

LAPTOP SEARCHES AT THE UNITED STATES BORDERS AND THE BORDER SEARCH EXCEPTION TO THE FOURTH AMENDMENT

Abstract: The border search exception to the Fourth Amendment allows broad discretion for United States customs officers to search the belongings of incoming and outgoing international passengers and their luggage. Although courts typically weigh the national security interest in the search against the privacy invasion caused by a potentially intrusive search, most border searches are constitutional if they are either routine or preceded by reasonable suspicion. Border searches of passengers' laptop computers, including hardware, software, and any external storage devices, pose a constitutional issue. This Note argues that laptop searches not preceded by reasonable suspicion are intrusive because the search may invade upon personal, proprietary, or confidential information that a passenger expects to be kept private, even at the border. Furthermore, this Note argues that even those laptop searches that are preceded by reasonable suspicion may not be constitutional, because border searches must be limited in scope to that which may either confirm or disprove the preceding suspicion.

INTRODUCTION

It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.

—Justice William Brennan¹

In July 2005, Michael Arnold arrived at the Los Angeles International Airport after a nearly twenty-hour flight from the Philippines.² He collected his bags from the baggage carousel and proceeded to the customs area, where he passed through a U.S. customs inspection point.³ He answered basic questions about his vacation, including

¹ *United States v. Montoya de Hernandez*, 473 U.S. 531, 548 (1985) (Brennan, J., dissenting) (citing *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)).

² *United States v. Arnold*, 454 F. Supp. 2d 999, 1001 (C.D. Cal. 2006); see also James Gilden, *Business Itinerary*, L.A. TIMES, Nov. 4, 2006, at 4.

³ *Arnold*, 454 F. Supp. 2d at 1001.

where he stayed and what activities he enjoyed during his trip.⁴ The customs official noticed that Arnold had a laptop computer and memory stick.⁵ She handed these items to her colleague, who turned the computer on and opened files in folders named "Kodak Memories" and "Kodak Pictures."⁶ Upon finding a picture of two nude women, the second customs agent called Immigration and Customs Enforcement ("ICE") officials, who questioned Arnold for several hours.⁷ They ran a more thorough search of Arnold's computer, which uncovered numerous photographs of naked children.⁸ ICE officials seized Arnold's computer, and received a warrant to search the computer several weeks later.⁹

In October 2006, in *United States v. Arnold*, the U.S. District Court for the Central District of California decided that a border laptop search without reasonable suspicion, such as the one Mr. Arnold was subjected to, was intrusive.¹⁰ The District Court's analysis of a laptop search in *Arnold* differs greatly from that of the U.S. Court of Appeals for the Fourth Circuit, which was faced with the same issue in a case with very different circumstances.¹¹ In 2005, in *United States v. Ickes*, the Fourth Circuit decided that a border laptop search preceded by reasonable suspicion was not intrusive and did not violate an international traveler's Fourth Amendment rights.¹² Further complicating the issue, in July 2006 the U.S. Court of Appeals for the Ninth Circuit, which may hear Arnold's appeal, already considered this issue, but

⁴ *Id.*

⁵ *Id.* A memory stick, sometimes called a "flash drive," "thumb drive," "jump drive," or "key drive," is a small memory storage device that connects through a Universal Serial Bus port connection or a firewire port on a computer. Michel Marriot, *From Storage, a New Fashion*, N.Y. TIMES, Sept. 23, 2005, at G1. Although a floppy diskette is capable of storing no more than 1.4 megabytes of data, a memory stick can store anywhere from 32 megabytes to 2 gigabytes, or 2048 megabytes. *Id.*

⁶ *Arnold*, 454 F. Supp. 2d at 1001.

⁷ *Id.* ICE, the largest investigative branch of the Department of Homeland Security, is responsible for conducting investigations at the border. U.S. Immigrations and Customs Enforcement, About Us, <http://www.ice.gov/about/operations.htm> (last visited Mar. 29, 2007).

⁸ *Arnold*, 454 F. Supp. 2d at 1001.

⁹ *Id.*

¹⁰ *Id.* For a comprehensive analysis of the Fourth Amendment implications of computer and digital media searches taking place in the interior of the United States, see generally Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531 (2005).

¹¹ See *Arnold*, 454 F. Supp. 2d at 1001; see also *United States v. Ickes*, 393 F.3d 501, 507-08 (4th Cir. 2005) (finding a nonrandom laptop search reasonable because it occurred at the border).

¹² 393 F.3d 507-508.

only to an extent.¹³ In *United States v. Romm*, that court ruled that a border search of a passenger's laptop, also preceded by reasonable suspicion, was permissible.¹⁴ Nevertheless, due to an omission in the petitioner's initial pleading, the *Romm* court did not answer the question typically posed to courts evaluating border searches: was the laptop inspection so intrusive as to exceed the scope of a routine search?¹⁵

With growing computer portability and accessibility of wireless networking, business and leisure travelers are increasingly taking along laptop computers or other portable media storage devices during international travel.¹⁶ After the September 11, 2001 attack on the United States and foiled terrorist attempts on approximately ten United States-bound passenger jets on August 10, 2006, the U.S. Department of Homeland Security ("DHS") increased security measures in airports, expanding investigations of international passengers and their belongings.¹⁷ U.S. Customs and Border Protection ("CBP") and ICE, both DHS bureaus, are charged with patrolling the country's borders to prevent terrorist activities and facilitate legitimate travel.¹⁸ CBP interviews passengers, searches luggage, and enforces duties and tariffs.¹⁹ Its responsibilities range from identifying smugglers of illegal meat or narcotics to turning away illegal aliens to preventing future terrorist activities.²⁰

¹³ See *United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Press Release, Travel Industry Association, *Staying Wired on Vacation: Travelers' Use of Technology on the Road* (July 25, 2006), <http://www.tia.org/pressmedia/pressrec.asp?Item=719>.

¹⁷ See John Ward Anderson & Karen DeYoung, *Plot to Bomb U.S.-Bound Jets Is Foiled*, WASH. POST, Aug. 11, 2006, at A01. On the morning of August 10, 2006, twenty-four suspects were arrested at London's Heathrow Airport in connection with a suspected plot to blow up as many as ten U.S.-bound aircraft by detonating liquid explosives during flight. See *id.*; see also Alan Cowell, *Court Permits British Investigators to Hold 10 Terror Suspects Longer*, N.Y. TIMES, Aug. 24, 2006, at A6.

¹⁸ U.S. Customs and Border Protection, CBP Border Patrol Overview, http://www.cbp.gov/xp/cgov/border_security/border_patrol/overview.xml (last visited Mar. 29, 2007); U.S. Immigrations and Customs Enforcement, *supra* note 7. Generally, the CBP's duties include inspection and interdiction, while ICE oversees investigations. U.S. Immigrations and Enforcement, *supra* note 7. This Note refers to both ICE and CBP officials as "customs officials," as U.S. customs legislation does not differentiate between the legal border authorities of officers from either agency, referring to them broadly as "customs officials." 19 U.S.C. § 1401 (2000 & Supp. IV 2004).

¹⁹ U.S. Customs and Border Protection, *supra* note 18.

²⁰ *Id.* On an average day in fiscal year 2006, CBP processed 1.1 million passengers, including the inspection of rail and sea containers, international air passengers, ship passengers, and privately owned vehicles. U.S. Customs and Border Protection, *On a Typical Day*,

During a border inspection, a customs officer might become suspicious about a passenger and conduct a search of that individual's computer to confirm or disprove these suspicions.²¹ In other situations, a customs officer might select a passenger at random, or with no reasonable suspicion, for a computer search.²² Searches of computers entering the United States fall under CBP's broad plenary powers.²³ Although many passengers travel with far less egregious materials on their computers than Mr. Arnold, CBP and ICE search through personal and proprietary data contained on a large number of travelers' computers every year.²⁴ CBP and ICE's abilities to search a computer's hard drive, memory sticks, cached files, and digital media storage devices raise questions about customs officials' authority which, left unchecked, might violate passengers' rights at the U.S. borders.²⁵

This Note explores the constitutionality of border searches of laptop computers.²⁶ Part I examines the border search exception to the Fourth Amendment's stringent requirements for a warrant or probable cause.²⁷ It also describes how the U.S. Supreme Court, in a collection of opinions largely authored by Chief Justice Rehnquist, has defined the threshold question for suspicionless border searches as whether the search is routine or nonroutine.²⁸ Part II describes three lower court decisions regarding the constitutionality of laptop computer searches at

http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/cbp_overview/typical_day.ctt/typical_day.pdf (last visited July 24, 2007). On average, at points of entry, officials confiscated 1769 pounds of narcotics; seized \$157,800 in undeclared or illicit currency and \$646,900 worth of fraudulent commercial merchandise; and intercepted 71 fraudulent documents, 20 smuggled aliens, and 1.5 travelers related to terrorism concerns. *Id.*

²¹ See *Ickes*, 393 F.3d at 507.

²² See *Arnold*, 454 F. Supp. 2d at 1006.

²³ U.S. Customs and Border Protection, *supra* note 18. CBP officials may search air, water, and land craft that are entering or exiting the United States. *Id.* Between official ports of entry, CBP employs a comprehensive technological approach, including unmanned aerial vehicles, remote video surveillance, and computer-based Geographic Information Systems (GIS), to survey and map potential border crossings. *Id.*

²⁴ Gilden, *supra* note 2. A survey of business travelers conducted by the Association of Corporate Travel Executives found that 90% of its 2500 members were not aware that customs officials might conduct a search of their laptops at the U.S. borders. Joe Sharkey, *To Do List: Rename Files Grandma's Favorite Recipes*, N.Y. TIMES, Nov. 7, 2006, at C6.

²⁵ See *Arnold*, 454 F. Supp. 2d at 1007.

²⁶ See *infra* notes 33–292 and accompanying text. For this Note, the term “laptop” shall apply to a portable personal computer and any accompanying digital storage device. See Kerr, *supra* note 10, at 538. Nevertheless, an analysis of border searches of other digital devices, such as mobile telephones, personal data assistants, and handheld entertainment devices such as MP3 players or gaming devices might include similar arguments. See *id.*

²⁷ See *infra* notes 33–67 and accompanying text.

