cir. 1985); Swain v. Spinney, 117 F.3d 1, 7 (1st Cir. 1997) (only required reasonable suspicion for visual body cavity search); United States v. Bravo, 295 F.3d 1002 (9th Cir. 2002) (noting in dictum that a body cavity search must be supported by reasonable suspicion).

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

[96] *Id.*

[97] Rectal searches have been upheld when conducted by medical personnel using accepted and customary medical techniques in medical surroundings. *See, e.g.*, Rivas v. United States, 368 F.2d 703 (9th Cir. 1966) (upholding rectal search by a doctor at doctor's office).

their person.[98] Because these searches do not constitute an actual physical invasion, however, the question becomes to what degree do X-ray searches intrude on this privacy?

The answer seems to turn, in large part, on whether an involuntary X-ray search is more akin to a strip search and thus only requires a "reasonable suspicion" for its application, or whether the intrusion is so great that it could potentially require a greater level of suspicion. In examining this issue, the Eleventh Circuit in *United States v. Vega-Barvo* determined that an X-ray search imposes only minimally on a person's dignity, less so than a strip search.[99] In reaching this conclusion, the *Vega-Barvo* court examined (1) the physical contact between the searcher and the person searched, (2) the exposure of intimate body parts, and (3) the use of force.[100] These factors helped the court examine the level of intrusiveness endured by the defendant and to conclude that the government agents, acting under a reasonable suspicion of illegal activity, properly detained and X-rayed the smuggler. The court reasoned that X-rays do not require physical contact or usually expose intimate body parts. The court also determined that "an x-ray is one of the more dignified ways of searching the intestinal cavity."[101] In general, other courts appear to agree with the Eleventh Circuit, likening X-ray searches to strip searches, and thus concluding that "reasonable suspicion" is the level of suspicion necessary to conduct an X-ray examination.[102]

Cumulative Effect of Multiple Routine Searches

Some have argued that subjecting an individual at the border to multiple routine searches during a period of detention can rise to the level of a non-routine search. This argument was raised in *Tabbaa v. Chertoff*, where the plaintiffs alleged that they were subjected to intrusive questioning, pat-down searches, the forcible spreading of their feet, and being fingerprinted and photographed, all in the course of a four- to six-hour period of detention at the border.[103] The Second Circuit first noted that, based on prior case law, "each of the individual elements of the searches was routine."[104] However, even though the court did "leave open the possibility that in some circumstances the cumulative effect of several routine search methods could render an overall search non-routine," the court did not find this particular sequence of search methods to be non-routine.[105] The decisive factor in determining whether a search is non-routine, said the court, is "the invasiveness of privacy" the search caused to the traveler, rather than the level of inconvenience. In this particular case, even taken collectively, the court found that the searches "were routine in the border context, albeit near the outer limits of what is permissible absent

[98] United States v. Vega-Barvo, 729 F.2d 1341, 1345-46 (11th Cir. 1984).

[99] *Id.*

[100] *Id.* at 1346.

[101] *Id.* at 1348.

[102] *See supra* "Non-Routine Searches." Although some courts had previously required the more stringent "clear indication" standard for X-ray searches, ever since the Supreme Court denounced "clear indication" in *Montoya de Hernandez*, courts now generally analogize X-rays with strip searches and only require reasonable suspicion. *Compare* United States v. Ek, 676 F.2d 379, 382 (9th Cir. 1982) (determining that while an X-ray search may not be as humiliating as a strip search, "it is more intrusive since the search is potentially harmful to the health of the suspect") *with* United States v. Oyekan, 786 F.2d 832, 837 (8th Cir. 1986) (requiring reasonable suspicion for X-ray search); United States v. Pino, 729 F.2d 1357, 1359 (11th Cir. 1984) (X-ray search equal to strip search).

[103] 509 F.3d 89, 99 (2d Cir. 2007).