²⁸ See *infra* notes 68–133 and accompanying text.

the border.²⁹ Part III applies the Supreme Court's border search analytical framework to laptop computer searches, and argues that a laptop search is nonroutine because it is deeply intrusive.³⁰ This Note concludes that computer searches should be preceded by reasonable suspicion to be constitutional.³¹ Part IV proposes an additional requirement that all laptop searches at the border be limited in scope to that which is necessary to confirm the custom officer's reasonable suspicion about the passenger or his computer.³²

I. LAPTOP SEARCHES IN THE CONTEXT OF THE BORDER SEARCH EXCEPTION TO THE FOURTH AMENDMENT

The Fourth Amendment of the U.S. Constitution governs searches and seizures conducted by government officials.³³ The Amendment requires that prior to conducting a search, government officials obtain a warrant that specifically describes the place, person, or items to be searched or seized.³⁴ Except under specific circumstances discussed

²⁹ See *infra* notes 134–194 and accompanying text.

³⁰ See *infra* note 195–253 and accompanying text. Although commentators have compared searches of laptop computers at the U.S. borders to routine searches of automobiles or briefcases, they have neglected to consider that a laptop search is deeply invasive, thus making it nonroutine and necessitating reasonable suspicion by a customs officer. See Kelly A. Gilmore, *Preserving the Border Search Doctrine in a Digital World: Reproducing Electronic Evidence at the Border*, 72 BROOK. L. REV. 759, 797 (2007). A passenger's laptop or digital storage device is not analogous to permissibly searched hard copies of documents or tangible folders. See *infra* note 229 and accompanying text. In fact, the U.S. Court of Appeals for the Fifth Circuit in 1986 found in *United States v. Fortna* that it was permissible for a customs official to make a photocopy of documents found in an international traveler's luggage, in part because the searching officer had reasonable suspicion to believe the passenger was participating in an international drug smuggling ring. 796 F.2d 724, 738 (5th Cir. 1986). Nevertheless, *Fortna's* permissible photocopying is not analogous to a random laptop or digital search at the border, because the search in *Fortna* was preceded by reasonable suspicion. See *id.* Furthermore, even if a laptop search is preceded by suspicion, as in *Fortna*, this holding is still not analogous, because, unlike a briefcase with tangible documents, computers may store an incomparable amount of data, the entirety of which is outside the scope of any border search, whether prompted by an officer's suspicion or not. See *id.*

³¹ See *infra* note 195–253 and accompanying text.

³² See *infra* notes 254–292 and accompanying text.

³³ U.S. CONST. amend. IV. The Fourth Amendment provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

³⁴ *Id.* The Supreme Court has interpreted the Fourth Amendment to invalidate most warrantless and unreasonable searches. *Katz v. United States*, 389 U.S. 347, 357 (1967) (noting that "searches conducted outside the judicial process, without prior approval by

below, courts strictly enforce this requirement, in part to protect individuals from searches that unreasonably intrude upon their privacy.³⁵ The warrant clause also serves as a deterrent against overzealous police officers who might otherwise act on a mere hunch.³⁶

Nevertheless, several exceptions to the warrant clause permit police officers and government officials to conduct warrantless searches.³⁷ These exceptions typically involve exigent circumstances in which obtaining judicial approval and a warrant is impractical and counterproductive.³⁸ The U.S. Supreme Court has reasoned that when exigent circumstances arise, the Constitution permits government authorities to conduct searches and seizures quickly before receiving judicial approval.³⁹ One example of an exigent circumstance is the border search exception, which permits U.S. customs officials to conduct routine searches of travelers entering and exiting the country when it would be infeasible to obtain a warrant.⁴⁰

judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions”).

³⁵ See *Boyd v. United States*, 116 U.S. 616, 630 (1886). The Supreme Court has long recognized that the warrant clause interposes a neutral judicial body between the government official and the individual, in part to prevent an officer from acting in his own discretion on information that might be vague or incorrect. *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (“The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.”).

³⁶ *Terry v. Ohio*, 392 U.S. 1, 22 (1968). The deterrent effect of the warrant clause might provide police officers and government officials with an incentive to follow the proper search and seizure procedure or risk inadmissibility of any evidence collected. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

³⁷ *Terry*, 392 U.S. at 20. Those circumstances in which government officials may search a person or her possessions without a warrant include investigatory detentions, searches incident to a valid arrest, seizures of items in plain view, consent searches, searches of vehicles, searches of containers, inventory searches, border searches, searches at sea, administrative searches, and searches in which law enforcement officials have a special need that renders obtaining probable cause and a warrant impracticable. 34 GEO. L.J. ANN. REV. CRIM. PRO. 37 (2005). See generally Christopher R. Dillon, Note, *Wren v. United States and Pretextual Traffic Stops: The Supreme Court Declines to Plumb Collective Conscience of Police*, 38 B.C. L. REV. 737 (1997) (analyzing the Supreme Court’s exploration of “the proper balance between individual rights and efficient law enforcement”).

³⁸ *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (holding that the “Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior”).

³⁹ *Terry*, 392 U.S. at 20. Nevertheless, the U.S. Supreme Court has held that in cases involving a permissible warrantless arrest, a magistrate must determine that there was probable cause to extend the detention. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

⁴⁰ See *Montoya de Hernandez*, 473 U.S. at 538. A routine search is a nonintrusive search that may be conducted without a warrant, probable cause, or reasonable suspicion. See

This Part examines the border search exception to the Fourth Amendment, and describes the context and judicial framework with which a warrantless border search is analyzed.⁴¹ It also explains how reasonable suspicion is not required for a routine search, but is necessary for a nonroutine search.⁴² Finally, this Part evaluates the dual role that a search's scope plays in the analysis of a constitutional border search.⁴³

A. Expanding the Boundaries of the Fourth Amendment: Justification and Evaluation of Warrantless Searches

When circumstances do not permit a government official to obtain judicial approval of a search or seizure, the official may legally search an individual or his property, so long as the action is based on more than an "inarticulate hunch."⁴⁴ The correct level of suspicion to justify a warrantless search depends on the circumstance of the search.⁴⁵ In almost all cases, officials must have some degree of suspicion prior to a warrantless search indicating that an individual is about to, has already, or is in the process of committing a crime.⁴⁶ Government officials may, however, conduct routine searches at the U.S. border with no suspicion at all.⁴⁷ Nonroutine border searches, on the other hand, do require that the official have reasonable suspicion that the traveler is violating

Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) (holding that because vehicle search at the border was unintrusive and therefore routine, reasonable suspicion was not required prior to search). A nonroutine search is an intrusive search that must be preceded by reasonable suspicion. See *United States v. Adekunle*, 2 F.3d 559, 561 (5th Cir. 1993) (holding that a border search that included an x-ray was nonroutine).

⁴¹ See *infra* notes 44–51 and accompanying text.

⁴² See *infra* notes 52–92 and accompanying text.

⁴³ See *infra* notes 93–133 and accompanying text.

⁴⁴ *Terry*, 392 U.S. at 22. In its analysis of a warrantless police search of three individuals, the Court noted that "failure to comply with the warrant requirement can only be excused by exigent circumstances." *Id.* at 20.

⁴⁵ *Id.* The Supreme Court's early warrantless search jurisprudence analogized warrantless searches to the country's customs laws, where Congress stated that government officials may stop, board, and search vessels to check for contraband, such as stolen goods, or products liable to duties. *United States v. Ramsey*, 431 U.S. 606, 616 (1977). The Court historically required that officers have probable cause prior to searching an automobile, for example, for contraband alcohol. *Carroll v. United States*, 267 U.S. 132, 149 (1925). Later, the Court rejected the more stringent probable cause standard, holding instead that the threshold requirement for a constitutional warrantless search is that the search must be reasonable. *Terry*, 392 U.S. at 20.

⁴⁶ *Terry*, 392 U.S. at 20.

⁴⁷ *Montoya de Hernandez*, 473 U.S. at 538.

or is planning to violate a law.⁴⁸ As the intrusiveness of a search increases, so too does the level of required suspicion.⁴⁹

To evaluate a warrantless search, the U.S. Supreme Court and lower federal courts typically weigh the government's interest in the warrantless search or seizure against the invasiveness of the search.⁵⁰ This evaluation is sometimes characterized as a two-part inquiry: courts will first identify the initial reason or suspicion for the search, then consider whether the scope of the search is reasonably related to that suspicion.⁵¹

B. *The Border Search Exception: Warrants Are Not Required for Routine Searches at the United States Borders*

The border search exception to the Fourth Amendment permits government officials at the country's borders to conduct routine searches of individuals and their personal effects without judicial approval or a warrant.⁵² The border search exception is widely employed

⁴⁸ See *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

⁴⁹ *Id.*

⁵⁰ See *Terry*, 392 U.S. at 20–21 (finding that a warrantless police pat down of three individuals was reasonable, after balancing the intrusion upon the individuals' dignity against the government's interest in protecting the community, which may be served by pat downs and brief on-the-street searches). The Court has reasoned that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 536–37 (1967). Nevertheless, Justice William Douglas harshly criticized the weight afforded to the government in this balancing test, arguing that the Framers of the Constitution intended a more stringent standard of suspicion to prevent police officers from encroaching on an individual's constitutional right of privacy. *Terry*, 392 U.S. at 35–37 (Douglas, J., dissenting).

⁵¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). In separating reasonableness from probable cause, the Court has severed the Fourth Amendment's reasonableness clause from the warrant clause, and the *Terry* ruling has come to be interpreted, generally, as meaning that either reasonableness or a warrant is necessary for a search. See Scott E. Sunby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 403–04 (1988) ("If the Court uses the warrant clause, the reasonableness balancing test controls the inquiry in the guise of flexible probable cause; traditional probable cause serves as only one example of probable cause. If the Court utilizes the reasonableness clause, the same balancing test controls, again precluding any independent role for traditional probable cause.").

⁵² See 6 U.S.C. § 251 (2000 & Supp. IV 2004) (granting authority to the Under Secretary for Border and Transportation Security of the Department of Homeland Security to conduct a warrantless search of a person who is seeking entry into the United States); *Almeida-Sanchez*, 413 U.S. at 272 (holding that the power of the federal government "can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders").

throughout the country's airports,⁵³ where customs officials may search travelers entering and exiting the United States.⁵⁴ At the country's borders, the government has the authority to inspect packages to regulate the collection of duties, prevent the introduction of contraband into the United States, and protect against dangerous products.⁵⁵ Included among customs officials' plenary authority is the ability to conduct routine and nonroutine searches.⁵⁶

A routine search might include an inspection of the passenger's vehicle, luggage, wallet, handbag, and clothing.⁵⁷ Upon entering the United States as a visitor, an individual might be asked general or specific questions about his trip, including his destination, purpose for visiting the States, place of stay, and how much cash he has on hand.⁵⁸

⁵³ See *United States v. Johnson*, 991 F.2d 1287, 1290 (7th Cir. 1993). The border search exception may be utilized at any of the country's borders, and includes international airports, which may not be an official national border, but are the functional equivalent of a border. *Id.* (finding that international travelers entering Chicago's O'Hare Airport were at the functional equivalent of a border).

⁵⁴ See, e.g., *Montoya de Hernandez*, 473 U.S. at 533 (passenger was entering the United States from Bogota, Colombia); *United States v. Berisha*, 925 F.2d 791, 795 (5th Cir. 1991) (border search exception applies to individuals exiting the United States).

⁵⁵ See *Ramsey*, 431 U.S. at 611-12. The Court quoted the first customs statute, which "granted 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 . . .'" *Id.* at 616 (quoting Act of July 31, 1789, ch. 5, 1 Stat. 29 (repealed 1790)).

⁵⁶ See 19 U.S.C. § 1582 (2000) ("The Secretary of the Treasury may prescribe regulations for the search of persons and baggage . . . and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations."). The Supreme Court has held that customs officials may conduct routine searches with no requirement of reasonable suspicion, probable cause, or warrant. *Montoya de Hernandez*, 473 U.S. at 538; *Ramsey*, 431 U.S. at 619. Implicitly, the Court has held that nonroutine searches do implicate Fourth Amendment protections, although here too the Court has loosened the standards for the amount of suspicion required. *Montoya de Hernandez*, 473 U.S. at 541. Based on its ruling in *Montoya de Hernandez*, it is unlikely the Court would ever require a warrant and probable cause to proceed with a routine search. *Id.* Nevertheless, the Court has implied that some degree of reasonable suspicion is required prior to a nonroutine search. See *id.* See generally Jon Adams, *Rights at United States Borders*, 19 *BYU J. PUB. L.* 353 (2005) (discussing the border search exception and its efficacy).

⁵⁷ See *Almeida-Sanchez*, 413 U.S. at 272 (holding that vehicle search at the border was routine); *United States v. Beras*, 183 F.3d 22, 26 (1st Cir. 1999) (holding that a pat down is a routine search); *Johnson*, 991 F.2d at 1291 (holding that extensive inspection of a traveler's suitcase was routine); *United States v. Charleus*, 871 F.2d 265, 267-68 (2d Cir. 1989) (holding that requiring a passenger to lift up his shirt for a border official to touch him lightly was routine).

⁵⁸ See *Montoya de Hernandez*, 473 U.S. at 533 (describing how after customs official noticed that passenger had completed eight recent round-trip visits to the United States, she was asked more detailed questions by a secondary customs officer).

An American citizen or resident returning to the United States from a visit or stay in another country might be asked similar questions about her trip, including where she stayed and her purpose for traveling internationally.⁵⁹

There is no bright-line rule to determine what type of search is nonroutine.⁶⁰ Most courts have held, for example, that strip searches,⁶¹ x-ray examinations,⁶² and body cavity inspections⁶³ are nonroutine, in part because they are physically intrusive searches that implicate the dignity and privacy interests of the person being searched.⁶⁴ For situations where there is little agreement, lower courts have developed tests to distinguish nonroutine searches.⁶⁵ Some courts take the approach that a nonroutine search must invade a person's physical boundaries; this involves a touch or bodily inspection that could embarrass or offend the average traveler.⁶⁶ Other courts reason that a nonroutine search is simply an invasive search, because it intrudes upon an individual's dignity and privacy interests.⁶⁷

The U.S. Supreme Court has not explicitly distinguished routine from nonroutine searches.⁶⁸ Nevertheless, the Court has, in dicta, sup-

⁵⁹ See *United States v. Arnold*, 454 F. Supp. 2d 999, 1001 (C.D. Cal. 2006).

⁶⁰ See *Flores-Montano*, 541 U.S. at 152; *Montoya de Hernandez*, 473 U.S. at 540.

⁶¹ *United States v. Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980) (reasoning that because a strip search is nonroutine, it requires reasonable suspicion prior to the search).

⁶² See *Adekunle*, 2 F.3d at 561-62 (holding that a border search that included an x-ray was nonroutine).

⁶³ *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967).

⁶⁴ See *Flores-Montano*, 541 U.S. at 152.

⁶⁵ See *United States v. Braks*, 842 F.2d 509, 511-12 (1st Cir. 1988). The First Circuit, for example, has developed a six-part analysis to determine whether a search is nonroutine, which includes an inquiry into whether the search abrogated the suspect's reasonable expectations of privacy. *Id.*; see also *United States v. Sandler*, 644 F.2d 1163, 1167 (5th Cir. 1981) (suggesting that a nonroutine search might be dangerous, painful, embarrassing, or invoke one's dignity).

⁶⁶ *Johnson*, 991 F.2d at 1291 (holding that a weight test, flex test, and scratch test on a traveler's suitcase was a routine search); see *Charleus*, 871 F.2d at 268 (holding that light touching of a traveler's back and the requirement that he lift his shirt for a CBP officer was routine, implicitly because it was not a highly intrusive search that implicated the suspect's dignity); *Braks*, 842 F.2d at 513 (holding that physical contact between a customs official and passenger was a factor in the test for intrusiveness).

⁶⁷ *Arnold*, 454 F. Supp. 2d at 1002. But see *United States v. Moya*, 74 F.3d 1117, 1120 (11th Cir. 1996) ("[B]ecause of the sovereign's responsibility, some degree of questioning and of delay is necessary and is to be expected at entry points into the United States. Because of this expectation, questioning at the border must rise to a distinctly accusatory level before it can be said that a reasonable person would feel restraints on his ability to roam.").

⁶⁸ See *Montoya de Hernandez*, 473 U.S. at 540.

ported the notion that strip searches, body cavity, or x-rays are likely to be considered nonroutine searches.⁶⁹

As in general warrantless search cases, the Supreme Court and lower federal courts employ a balancing test to determine whether a border search violates an individual's Fourth Amendment rights.⁷⁰ Here, too, courts weigh the government's interest in the warrantless search or seizure against the invasiveness of the search.⁷¹ In border search cases, the government has a strong interest in national self protection that reasonably requires an entrant—whose expectation of privacy, the Supreme Court has indicated, is quite low—to identify himself and his belongings as authorized to enter the country.⁷² Nevertheless, courts have indicated that at a certain point, the intrusion of a search outweighs the national security interest, and the search is unconstitutional.⁷³

1. Routine Searches Do Not Require Reasonable Suspicion

In the earliest border search cases, the U.S. Supreme Court examined the border search exception by applying its balancing test and found that routine border checkpoints require neither a warrant nor probable cause.⁷⁴ In 1976, in *United States v. Martinez-Fuerte*, the Court held that a routine warrantless and suspicionless border search was constitutional.⁷⁵ In *Martinez-Fuerte*, a number of arrestees claimed that border patrol agents violated their Fourth Amendment rights by stopping their vehicles for brief questioning, even though the officials did not have any reason to believe those individuals were perpetrating or about to perpetrate a crime.⁷⁶ Justice Powell, writing for the major-

⁶⁹ *Id.* at 541.

⁷⁰ *See id.* at 539–40.

⁷¹ *Id.*

⁷² *Flores-Montano*, 541 U.S. at 152; *Montoya de Hernandez*, 473 U.S. at 551 (Brennan, J., dissenting).

⁷³ *See Arnold*, 454 F. Supp. 2d at 1007. Considering the potential amount of personal, professional, and proprietary information that an individual may store on a laptop computer, the calculus of one's expectation of privacy is qualitatively different than for that of a piece of luggage or wallet. *See infra* notes 251–254 and accompanying text.

⁷⁴ *Martinez-Fuerte*, 428 U.S. at 561–62; *see Terry*, 392 U.S. at 20–21. Although the Supreme Court has declined to distinguish between routine and nonroutine searches, the Court has been consistently clear that routine searches may be suspicionless or random. *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.")

⁷⁵ *See* 428 U.S. at 545.

⁷⁶ *See id.*

ity, reasoned that these stops were constitutional because the government's need to conduct routine border checkpoint stops was high and the intrusion on the individuals' Fourth Amendment interests was limited.⁷⁷ Thus, the Court eschewed its earlier "reasonable suspicion" requirement from the 1968 case *Terry v. Ohio*, implicitly because most checkpoint searches are routine.⁷⁸

Importantly, the Court held that the *Martinez-Fuerte* checkpoint stops did not require any individualized suspicion, as long as the checkpoints were reasonably located.⁷⁹ In this way, the Court foreshadowed its later categorization of the balancing test as two fold.⁸⁰ Balancing the government's interest against the interests of the motorists, the Court first held that the police action was justified then decided that the routine border searches were reasonably related in scope to the circumstances.⁸¹ The government interest was in stemming the rising rate of illegal aliens entering the country.⁸²

2. Nonroutine Searches Require Reasonable Suspicion

In situations where the border search may have been nonroutine, courts ask whether the search was reasonable.⁸³ The U.S. Court of Appeals for the Ninth Circuit has held that as the intrusiveness of the search increases, the level of requisite reasonable suspicion increases as well.⁸⁴ The constitutionality of the search depends on whether the official conducting the search had reasonable suspicion, and whether the scope of the search was reasonable.⁸⁵

When a customs official first encounters a passenger, the information she gathers during the routine search or questioning might give her suspicion that a nonroutine search would uncover illegal products or contraband.⁸⁶ To determine whether a border official had

⁷⁷ See *id.* at 557.

⁷⁸ *Id.* at 561.

⁷⁹ *Id.* at 561-62.

⁸⁰ *Martinez-Fuerte*, 428 U.S. at 562; see *T.L.O.*, 469 U.S. at 341.

⁸¹ *Martinez-Fuerte*, 428 U.S. at 562; see *T.L.O.*, 469 U.S. at 341.

⁸² *Martinez-Fuerte*, 428 U.S. at 556.