[104] *Id.*

[105] *Id.*

reasonable suspicion."[106] Thus, while in this particular circumstance, the series of searches was found to be routine, the Second Circuit left open the possibility that "the cumulative effect of several routine searches" could rise to the level of a non-routine search.[107]

Searches and Seizures of Vehicles

Although federal courts had initially analyzed vehicular border searches by evaluating whether they were routine or non-routine, a 2004 decision by the Supreme Court appears to have placed this practice into question. In *United States v. Flores-Montano*, the Supreme Court found that the dignity and privacy interests that require reasonable suspicion for highly intrusive searches of the person do not apply to vehicles being examined at the border.[108]

Prior to *Flores-Montano*, federal courts had concluded that border searches of personal property involving the use of "force" could be considered "non-routine," thus requiring reasonable suspicion in order to be justified under the Fourth Amendment.[109] In this vein, courts found that drilling a hole into personal property, such as a container or a vehicle, to explore its interior made the searches non-routine.[110]

However, the Supreme Court in *Flores-Montano* held that a border search involving the dismantling, removal, and reassembly of a vehicle's fuel tank did not require reasonable suspicion. The Court, in its reasoning, relied on what it characterized as the United States' longstanding right as a sovereign "to protect itself by stopping and examining persons and property crossing into [the] country…."[111] In light of the government's need to stem the flow of drugs smuggled across the United States' border, the Court determined that the "inherent authority to protect, and a paramount interest in protecting, its territorial integrity" amply justified the search of the vehicle.[112]

Furthermore, in upholding the suspicionless search, the Court noted that the search at issue resulted in the vehicle ultimately being reassembled, which differs significantly from a potentially destructive search that involves drilling.[113] The Court concluded that "while it may be true that some searches of property are so destructive as to require a different result, this was not one of them."[114] The Court, however, left open the question of "whether, and under what circumstances,

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[106] *Id.*

[107] *Id.*

[108] United States v. Flores-Montano, 541 U.S. 149, 152 (2004) ("Complex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles.").

[109] *See, e.g.*, United States v. Robles, 45 F.3d 1, 5 (1st Cir. 1995).

[110] *Id.* (drilling a hole into a metal cylinder transported to an airport on an international flight was a non-routine search); United States v. Rivas, 157 F.3d 364, 367 (5th Cir. 1998) (drilling a hole into a tractor-trailer's frame was a non-routine search); United States v. Carreon, 872 F.2d 1436, 1440-41 (10th Cir. 1989) (implicitly requiring that drilling a hole into a camper wall in order to effect a search of its interior required reasonable suspicion to be justified).

[111] *Id.* at 152-53 *quoting Ramsey*, 431 U.S. at 616.

[112] *Id.* at 153.

[113] *Id.* at 155, n.2 (*citing Rivas*, 157 F.3d 364 (5th Cir. 1998) (drilling into body of trailer required reasonable suspicion); United States v. Robles, 45 F.3d 1 (1st Cir. 1995) (drilling into machine part required reasonable suspicion); *United States v. Carreon*, 872 F.2d 1436 (10th Cir. 1989) (drilling into camper required reasonable suspicion).

[114] *Flores-Montano*, 541 U.S. at 155-156.

a border search might be deemed 'unreasonable' because of the particularly offensive manner [in which] it is carried out."[115] Thus, reasonable suspicion may not be presumptively required to justify invasive vehicle searches because they do not implicate the same privacy interest as invasive searches of the human body; however, especially destructive searches of vehicles, and perhaps other forms of personal property, may require reasonable suspicion.[116]

Subsequently, federal courts have determined that the use of the routine/non-routine analysis for vehicular border searches has been "specifically refuted" by *Flores-Montano*.[117] These courts now rely on the reasoning of *Flores-Montano* to permit an array of search techniques on vehicles without requiring reasonable suspicion.[118] In *United States v. Cortez-Rocha*, for example, the Ninth Circuit held that reasonable suspicion was not required to justify the slashing of a vehicle's spare tire in order to search its interior.[119] The court examined (1) the degree of damage inflicted on the vehicle and (2) any potential effect on the safety or security of the vehicle or its passengers. It then concluded that the "disabling of a spare tire does not undermine the immediate safety of the vehicle or threaten the security of the vehicle's driver or passengers."[120] Other Ninth Circuit border search cases have upheld the drilling of a single 5/16-inch hole in the bed of a pickup truck,[121] the use of a radioactive density meter called a "Buster" to search the inside of a spare tire,[122] and the removal of an interior door panel.[123] In all of these cases, the court concluded that because safety was not compromised by the limited amount of damage inflicted on the vehicles, reasonable suspicion was not required. Concurring opinions, however, questioned whether the government needed a broad "suspicionless" search argument to prevail in these cases when the results could have been sustained on the grounds that there was reasonable suspicion to support the searches.[124]

Searches of Electronic Storage Devices

A developing issue is whether, at the border, the Fourth Amendment permits warrantless searches of the contents of laptop computers and other electronic storage devices, and if it does, whether

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[115] *Id.* at 155, n.2.

[116] *Flores-Montano*, 541 U.S. at 155-156; United States v. Bennett, 363 F.3d 947, 951 (9th Cir. 2004). *Cf. Okafor*, 285 F.3d at 846 (qualifying its holding by stating that a suspicionless X-ray search of luggage may be done at the border "[s]o long as the means of examination are not personally intrusive, do not significantly harm the objects scrutinized, and do not unduly delay transit").

[117] United States v. Cortez-Rocha, 394 F.3d 1115, 1119 (9th Cir. 2005).

[118] *Flores-Montano*, 424 F.3d at 1049, n.6 (This case dealt with the same defendant as the Supreme Court case but posed a different legal question.). *See also Cortez-Rocha*, 394 F.3d at 1119; United States v. Chaudhry, 424 F.3d 1051, 1054 (9th Cir. 2005).

[119] *Cortez-Rocha*, 394 F.3d 1115.

[120] *Id.* at 1119-1120.

[121] United States v. Chaudhry, 424 F.3d 1051, 1053 (9th Cir. 2005).

[122] United States v. Camacho, 368 F.3d 1182 (9th Cir. 2004). The Ninth Circuit in this case distinguished prior precedent (*Ek*, 676 F.2d 379) requiring a heightened level of suspicion for X-ray searches of persons because such searches were potentially harmful to the health of the suspect, whereas the "Buster" search was not harmful to motorists.

[123] United States v. Hernandez, 424 F.3d 1056 (9th Cir. 2005).

[124] *Chaudhry*, 424 F.3d at 1054-1055 (Fletcher, J., concurring) ("In each case, the government chose to create a dispute where none existed, rather than to prove up its officers' valid suspicions."); (Fisher, J. concurring) ("I am troubled by the government's evident decision in this and other cases to eschew reliance on dog alerts or other evidence supporting reasonable suspicion.") *Id.* at 1055.

these searches are routine or non-routine.[125] The U.S. Supreme Court has yet to address this matter. Some lower federal courts, however, have held that searches of laptops and other forms of electronic storage devices fall under the border search exception.[126] Yet, these courts have also been far more reticent in determining whether these types of searches are routine or non-routine. Instead, they have found that reasonable suspicion supported the searches, and, thus, they did not reach the question.[127] Even when a court has held that searches of electronic storage devices were routine, there has usually been an accompanying finding of reasonable suspicion to support the searches.[128] The one exception is the Ninth Circuit, which has expressly held that reasonable suspicion is not required to support a border search of an electronic storage device.[129]

In *United States v. Arnold*, the Ninth Circuit, while disregarding the traditional routine/non-routine analysis following the Supreme Court's apparent rejection of such an analysis with respect to border searches of property, expressly held that reasonable suspicion was not required to support a border search of an electronic storage device.[130] Rather than evaluate the circumstances of the search and consider the particular characteristics of electronic storage devices, the court described the search as that of a "closed container."[131] Applying a "closed container" analysis, the court concluded that there was no material difference between a search of an electronic storage device and the search of a briefcase, purse, pocket, or pictures and film, and thus, like any border search of any "closed container," reasonable suspicion was not required.[132] According to the Ninth Circuit, the only two types of border searches of closed containers that would require reasonable suspicion are searches that involve "exceptional damage of property" or searches conducted in a "particularly offensive manner."[133] The court, in its holding, expressly concluded that nothing about an electronic storage device, such as its large storage capacity or its ability to contain personal information, renders a search of its contents inherently offensive.[134] Thus, the court held, border search at issue in *Arnold* did not require reasonable suspicion.[135]

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[125] *See* CRS Report RL34404, *Border Searches of Laptop Computers and Other Electronic Storage Devices*, by Yule Kim, Border Searches of Laptop Computers and Other Electronic Storage Devices, by Yule Kim for an in-depth analysis of this issue.

[126] *See, e.g.*, United States v. Ickes, 393 F.3d 501, 505 (4th Cir. 2005); United States v. Romm, 455 F.3d 990, 997 (9th Cir. 2006); United States v. Irving, 452 F.3d 110, 123 (2d Cir. 2006); 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.

[127] *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, supra* ("[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.").