⁸³ See *Montoya de Hernandez*, 473 U.S. at 537.

⁸⁴ *United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995).

⁸⁵ See *id.*

⁸⁶ See *United States v. Sokolow*, 490 U.S. 1, 5-6 (1989) (explaining that officials had reasonable suspicion to believe traveler was transporting drugs because he: paid cash for his airplane fare; traveled under a pseudonym; was traveling from Miami, a source city for illicit drugs; stayed in Miami for only 48 hours, even though a round-trip flight from his destination was 20 hours; appeared nervous during the trip; did not check any luggage). In *Montoya de Hernandez*, the Court refused to draw a clear line between reasonable suspi-

the requisite level of suspicion prior to a nonroutine border search, courts examine the totality of the circumstances.⁸⁷ This might include an officer's suspicions about the passenger's demeanor, belongings, or itinerary.⁸⁸ An officer generally has a particularized and objective basis for reasonable suspicion when the traveler acts strangely or apprehensively, does not check any luggage, has an unorthodox travel plan, refuses to answer routine questions, or if the authorities discover incriminating information during a routine search.⁸⁹ Similar factors apply to customs officials' reasonable suspicions about a passenger's luggage.⁹⁰ In many cases, a lack of checked luggage for a long trip or the type of luggage a passenger brings might give an officer reasonable suspicion.⁹¹ The threshold for reasonable suspicion at the border is so low, in fact, that the only circumstance that would likely not meet this standard is a complete lack of suspicion, or a random search.⁹²

C. *The Dual Role of a Search's Scope in the Border Search Jurisprudence*

The scope of a border search occupies a dual role in border search jurisprudence.⁹³ Scope defines whether a search is routine or nonroutine, but it also determines how far a customs officer can go in conducting the search.⁹⁴

cion and probable cause, simply stating instead that the customs official had a reasonable suspicion based on all the facts surrounding the traveler and her trip. 473 U.S. at 541 n.4. The Court has noted, however, that the reasonable suspicion standard requires a particularized and objective basis for suspecting the particular person of the illegal activity. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

⁸⁷ *Cortez*, 449 U.S. at 417.

⁸⁸ *See id.* at 419 ("[W]hen used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion."); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975) ("Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant.");

⁸⁹ *See Montoya de Hernandez*, 473 U.S. at 533 (describing how international traveler was nervous, did not know where she was going to stay, had packed inappropriate items for a vacation in Miami, and had limited cash); *United States v. Ickes*, 393 F.3d 501, 502-03 (4th Cir. 2005) (describing how traveler was acting suspicious, brought superfluous items with him on his alleged vacation, and officers discovered an outstanding warrant during a routine search).

⁹⁰ *See Montoya de Hernandez*, 473 U.S. at 534.

⁹¹ *See id.*

⁹² *See Flores-Montano*, 541 U.S. at 152-53.

⁹³ *See Montoya de Hernandez*, 473 U.S. at 542; *Ramsey*, 431 U.S. at 624-25.

⁹⁴ *See Montoya de Hernandez*, 473 U.S. at 542; *Ramsey*, 431 U.S. at 624-25.

1. Scope Defines the Reasonableness of a Border Search

Although the U.S. Supreme Court's border search jurisprudence does not delineate the exact line that separates routine from non-routine searches, it is implicit in the Court's reasoning that a routine search is more limited in scope than a nonroutine search.⁹⁵ Because the scope of a search factors into whether the search is intrusive, the scope contributes to the distinction between a routine and a non-routine search.⁹⁶ To determine whether a search is so intrusive that it has become unreasonable, the Court implicitly weighs the government interest against the level of intrusion, and asks if the scope of the search was appropriate as it related to the officer's suspicion.⁹⁷

The U.S. Supreme Court's 1985 decision in *United States v. Montoya de Hernandez* applied this test, balancing the government interest in the search against the intrusiveness of the search.⁹⁸ Applying its border search exception analysis, the Court questioned whether holding and searching a traveler at the Los Angeles International Airport was reasonable in scope.⁹⁹ A customs official suspected Ms. Montoya de Hernandez, an airline passenger from Colombia, of smuggling drugs in her digestive tract.¹⁰⁰ She was subjected to a pat down, strip search, and a sixteen hour wait in the customs office under observation before customs officials received a court order authorizing them to administer a pregnancy test, x-ray, and a rectal examination.¹⁰¹ Justice Rehnquist, writing for the court, along with a concurrence from Justice Stevens, balanced the intrusion upon Ms. Montoya de Hernandez's privacy against the government's interest of protecting its citizens at the border.¹⁰² Justice Rehnquist gave considerable deference to customs officials and the national security interests they sought to protect.¹⁰³ Concluding that the search was constitutional, Justice Rehnquist noted that

⁹⁵ See *Flores-Montano*, 541 U.S. at 154-55.

⁹⁶ See *id.*

⁹⁷ See *Montoya de Hernandez*, 473 U.S. at 537. Here as well, the Court gives great deference to the government's interest in protecting the integrity of the country's borders. *Id.* at 538.

⁹⁸ *Id.* at 539-40.

⁹⁹ *Id.* at 542.

¹⁰⁰ *Id.* at 534.

¹⁰¹ *Id.* at 534-35.

¹⁰² *Montoya de Hernandez*, 473 U.S. at 539-40.

¹⁰³ *Id.* at 540.

at the border, the Fourth Amendment balance will weigh more favorably in the government's direction.¹⁰⁴

Justice Brennan's strong dissent in *Montoya de Hernandez* expressed concern that the government's interest was given too much weight against an individual's rights to privacy.¹⁰⁵ Justice Brennan described the search of Ms. Montoya de Hernandez as "disgusting and saddening."¹⁰⁶ He accused the Court of attempting to convert the Fourth Amendment into a general balancing test, a process "in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales."¹⁰⁷

2. All Border Searches Must Be Limited in Scope

The scope of the search must be limited in both routine and nonroutine searches.¹⁰⁸ The U.S. Supreme Court has implied that all routine and nonroutine searches, regardless of their precedent suspicion, must be limited in some way in their scope.¹⁰⁹ Courts have held that for a nonroutine search, the scope must be limited to that which is necessary to confirm or disprove the official's reasonable suspicions that preceded the search.¹¹⁰

¹⁰⁴ *Id.* at 539, 540. This holding echoed the *Ramsey* Court's reasoning that many searches made at the border, pursuant to the U.S. government's authority to protect the country, are reasonable simply by virtue of the fact that they occur at the border. *Id.*; *Ramsey*, 431 U.S. at 616.

¹⁰⁵ 473 U.S. at 558 (Brennan, J., dissenting).

¹⁰⁶ *Id.* at 545 (quoting *United States v. Holtz*, 479 F.2d 89, 94 (9th Cir. 1973) (Ely, J., dissenting) (regarding a similar case, which involved border police disrobing and searching a female entrant into the United States)).

¹⁰⁷ *Id.* at 558.

¹⁰⁸ See *T.L.O.*, 469 U.S. at 347.

¹⁰⁹ See *Ramsey*, 431 U.S. at 618 n.13. Although the *Ramsey* Court refused to "decide whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out," the Court implied that there is a point at which this might occur. See *id.* The *Flores-Montano* Court, noting that variations in facts among border search cases make such a distinction difficult, also declined to decide this issue. 541 U.S. at 154-55 n.2. Nevertheless, the Court implied that, had the disassembly of the gasoline tank resulted in extreme destruction, loss of property, or presented a danger to the motorist, then the search may have been excessive in scope. See *id.*

¹¹⁰ See *United States v. Palmer* 575 F.2d 721, 723 (9th Cir. 1978) ("In our judgment, in such a case if suspicion is founded on facts specifically relating to the person to be searched, and if the search is no more intrusive than necessary to obtain the truth respecting the suspicious circumstances, then the search is reasonable."); see also *United States v. Price*, 472 F.2d 573, 574-75 (9th Cir. 1973) (reasoning that a border strip search of an individual was reasonable, but officers were not permitted to continue the search when it did not reveal the item for which they were looking). The Ninth Circuit, for example, has

In addition to the balancing test, the U.S. Supreme Court has looked at the scope of the search as it relates to the suspicion surrounding the individual or her belongings.¹¹¹ For example, in 1972, Justice Rehnquist, writing for the Court in *United States v. Ramsey*, upheld the scope of a search of international mail.¹¹² Without defining the search as routine or nonroutine, the Court nonetheless held that the scope of the search was appropriate, in part because the officer had reasonable cause to suspect the envelopes contained contraband after observing that the envelopes were bulky, weighing the envelopes, and then feeling the envelopes from the outside.¹¹³ Justice Rehnquist further held that opening the envelope was not an unconstitutional search, but noted that had the envelopes contained correspondence, the officer would have been required to obtain a warrant prior to reading the envelopes' contents.¹¹⁴ Justice Rehnquist implicitly acknowledged that reading the correspondence would be beyond the scope of a reasonable search.¹¹⁵ Because the officer suspected that the letters contained contraband instead of correspondence, he would only be permitted to search until his suspicions were confirmed or disproven.¹¹⁶ Although the *Ramsey* officer was statutorily permitted to search envelopes at the border, the U.S. Constitution does not permit customs officers to exceed their authority or contravene the purpose of the Fourth Amendment.¹¹⁷ Thus, in confirming the officer's actions, the Court implicitly held that confining the scope of an envelope search to the officer's reasonable suspicion was constitutional.¹¹⁸ Because a statute cannot lower protections established by the Constitution, the Court's affirmation of this law and procedure implicitly upholds the officers' right to search mail, with reasonable suspicion, but only as necessary to confirm or dispel the suspicions.¹¹⁹

held that a search may be no more intrusive than necessary to investigate adequately the official's suspicions. *Price*, 472 F.2d at 574-75. Thus, a border search official may not conduct a strip search when a simple pat down would suffice in revealing drugs or smuggled goods. *Id.* But see *Palmer*, 575 F.2d at 723-24 (noting that when a search "creates new grounds" for further suspicion, the searching officials may continue with the search).

¹¹¹ See *Ramsey*, 431 U.S. at 624.

¹¹² *Id.* at 624-25.

¹¹³ *Id.* at 614.

¹¹⁴ *Id.* at 624.

¹¹⁵ See *id.*

¹¹⁶ See *Ramsey*, 431 U.S. at 615-16.

¹¹⁷ See U.S. CONST. amend. IV; *Ramsey*, 431 U.S. at 615-16.

¹¹⁸ See *Ramsey*, 431 U.S. at 624.

¹¹⁹ See *id.* at 615-16, 624.

Importantly, in both *Ramsey* and *Montoya de Hernandez*, two cases where the Court balanced the government's interest against the intrusion upon the individual's privacy, the searching officers had a high level of reasonable suspicion prior to the search.¹²⁰ The *Montoya de Hernandez* Court held that the scope of the passenger's search, which included lengthy wait, x-ray, and body cavity search, was reasonable, in part because the extent of the search was directly related to the officers' suspicion.¹²¹ Implicitly, the Court balanced the intrusion upon the individual's privacy against the officers' suspicion and determined that the search's scope was appropriate.¹²²

Justice Brennan, dissenting in *Montoya de Hernandez*, argued that at some point, routine searches cross the line to become severe intrusions, at which time more stringent Fourth Amendment safeguards should be required.¹²³ Few U.S. Supreme Court cases, however, have defined specific factors that characterize a nonroutine search.¹²⁴ In 2004, in *United States v. Flores-Montano*, Justice Rehnquist, writing for the Court, identified some factors that supported the finding of a routine search.¹²⁵ Perhaps the inverse of these factors might contribute to a finding that a search was nonroutine.¹²⁶ The *Flores-Montano* Court held that the disassembly and reassembly of an automobile's gasoline tank was routine, in part because the search was quick and did not burden the individual.¹²⁷ Justice Rehnquist reasoned implicitly that because the gasoline tank search was not a physical invasion on the person's body, did not expose the individual to any harm or bodily contact, and did not cause permanent physical damage, the search was not intrusive.¹²⁸ Moreover, Justice Rehnquist implied that the duration of the search could be a factor, and situations where the search takes too long might be deemed nonroutine.¹²⁹ Nevertheless, Justice Rehnquist's opinion left open the possibility that nonphysical searches could also be intrusive; therefore, a nonbodily search could be considered nonroutine.¹³⁰

¹²⁰ *Montoya de Hernandez*, 473 U.S. at 533, 539–40; *Ramsey*, 431 U.S. at 614.

¹²¹ 473 U.S. at 542.

¹²² *See id.* at 539–40.

¹²³ *Id.* at 551 (Brennan, J., dissenting).

¹²⁴ *See Flores-Montano*, 541 U.S. at 154–55 n.2; *Montoya de Hernandez*, 473 U.S. at 541.

¹²⁵ 541 U.S. at 155.

¹²⁶ *See id.*

¹²⁷ *Id.*

¹²⁸ *See id.* at 154–55.

¹²⁹ *See id.*; *see also* Adams, *supra* note 56 at 357 (suggesting that duration is a central factor in distinguishing between routine and nonroutine searches).

¹³⁰ *Flores-Montano*, 541 U.S. at 155; *see* Email from Orin Kerr, Associate Professor of Law, The George Washington University Law School (Jan. 4, 2007) (on file with author).

In contrast, some lower federal courts have defined narrowly the appropriate scope of nonroutine searches.¹³¹ Lower courts have held that customs officials should limit their searches to a scope that is no more intrusive than necessary to gather information to fulfill CBP duties.¹³² In this way, the lower courts have characterized reasonable scope by linking the suspicion necessary for a nonroutine search to the level of intrusiveness caused by the inspection.¹³³

II. THE LOWER COURTS' EXAMINATION OF BORDER LAPTOP SEARCHES

Border searches of laptop computers have not yet been addressed by the U.S. Supreme Court.¹³⁴ Only three federal courts have considered whether a computer search, including a search through the cache of deleted items stored in a traveler's computer, is constitutional.¹³⁵ Just one of these cases, the 2006 decision by the U.S. District Court for the Central District of California in *United States v. Arnold*, has addressed the question of whether a customs official may conduct a random laptop search.¹³⁶ Because a laptop or other digital media storage device is different—in that it is capable of storing vast amounts of personal, proprietary, and confidential information—from a wallet or handbag, courts may be hesitant to place computers in the group of items that

¹³¹ See *Price*, 472 F.2d at 574–75 (holding that after strip search dispelled officers' initial suspicion, they were not justified in continuing with the search).

¹³² *Arnold*, 454 F. Supp. 2d at 1003. Courts in the Ninth Circuit have reasoned that a nonroutine search must be limited in scope and that this scope must be within the boundaries of the Fourth Amendment's requirements. *Price*, 472 F.2d at 575 (finding that a customs search for contraband should have been limited in scope and that once it became apparent that a bulge around the suspect's waist was not contraband, the customs officials were "not entitled, based on appellant's nervousness alone, to keep looking until they found something").

¹³³ See *Price*, 472 F.2d at 575.

¹³⁴ See *United States v. Arnold*, 454 F. Supp. 2d 999, 1000 (C.D. Cal. 2006).

¹³⁵ See *United States v. Romm*, 455 F.3d 990, 1006 (9th Cir. 2006); *United States v. Ickes*, 393 F.3d 501, 505 (4th Cir. 2005); *Arnold*, 454 F. Supp. 2d at 1007. On November 15, 2006, CBP officials conducted a search of a Dallas man's laptop computer after they discovered he had been smuggling \$60,000 into the United States. Jason Trahan, *Dallas Man Held on Airport Smuggling Charge*, DALLAS MORNING NEWS, Nov. 17, 2006, at 2A. The search revealed that the laptop contained information about nuclear materials and cyanide, which the traveler claimed was for his personal interest. *Id.* Although a court has not yet considered whether the evidence gathered during this laptop search would be admissible, this search was presumably constitutional because it was prefaced by reasonable suspicion. *Id.*

¹³⁶ See *Romm*, 455 F.3d at 1006; *Ickes*, 393 F.3d at 505; *Arnold*, 454 F. Supp. 2d at 1007.

may be routinely searched at a border.¹³⁷ Nevertheless, as demonstrated above, the Supreme Court has examined a range of border searches and determined most of them to be either routine and outside the Fourth Amendment's requirements or nonroutine and reasonable.¹³⁸ This Part examines recent developments in the lower courts, in light of the Supreme Court's border search jurisprudence, that suggest that a laptop search may be less routine than a wallet or automobile search.¹³⁹

A. The Fourth Circuit Examines a Border Laptop Search Preceded by Reasonable Suspicion: United States v. Ickes

In 2005, in *United States v. Ickes*, the U.S. Court of Appeals for the Fourth Circuit upheld a search of John Woodward Ickes, Jr., who had his laptop computer with him in his van as he drove across the Canadian and American border.¹⁴⁰ Ickes told U.S. customs agents that he was returning from a vacation, which seemed unlikely to the agents, considering that the van appeared to contain "almost everything [Ickes] owned."¹⁴¹ The agents commenced an inspection of Ickes's van, and their suspicions were further raised when the cursory inspection revealed a video camera "containing a tape of a tennis match which focused excessively on a young ball boy."¹⁴² The agents proceeded to conduct a more thorough search, which uncovered marijuana seeds, marijuana pipes, a copy of a Virginia warrant for Ickes's arrest, and child pornography in a photograph album.¹⁴³ When the agents learned that Ickes was subject to two outstanding warrants, they placed Ickes under arrest, continued to search the van, and examined the contents of Ickes's computer and seventy-five diskettes, which contained child pornography.¹⁴⁴ Ickes filed a motion to suppress the contents discovered from the computer and disk searches.¹⁴⁵ He claimed that this

¹³⁷ See *Arnold*, 454 F. Supp. 2d at 1007 (holding that a warrantless search of a laptop computer at the border is unconstitutional). But see *Ickes*, 393 F.3d at 505 (holding that such a search is constitutional).

¹³⁸ See generally *United States v. Flores-Montano*, 541 U.S. 149 (2004) (finding a gasoline tank inspection to be routine); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (finding a strip search and body cavity search to be nonroutine yet reasonable); *United States v. Ramsey*, 431 U.S. 606 (1977) (finding an inspection of incoming international mail to be nonroutine and reasonable).

¹³⁹ See *infra* notes 140–194 and accompanying text.

¹⁴⁰ 393 F.3d at 502.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 502–03.

¹⁴⁴ *Id.*

¹⁴⁵ *Ickes*, 393 F.3d at 503.

evidence was the result of a warrantless and unconstitutional search that violated his Fourth Amendment rights.¹⁴⁶ The district court denied this motion, Ickes was convicted of transporting child pornography, and he appealed his conviction.¹⁴⁷

The Fourth Circuit held that the evidence obtained by the search was properly presented at Ickes's trial.¹⁴⁸ The court first affirmed the customs agents' statutory authority to search Ickes's van and computer.¹⁴⁹ Reasoning that the "plain language" of the statute was meant to be read expansively, the court determined that a laptop fits into the list of items a customs official may properly search.¹⁵⁰

Next, the court considered whether, notwithstanding the statutory authority, a border search of a laptop computer is constitutional.¹⁵¹ Although the court did not describe it as such, they employed a two-step analysis to determine whether the customs agent had the requisite level of suspicion and whether the search itself was reasonable.¹⁵² First, the court affirmed that probable cause was not necessary for the customs agent to proceed, but although declining to indicate what level of suspicion the agent must have to search Ickes's computer, the court implied that the officers had reasonable suspicion to validate the search.¹⁵³ Next, the court weighed the interests of the government against the individual's privacy interests, and found, as in the Supreme Court cases *United States v. Montoya de Hernandez* and *United States v. Ramsey*, that at the borders, the balance favors the government's interests.¹⁵⁴

B. *The Ninth Circuit Examines a Border Laptop Search with Reasonable Suspicion but Does Not Evaluate the Search's Intrusiveness:*
United States v. Romm

In July 2006, in *United States v. Romm*, the U.S. Court of Appeals for the Ninth Circuit concluded that a customs official need not have

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 504; see 19 U.S.C. § 1581 (2000).

¹⁵⁰ *Ickes*, 393 F.3d at 504; see 19 U.S.C. § 1581.

¹⁵¹ *Ickes*, 393 F.3d at 505.

¹⁵² *Id.* at 507; see *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (suggesting a two-step analysis for the reasonableness of warrantless searches).