[128] *Ickes*, 393 F.3d at 507 (noting that the computer search did not begin until the custom agents found marijuana paraphernalia and child pornography which raised a reasonable suspicion); *Hampe, supra* (holding that even though the laptop search did not implicate any of the serious concerns that would characterize a search as non-routine, that the peculiar facts of the case gave rise to reasonable suspicions).

[129] United States v. Arnold, 533 F.3d 1003 (9th Cir. 2008).

[130] *Id.* at 1008.

[131] *Id.* at 1007.

[132] *Id.*

[133] *Id.* at 1007-08.

[134] *Id.* at 1009-10.

[135] As a side note, even though these cases usually arise in child pornography prosecutions, there are national security implications involved as well. For example, one of the justifications given for not requiring probable cause to conduct a laptop search is that to do so would enable terrorists to smuggle potentially incriminating information on electronic media without fear of it being searched. *Ickes*, 393 F.3d at 506. Another potential issue that might arise is the (continued...)

Searches of Expressive Materials

Some have argued that border searches of letters, documents, and other forms of expressive content should require some form of individualized suspicion. This argument was raised before the Fourth Circuit in *Ickes*, where the defendant claimed that the suspicionless border search of his laptop was invalid because the First Amendment protects expressive content from at-will government perusal.[136] The Fourth Circuit rejected this argument for three reasons: (1) recognizing an expressive content exception to the border search doctrine would insulate terrorist and criminal communications from search, (2) applying such an exception in the field would be impractical for border officers who would have to determine, "on their feet," whether the expressive content they wish to search is protected by the First Amendment, and (3) a First Amendment exception for border searches would create inconsistencies with Supreme Court precedent which states that a higher standard than probable cause is not needed for ordinary searches of expressive content.[137] This reasoning was later endorsed by the Ninth Circuit in *Arnold*, which expressly adopted the Fourth Circuit reasoning.[138]

Thereafter, the Ninth Circuit, *en banc*, reaffirmed this holding in *United States v. Seljan*, which upheld the suspicionless border search of a letter which solicited sex from a child residing in the Philippines. [139] This search was found constitutionally sound even though the scope of the statute authorizing the search of the package containing the letter was limited to the interdiction of undeclared currency transported across the United States' border.[140] Indeed, the *Seljan* majority specifically cited *Ramsey*, arguably the seminal case concerning the border search doctrine, in holding that "[a]n envelope containing personal correspondence is not uniquely protected from search at the border."[141] 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.[142]

Although most federal circuits addressing this issue have held that expressive materials are not exempt from the border search exception, forceful countervailing arguments have been made. For example, in his dissent in *Seljan*, Judge Alex Kozinski argued that the Fourth Amendment provides heightened protections for expressive materials at the border.[143] 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

(...continued)

possibility that the search power could be abused if an officer does not need to provide an articulable reason for his search.

[136] *Id.* at 507-08.

[137] *Id.* at 506-07 *citing* New York v. P.J. Video, 475 U.S. 868, 874 (1986). *See also* United States v. 37 Photographs, 402 U.S. 363, 376 (1974) (finding that particularized suspicion not required for searches of pictures, films and other graphic materials); United States v. 12,200 Feet Reels of Super 8mm Film, 413 U.S. 128, 124-25 (1973).

[138] *Arnold*, 533 F.3d at 1010.

[139] 547 F.3d 993, 996 (9th Cir. 2008).

[140] *Id.* at 996 (*citing* 31 U.S.C. § 5317(b)).

[141] *Id.* at 1003.

[142] *Id.* at 1004.

[143] *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.[144] In support of this interpretation, Judge Kozinski provided an analysis where he cited *Entick v. Carrington*, an important English common law case 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.[145] 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 support a search of papers even at the border.[146] 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.[147] 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.[148]

Legislative Action on Border Security

There are several bills before the 111th Congress that deal with border security. These bills follow several that were enacted in earlier Congresses and which significantly affected border security policy as recommended by the 9/11 Commission. The 9/11 Commission made several recommendations and observations in its Report for changes to U.S. border security operations. Most of these proposed changes involve enhancing the detection of travelers who would pose the United States harm and promoting cooperation between U.S. federal agencies and with foreign governments. The 9/11 Report emphasizes the importance of constraining and intercepting terrorist travel by using better technology and training to detect falsified documents.[149] To accomplish this end, the Commission recommended: (1) creating a strategy to combine terrorist intelligence, operations and law enforcement; (2) integrating the U.S. border security system into a larger network of screening points; (3) implementing a biometric entry-exit screening system; and (4) enhancing international cooperation, particularly with Canada and Mexico, to raise global border security standards.[150] Some of these recommendations, and others, were implemented by the 108th Congress in the 9/11 Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458)—a compromise piece of legislation drawn from H.R. 10, the 9/11 Recommendations Implementation Act and S. 2845, the National Intelligence Reform Act of 2004 during conference.