¹⁵³ *Ickes*, 393 F.3d at 507. As proof that border officials must have some suspicion, the court pointed to the many factors that led the officials to search Ickes's van, such as marijuana paraphernalia, printed child pornography, and an outstanding warrant for his arrest. *Id.*

¹⁵⁴ *Id.* at 506; see *Montoya de Hernandez*, 473 U.S. at 540; *Ramsey*, 431 U.S. at 619.

reasonable suspicion to search a laptop computer.¹⁵⁵ In *Romm*, a passenger was denied entry to Canada because, after he informed them that he had a criminal record, a search by the Canadian Border Services Agency uncovered illegal child pornography on his laptop computer.¹⁵⁶ Mr. Romm was placed on a return flight to the United States, and Canadian officials informed ICE officers of the reason for his rejection.¹⁵⁷ Romm denied having any illegal pictures on his computer, but a subsequent ICE search revealed that the computer contained ten images of child pornography, all of which Romm had previously deleted from his hard drive.¹⁵⁸ Romm later appealed his conviction, claiming in part that because the American officer did not have reasonable suspicion, the search was unconstitutional.¹⁵⁹

The Ninth Circuit echoed the Supreme Court's *Montoya de Hernandez* reasoning that routine searches at the border do not require reasonable suspicion.¹⁶⁰ But the court stopped short of distinguishing the laptop search as routine or nonroutine, because Romm had not included this claim in his opening brief.¹⁶¹ The court declined to consider this factor, holding that issues that are not raised in opening briefs are waived.¹⁶² Nevertheless, had the court decided that this search was a nonroutine search, it likely would have been constitutional, because ICE officers, informed by Canadian officials that Mr. Romm was transporting child pornography on his computer, had reasonable suspicion that a computer search would reveal illegal images.¹⁶³

¹⁵⁵ 455 F.3d at 997.

¹⁵⁶ *Id.* at 994.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 996.

¹⁶⁰ Compare *Romm*, 455 F.3d at 996 (finding that customs officials should be granted broad discretion to conduct suspicionless searches), with *Montoya de Hernandez*, 473 U.S. at 538 (finding that some searches are so intrusive that they require prior suspicion).

¹⁶¹ *Romm*, 455 F.3d at 997.

¹⁶² *Id.*

¹⁶³ See *id.* at 994. Of course, how the Canadian officials came to discover that Romm was transporting child pornography is less clear. See *id.* Canadian officials knew that Romm was under probation in the state of Florida, where he pleaded "nolo contendere to two counts of promoting sexual performance by a child and one count of child exploitation by means of a computer." *Id.* at n.4. The Canadian customs official asked for and was granted Romm's permission to turn on the computer and look on the computer's browsing history. *Id.* at 994. The history revealed that Romm had visited several Internet sites that contained child pornography, and when the officer asked about these sites in relation to Romm's probation, Romm responded, "That's it. My life's over." *Id.* Because Romm's Florida probation was presumably enough to give the customs officer reasonable suspicion, the ensuing laptop search was likely permissible. *Id.* Similar to the United States, many countries have not yet codified their procedures regarding laptop searches at the borders, but

C. *The Central District of California Characterizes Border Laptop Searches as Nonroutine: United States v. Arnold*

In contrast to the Ninth Circuit's decision in *Romm*, in 2006, in *Arnold*, the U.S. District Court for the Central District of California held that a similar border laptop search was an unconstitutional search and seizure.¹⁶⁴ The court first found that the search of the defendant Arnold's computer was nonroutine.¹⁶⁵ Although the court recognized the longstanding history and importance of the border search exception, it explained that this must take into account the intrusion upon the individual's privacy.¹⁶⁶ The court compared a search of the information and data stored on a passenger's computer to a strip search or body cavity search, reasoning that the former can be as much, if not more, of an intrusion into the dignity and privacy interests of a person as the latter.¹⁶⁷ The court reasoned that when a border search implicates the dignity and privacy interests of the individual, the border search becomes intrusive and therefore nonroutine.¹⁶⁸

Because the court deemed the search of Arnold's computer to be nonroutine, the opinion next turned to an analysis of the reasonableness of the customs official's suspicion and search methods.¹⁶⁹ The court first reasoned that a nonroutine search requires a heightened level of suspicion, the existence of which was debatable in Mr. Arnold's situation.¹⁷⁰ The court was not satisfied with the custom official's report, which was supposed to detail specific suspicions or concerns she had about the passenger prior to conducting a nonroutine search.¹⁷¹ Calling the government's documentation a "broken chain," the court noted that the only official memorandum of the official's suspicions was completed a year after the arrest.¹⁷² Based on inconsistencies and shortcomings in the memorandum and the customs official's testi-

anecdotes from travelers reveal that this practice occurs in countries such as Canada and England. *Id.*; see also Chris Nuttal, *UK Customs Check for Laptop Porn*, BBC NEWS ONLINE, Aug. 13, 1998, <http://news.bbc.co.uk/2/hi/science/nature/150465.stm>.

¹⁶⁴ *Arnold*, 454 F. Supp. 2d at 1007.

¹⁶⁵ *Id.* at 1003.

¹⁶⁶ *Id.* at 1002-03.

¹⁶⁷ *Id.* at 1000.

¹⁶⁸ *Id.* at 1002 (quoting *Flores-Montano*, 541 U.S. at 152).

¹⁶⁹ *Arnold*, 454 F. Supp. 2d at 1004.

¹⁷⁰ *Id.* A customs official must have a heightened level of suspicion to conduct a non-routine search of a passenger or his luggage. See *Montoya de Hernandez*, 473 U.S. at 541-42.

¹⁷¹ *Arnold*, 454 F. Supp. 2d at 1004.

¹⁷² *Id.*

mony,¹⁷³ the court questioned the official's credibility.¹⁷⁴ The court acknowledged that Arnold may have exhibited behaviors such as moving around in the customs line, eavesdropping on his fellow passengers' conversations, and staring at his laptop while the official was searching through his luggage.¹⁷⁵ Nevertheless, the court found these actions to be normal behavior for a passenger who has completed a twenty-hour flight, and it held that the government did not have reasonable suspicion to engage in a nonroutine search of Arnold's belongings.¹⁷⁶

Next, the court turned to an analysis of whether the search itself was reasonable in scope.¹⁷⁷ The court determined that a search of Arnold's computer was highly invasive.¹⁷⁸ The opinion noted that computers contain vast amounts of personal information, including diaries, personal letters, medical information, photos and financial records.¹⁷⁹ Though the court acknowledged the government's "desire to prevent the clear evil of smuggling through laptops and other storage devices child pornography and other informational contraband," the court stated that this was outweighed by an individual's liberty to travel with vast amounts of private information.¹⁸⁰ The court reasoned that such an invasive search requires reasonable suspicion, and without it, the search goes "well beyond the goals of the customs statutes and the reasonableness standard articulated in the Fourth Amendment."¹⁸¹ Finding the search of Arnold's computer unconstitutional, the court suppressed the results of the search during trial.¹⁸²

¹⁷³ *Id.* at 1005. For example, the memorandum described Arnold as "disheveled." *Id.* During cross-examination, when the customs official was asked what "disheveled" meant, she answered that "disheveled" means "out of it." *Id.* Later, the official stated that disheveled was actually the term provided by the government's counsel, and not her own. *Id.* Furthermore, the official described Arnold's answers as "vague and elusive," but later admitted that she had not asked questions that required specific answers. *Id.*

¹⁷⁴ *Id.* at 1004. The customs official did not prepare her own report, and when she did provide details about the circumstances surrounding the incident, she was "imprecise and internally inconsistent." *Id.*

¹⁷⁵ *Id.* at 1006.

¹⁷⁶ *Arnold*, 454 F. Supp. 2d at 1006. The court noted, "Nervousness alone does not warrant an inference of reasonable suspicion." *Id.*

¹⁷⁷ *Id.* at 1003.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1003-04. The court also noted that computers contain confidential information, such as attorney or doctor's files about their clients or patients. *Id.*

¹⁸⁰ *Id.* at 1007.

¹⁸¹ *Arnold*, 454 F. Supp. 2d at 1007.

¹⁸² *Id.*

D. Disagreement Among the Federal Courts

The Central District of California's ruling in *Arnold* suggests that there is some disagreement among the courts as to whether a laptop search is routine or nonroutine, and whether such a search is appropriate in scope.¹⁸³

Despite the Ninth Circuit's finding that the laptop search in *Romm* was constitutional, the Central District of California's *Arnold* ruling is not inconsistent with the current Ninth Circuit position.¹⁸⁴ The Ninth Circuit in *Romm* refused to consider whether a search of a laptop computer was nonroutine, because the appellant had not raised this issue in his initial claim.¹⁸⁵ Because appellant waived his claim that the laptop search was intrusive, the court presumed that the search was routine.¹⁸⁶ Adhering to the Supreme Court's *Montoya de Hernandez* ruling, the Ninth Circuit reasoned that a routine search is permissible without probable cause or a warrant under the border search exception.¹⁸⁷ Thus, because the court held that Mr. Romm's laptop search was routine, reasonable suspicion was not necessary.¹⁸⁸

As in *Romm*, the Fourth Circuit Court of Appeals in *Ickes* refused to suppress evidence uncovered during a search of the passenger's van upon reentry into the United States from Canada.¹⁸⁹ Here, too, the court did not draw a distinction between a routine and a non-routine search, implicitly because the search was prefaced by reasonable suspicion.¹⁹⁰ Therefore, the *Romm* search presumably would have been permissible under either characterization.¹⁹¹

¹⁸³ See *id.* (finding a random laptop search to be nonroutine and thus unconstitutional). But see *Ickes*, 393 F.3d at 507–08 (upholding a border search of an individual's laptop as constitutional); Mark Agee, *Mixed Rulings Sow Confusion*, FORT WORTH STAR-TELEGRAM, Nov. 21, 2006, at C3; Editorial, *Looking into Laptops*, L.A. TIMES, Nov. 11, 2006, at 20.

¹⁸⁴ See *Romm*, 455 F.3d at 1006; *Arnold*, 454 F. Supp. 2d at 1007.

¹⁸⁵ 455 F.3d at 997.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1006.

¹⁸⁸ *Id.*

¹⁸⁹ *Romm*, 455 F.3d at 1006; *Ickes*, 393 F.3d at 507–08.