Subsequently, the 109th Congress passed the 9/11 Intelligence Reform law and the FY2005 Emergency Supplemental Appropriation Act for Defense, the Global War on Terror, and Tsunami Relief (P.L. 109-13), which calls on DHS to study the technology, equipment, and personnel needed to address security vulnerabilities near the U.S. borders and to develop a pilot program to

[144] *Id.* at 1017-19 (Kozinski, J., dissenting).

[145] *Id.* at 1017 (Kozinksi, J., dissenting) (*citing Entick v. Harrington*, 19 Howell's State Trials 1029, 95 Eng. Rep. 807 (1765)).

[146] *Id.* (Kozinski, J., dissenting).

[147] *Id.* at 1016. (Kozinski, J., dissenting).

[148] *Id.* at 1014-15 (Kozinski, J., dissenting).

[149] The 9/11 Commission Report: Final Report on the National Commission on Terrorist Attacks Upon the United States, p. 385 (Official Gov't Ed. 2004).

[150] *Id.* at 385-390.

utilize or increase the use of ground surveillance technologies (e.g., video cameras, sensor technology, motion detectors) on both the northern and southern borders. The 109th Congress also passed the Secure Fence Act of 2006 (P.L. 109-367), which requires the Secretary of DHS to take all actions the Secretary determines necessary to achieve and maintain operational control over the entire international land and maritime borders of the United States. The Secretary is to use systematic surveillance and physical infrastructure enhancements, including fencing, to achieve control of the border.

The 110th Congress continued to address border security issues covered by the 9/11 Commission in the Implementing Recommendations of the 9/11 Commission Act of 2007.[151] This law attempts to modernize and strengthen the visa waiver program in INA § 217 by enhancing program security requirements through an electronic travel authorization system to collect biographical information about passengers, and extending visa-free travel privileges to nationals of countries that are cooperating with the United States in its anti-terrorism campaign. The law also authorizes: (1) a Terrorist Travel Program to monitor terrorists and prevent their entry into the United States, (2) the creation of a "model" port-of-entry program to help provide a more efficient and welcoming international arrival process at ports-of-entry, and (3) a pilot program to develop, with states, a machine-readable and tamper-proof driver's license that can be used for admission into the United States from either the Canadian or Mexican border.

In the current Congress, several additional proposals relate to border security and may have the potential to implicate Fourth Amendment concerns. These include the following:

- H.R. 1900 was introduced to provide emergency deployments of CBP, DEA, and ATF agents to the border and to authorize funds to local law enforcement to stem the illegal trafficking of firearms into Mexico. S. 205, H.R. 495, and H.R. 1448 would also authorize funds for ATF agents to interdict the illegal trafficking of firearms to Mexico.
- H.R. 239, the Securing our Borders and our Data Act of 2009, would prohibit searches of digital media devices based solely on the border search authority. Rather, border agents could only conduct searches of digital devices if they have reasonable suspicions of unlawful conduct. Border agents also would be prohibited from seizing digital devices based solely on their border search authority; some other undescribed constitutional authority would be required.
- H.R. 1726, the Border Security Search Accountability Act of 2009, would mandate that the Commissioner of Customs and Border Protection promulgate a rule with respect to the scope of and procedural and recordkeeping requirements associated with border security searches of electronic devices. The rule would require that (1) commercial information be handled in a manner consistent with all laws and regulations governing such information, (2) electronic searches be conducted in front of a supervisor, (3) the number of days commercial information could be retained without probable cause be determined, (4) the individual whose information was seized be notified if the information is entered into an electronic database, (5) an individual receive a receipt if his device is seized during a border search, (6) an individual subject to a border search of an electronic device receive notice as to how he can report any abuses or concerns

[151] Implementing Recommendations of 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266.

related to the search, (7) the rights of individuals with regard to border searches be posted at all ports of entry, (8) that a privacy impact assessment of the rule be made, and (9) a civil rights impact assessment of the rule be made.

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