¹⁹⁰ See *Ickes*, 393 F.3d at 504.

¹⁹¹ See *id.* Nevertheless, the *Ickes* court did limit its holding to the facts in that case. *Id.* For example, the court described the defendant's claim that, should the court find for the government, "any person carrying a laptop computer . . . on an international flight would be subject to a search of the files on the computer hard drive" as "far-fetched." *Id.* at 506–07. The court pointed out that in this circumstance, U.S. customs officials had reasonable suspicion to believe that Mr. Ickes was carrying contraband into the country. *Id.* Although, lest this holding be interpreted as upholding laptop searches only when predicated by reasonable suspicion, the court noted that "to state the probability that reasonable suspi-

The Central District of California's decision in *Arnold*, however, specifically examined whether such a search is routine.¹⁹² Holding that highly intrusive searches are not reasonable merely because they take place at the border, the court drew a line between routine and nonroutine searches.¹⁹³ The court reasoned that a laptop search is nonroutine, in part because this type of search implicates personal privacy and dignity.¹⁹⁴

III. CHALLENGING THE CONSTITUTIONALITY OF LAPTOP SEARCHES AT THE U.S. BORDERS

The Rehnquist Court leaves a legacy of complex border search exception cases that carve out the rights and expectations of those individuals crossing the U.S. borders.¹⁹⁵ Although the U.S. Supreme Court has not specifically decided whether suspicionless border laptop searches are permissible, Justice Rehnquist's border search opinions provide clues about those factors that would likely determine the constitutionality of this type of search.¹⁹⁶ In 1977 in *United States v. Ramsey* and again in 1985 in *United States v. Montoya de Hernandez*, Justice Rehnquist, writing for the Court, affirmed the constitutionality of suspicionless, warrantless searches at the border, so long as those searches were routine.¹⁹⁷ Similarly, in 2006, in *United States v. Flores Montano*, Justice Rehnquist upheld the government's authority to conduct suspicionless inspections of automobiles that include disassembly and reassembly of a vehicle's fuel tank, in part because this type of search is noninvasive.¹⁹⁸ Acknowledging the need for CBP to control the entry of persons and effects into the country, the Court has long recognized the broad plenary powers of U.S. customs officials at the border.¹⁹⁹

Despite the Court's strong support for CBP's authority, implicit in its border search jurisprudence is an indication that some searches go

cions will give rise to more intrusive searches is a far cry from enthroneing this notion as a matter of constitutional law." *Id.* at 507.

¹⁹² 454 F. Supp. 2d at 1003.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1004.

¹⁹⁵ See *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

¹⁹⁶ See *Flores-Montano*, 541 U.S. at 154-55; *Montoya de Hernandez*, 473 U.S. at 544.

¹⁹⁷ *Montoya de Hernandez*, 473 U.S. at 541; *Ramsey*, 431 U.S. at 616.

¹⁹⁸ 541 U.S. at 155.

¹⁹⁹ *Ramsey*, 431 U.S. at 616.

too far.²⁰⁰ When a nonroutine search is not preceded by the appropriate level of suspicion, for example, or when the scope of any search is unreasonable, courts should strike down those inspections as unconstitutional.²⁰¹ In those instances when the customs official has no reasonable suspicion—such as when a traveler is selected at random for a search—a laptop search is constitutional only if that search is routine.²⁰²

This Part argues that a suspicionless border laptop search is impermissible, because it exceeds the judicially-defined boundaries of a constitutional border search.²⁰³ This Part refutes the approach that because it is nonphysical, a laptop search must therefore be routine, and argues instead that a laptop search is nonroutine because it implicates dignity and privacy interests.²⁰⁴ Because of this, a random laptop search is so intrusive that it contravenes an individual's Fourth Amendment rights at the borders.²⁰⁵

A. Characterizing Computer Searches as Routine or Nonroutine

The 2006 decision in *United States v. Arnold* and the 2005 decision in *United States v. Ickes* demonstrate that the U.S. District Court for the Central District of California and the U.S. Court of Appeals for the Fourth Circuit could disagree about the circumstances under which a

²⁰⁰ See *Montoya de Hernandez*, 473 U.S. at 540; see also Comment, *Intrusive Border Searches: Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276, 287 (1966) ("Clearly, it is one thing to stop a traveler to ask him his place and date of birth; this is hardly a nuisance. But it becomes a more serious and degrading business, increasingly an inconvenience and an affront to the dignity of the traveler, as the search progresses from his luggage to the contents of his pockets, his clothing, his naked body, his rectum and his stomach.").

²⁰¹ See *United States v. Arnold*, 454 F. Supp. 2d 999, 1007 (C.D. Cal. 2006); see also Comment, *At the Border of Reasonableness: Searches by Custom Officials*, 53 CORNELL L. REV. 871, 884 (1968) ("A line must be drawn between acceptable and unacceptable searches at the border.").

²⁰² See *Flores-Montano*, 541 U.S. at 155; *Montoya de Hernandez*, 473 U.S. at 538. In fact, despite the small amount of suspicion that preceded the *Arnold* search, the U.S. government might agree with this argument. Editorial, *supra* note 183. A *Los Angeles Times* editorial reported that the government claimed that customs officials will not conduct a laptop search until a routine check of the traveler's background or travel plans reveals some suspicion. *Id.* If this protocol is followed throughout the agency, then the government has implicitly agreed that some reasonable suspicion must be necessary to search one's laptop. See *id.* However, until this protocol is codified legislatively, any passenger's laptop may be searched on the basis of very little or no reasonable suspicion. See *Arnold*, 454 F. Supp. 2d at 1004.

²⁰³ See *infra* notes 206–253 and accompanying text.

²⁰⁴ See *infra* notes 206–253 and accompanying text.

²⁰⁵ See *infra* notes 206–253 and accompanying text.

laptop search might be considered constitutional.²⁰⁶ One approach to resolve this tension is to examine those factors that the courts have employed to characterize a border search as nonroutine.²⁰⁷ The U.S. Supreme Court has not drawn an explicit line between routine and nonroutine searches.²⁰⁸ Both the Supreme Court and lower courts' border search cases provide guidance as to specific factors that might contribute to a finding that a computer search is intrusive.²⁰⁹ Courts have recognized a range of elements that contribute to a search's intrusiveness.²¹⁰ This section evaluates the possible intrusion to both to one's body and one's dignity, and concludes that either type of intrusion might contribute to a nonroutine search.²¹¹

*B. Physical Intrusiveness Should Not Be the Only Element
of a Nonroutine Search*

The courts have not yet come to agreement about how to characterize the routiness of a laptop search because *Ickes* examined a situation where there was prior reasonable suspicion and *Arnold* examined a situation where there was no reasonable suspicion.²¹² One approach to resolve this uncertainty is to examine those factors that the courts have employed to characterize a border search as nonroutine.²¹³ In general, the more physical a search is, the more likely it is to be considered nonroutine.²¹⁴

Some courts have held that a nonroutine search likely involves an element of physical intrusion on the suspect's body or clothing; actual physical contact is required.²¹⁵ The U.S. Court of Appeals for the First

²⁰⁶ See *United States v. Ickes*, 393 F.3d 501, 506 (4th Cir. 2005); *Arnold*, 454 F. Supp. 2d at 1003.

²⁰⁷ See *United States v. Braks*, 842 F.2d 509, 511-12 (1st Cir. 1988); *United States v. Oyekan*, 786 F.2d 832, 838 (8th Cir. 1986); *United States v. McMurray*, 747 F.2d 1417, 1420 (11th Cir. 1984).

²⁰⁸ See *Flores-Montano*, 541 U.S. at 152. In holding that a search of an automobile gasoline tank is routine, the Court implicitly distinguished the two types of searches but did not indicate at what point a search becomes nonroutine. See *id.*

²⁰⁹ See *id.* at 154-55; *Braks*, 842 F.2d at 511-12; *Oyekan*, 786 F.2d at 838; *McMurray*, 747 F.2d at 1420.

²¹⁰ See *Flores-Montano*, 541 U.S. at 154-55; *Braks*, 842 F.2d at 511-12; *Oyekan*, 786 F.2d at 838; *McMurray*, 747 F.2d at 1420.

²¹¹ See *infra* notes 212-253 and accompanying text.

²¹² See *Ickes*, 393 F.3d at 504; *Arnold*, 454 F. Supp. 2d at 1003.

²¹³ See *Braks*, 842 F.2d at 511-12; *Oyekan*, 786 F.2d at 838; *McMurray*, 747 F.2d at 1420.

²¹⁴ See *United States v. Charleus*, 871 F.2d 265, 268 (2d Cir. 1989); *Braks*, 842 F.2d at 511-12.

²¹⁵ See *Charleus*, 871 F.2d at 268; *Braks*, 842 F.2d at 511-12.

Circuit uses a six-part analysis that asks questions about the physicality of the search, for example, whether the suspect was required to disrobe or encountered pain or danger during the search.²¹⁶ Certainly, on this end of the spectrum, a computer search would likely be considered routine, because a laptop search is not physical; the suspect encounters no pain during the search, and he is not required to expose any part of his body for a tactile or visual search.²¹⁷ A traveler whose laptop is randomly searched would not likely succeed in demonstrating that this search is intrusive in the same way that a strip search is physically intrusive.²¹⁸

Nevertheless, physicality is not the only element that courts might use to distinguish a search as intrusive.²¹⁹ Rather, the totality of the invasiveness should determine whether a search is intrusive and thus, nonroutine.²²⁰ In fact, the Supreme Court in *Flores-Montano* cautioned against using a multipart balancing test to decide the routineness of an automobile search.²²¹ Nevertheless, the Court implied that a non-routine search is intrusive.²²² The Court has explicitly recognized that a search is intrusive when it implicates dignity and privacy interests.²²³

In fact, even the more stringent First Circuit six-part analysis, which focuses on the physical aspects of a nonroutine search, considers whether the search violated the suspect's reasonable expectations of privacy.²²⁴ The Supreme Court has stated unequivocally that a traveler's expectation of privacy at the border is quite low.²²⁵ Nevertheless, a judicial invocation of a traveler's privacy indicates that one does have a right to expect that some items will be kept private from random or

²¹⁶ *Braks*, 842 F.2d at 511-12.

²¹⁷ *Id.* at 512. The court noted that "the only types of border search of an individual's person that have been consistently held to be non-routine are strip-searches and body-cavity searches," but noted that these are fact specific situations that require a balancing of the factors. *Id.* at 512-13. Another court drew the distinction between an x-ray of a person's body and his luggage, holding that the latter would only be nonroutine if it caused physical damage to the property. *United States v. Okafor*, 285 F.3d 842, 846 (9th Cir. 2002). The court noted that an incision made in the bag's interior lining, on the other hand, could be considered nonroutine. *Id.*

²¹⁸ See *Braks*, 842 F.2d at 511-12.

²¹⁹ See *Flores-Montano*, 541 U.S. at 155 n.2.

²²⁰ See *Charleus*, 871 F.2d at 268.

²²¹ 541 U.S. at 152.

²²² See *id.*

²²³ *Id.*

²²⁴ *Braks*, 842 F.2d at 512.

²²⁵ *Montoya de Hernandez*, 473 U.S. at 539-40.

unwarranted inspection.²²⁶ Although a traveler's expectation of privacy is lower at the border, he does not abrogate all constitutional protections simply by entering or exiting the country.²²⁷ A person should have an expectation that the information on his computer, which might contain numerous personal, proprietary, and professional files, would be kept more private than a wallet or handbag, which also contain private items but have the capability and likelihood of storing much less.²²⁸ A search of a passenger's computer or digital media storage device is uniquely different from an accordion file or hard copy of documents.²²⁹ Just as the Supreme Court has modified its Fourth Amendment warrantless search jurisprudence for situations involving automobiles²³⁰ or school lockers,²³¹ rapidly expanding digital storage technology requires an adapted jurisprudence to respond to constitutional challenges posed by ever-expanding technological searches at the country's borders.²³²

C. A Laptop Search Is an Intrusion Upon One's Dignity and Privacy

Even though a laptop search might not match the physical intrusiveness of a body cavity search, it is a deeply personal intrusion.²³³ There are intrusive, nonphysical elements of a laptop search that might characterize it as nonroutine.²³⁴ Individuals use computers to

²²⁶ See *Braks*, 842 F.2d at 512; see also David Allen Jordan, *Decrypting the Fourth Amendment: Warrantless NSA Surveillance and the Enhanced Expectation of Privacy Provided by Encrypted Voice Over Internet Protocol*, 47 B.C. L. REV. 505, 539 (2006) ("The issue of whether an item is constitutionally protected is determined based solely on whether the person claiming protection had manifested a subjective expectation of privacy in that item, and whether that expectation is one which society is willing to recognize as reasonable.").

²²⁷ See *United States v. Villamonte-Marquez*, 462 U.S. 579, 599 n.6 (1983) (Brennan, J., dissenting) ("[T]he border-search rule does not represent any exception to our uniform insistence under the Fourth Amendment that the police may not be loosed upon the populace with no limits . . .").

²²⁸ See *Arnold*, 454 F. Supp. 2d at 1004. Additionally, a search of one's laptop might be very embarrassing or reveal private details, and is thus intrusive. *United States v. Mejia*, 720 F.2d 1378, 1382 (5th Cir. 1983) (rejecting the requirement of a physical element for a nonroutine search, instead holding that "intrusion is keyed to embarrassment, indignity, and invasion of privacy").

²²⁹ See *Arnold*, 454 F. Supp. 2d at 1004.

²³⁰ See *Carroll v. United States*, 267 U.S. 132, 149 (1925).

²³¹ See *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

²³² See *Arnold*, 454 F. Supp. 2d at 1004.

²³³ See *Mejia*, 720 F.2d at 1382; see also *United States v. Palmer*, 575 F.2d 721, 723 (9th Cir. 1978) ("[B]etween a search of pockets and a strip search there can be a variety of types of intrusion, with varying degrees of intrusiveness It is hardly feasible to enunciate a clear and simple standard for each.").

²³⁴ See *Mejia*, 720 F.2d at 1382.

store massive amounts of data; files; passwords; and financial, personal, and professional information.²³⁵ Some courts have left open the possibility that a border search could be considered nonroutine if it is invasive, intrusive, or embarrassing.²³⁶ This rubric recognizes that different types of searches include varying levels of intrusion that may trigger greater Fourth Amendment protections.²³⁷ A passenger subjected to a random, suspicionless laptop search might feel great embarrassment and an invasion of her privacy by a customs official searching through her hard drive and cached and deleted files.²³⁸

If a laptop search falls somewhere between a routine wallet search and a nonroutine x-ray or body cavity search, then courts should first recognize that a laptop is substantively different from a wallet.²³⁹ The difference is in the reading or collection of information; in a wallet search, a customs officer might examine identification cards, licenses, money, or credit cards, all of which are admittedly personal.²⁴⁰ But a laptop search, especially one in which the customs officer opens files, searches through a user's Internet browsing history, and examines his cached or deleted files, is more akin to reading a passenger's diary, reading the contents of international mail, examining legal documents that he takes aboard an airplane, or even subjecting him to a lie-detector test.²⁴¹

In light of this, a laptop search should be characterized as deeply intrusive.²⁴² When CBP or ICE officials open a person's laptop and examine its contents—including, in many cases, a full search of the

²³⁵ *Arnold*, 454 F. Supp. 2d at 1003–04. Listing the many types of private information stored on a laptop, Judge Pregerson stated:

A laptop and its storage devices have the potential to contain vast amounts of information. People keep all types of personal information on computers, including diaries, personal letters, medical information, photos and financial records. Attorneys' computers may contain confidential client information. Reporters' computers may contain information about confidential sources or story leads. Inventors and corporate executives' computers may contain trade secrets.

Id.

²³⁶ See *United States v. Dorsey*, 641 F.2d 1213, 1218 (7th Cir. 1981).

²³⁷ See *id.* at 1216.

²³⁸ See *Arnold*, 454 F. Supp. 2d at 1003–04.

²³⁹ See *Flores-Montano*, 541 U.S. at 155; *Arnold*, 454 F. Supp. 2d at 1003–04.

²⁴⁰ See *Flores-Montano*, 541 U.S. at 155; *Arnold*, 454 F. Supp. 2d at 1003–04.

²⁴¹ See *Ramsey*, 431 U.S. at 615; *Arnold*, 454 F. Supp. 2d at 1007.

²⁴² See *Braks*, 842 F.2d at 511–12; see also *Arnold*, 454 F. Supp. 2d at 1000 (“Electronic storage devices function as an extension of our own memory. They are capable of storing our thoughts, ranging from the most whimsical to the most profound.”).

cache of deleted items—this search could reveal much more personal information than what is found when customs officials pat down a passenger, read a hard copy of her documents, ask her to empty her pockets, or rifle through her luggage.²⁴³ If the U.S. Court of Appeals for the Ninth Circuit does review *Arnold*, the court would examine the intrusion upon Mr. Arnold's privacy caused by the CBP laptop search against the level of suspicion on the part of the inspecting officer.²⁴⁴ In Mr. Arnold's case, the level of intrusion was high and the level of suspicion was very low.²⁴⁵ When the customs official selected him at random, the official was unaware that the laptop search might contain child pornography.²⁴⁶ The result of the ensuing search should not force him to abrogate his Fourth Amendment right against unconstitutional searches.²⁴⁷

Although a court might be unsympathetic toward the privacy interests of someone who collects child pornography, the issue should be considered in light of its impact on the general public.²⁴⁸ Any passenger traveling with a computer might store personal information or private documents on the hard drive.²⁴⁹ A random laptop search would implicate dignity and privacy interests of the individual, thus causing the search to be intrusive.²⁵⁰ A laptop might contain private photographs, passwords, financial records, legal pornography, personal email correspondence, confidential business records, home movies, medical information, or music files that a person considers very private.²⁵¹ Because a computer can contain vast amounts of data that a passenger is unlikely to pack for a vacation or trip, a search through its hard drive is not analogous to looking through a person's luggage, wallet, or automobile.²⁵² It is much more personal, and implicates dignity and privacy interests that should contribute to a finding that a laptop search is intrusive.²⁵³

²⁴³ See *Braks*, 842 F.2d at 511-12; *Dorsey*, 641 F.2d at 1218; *Arnold*, 454 F. Supp. 2d at 1000.

²⁴⁴ See *Braks*, 842 F.2d at 511-12; *Dorsey*, 641 F.2d at 1218; *Arnold*, 454 F. Supp. 2d at 1000.

²⁴⁵ *Arnold*, 454 F. Supp. 2d at 1000.

²⁴⁶ *Id.* at 1006.

²⁴⁷ See *id.* at 1007.

²⁴⁸ See *id.* at 1000-01.

²⁴⁹ See *id.* at 1000.

²⁵⁰ See *Flores-Montano*, 541 U.S. at 152.

²⁵¹ See *Arnold*, 454 F. Supp. 2d at 1003-04.

²⁵² See *id.* at 1000.

²⁵³ See *id.* at 1003.

IV. THE SCOPE OF A LAPTOP SEARCH CONTRIBUTES TO ITS CONSTITUTIONALITY

In the event that a laptop search is permissible—either because the search is routine, thus making reasonable suspicion unnecessary, or because the laptop search is nonroutine and preceded by the requisite level of suspicion—there is still another requirement for the search to be constitutional.²⁵⁴ A border search must be conducted in a reasonable manner.²⁵⁵ Courts have interpreted this to mean that a border search may be no more intrusive than necessary to confirm or dispel the searching official's reasonable suspicions.²⁵⁶ A laptop search that is broader in scope than necessary to confirm or dispel the searching agent's suspicions would likely be too invasive, and thus unconstitutional.²⁵⁷

A. *Even if Permissible, Border Laptop Searches Must Be Limited in Scope*

In 2004, in *United States v. Flores-Montano*, the U.S. Supreme Court listed several factors that contributed to a finding that a gasoline tank search was routine.²⁵⁸ For example, the Court noted that the disassembly and reassembly were relatively quick and the search would not prevent an innocent individual from using his car shortly after the search.²⁵⁹ The methods used by customs officials who search international passengers' laptops, on the other hand, might range from simply opening the computer to seizing the device and running advanced searches on the hard drive's documents, deleted files, and Internet cache.²⁶⁰ Officials might retain the equipment for weeks, thus preventing the individual from accessing his computer and separating him from potentially important documents and files.²⁶¹ The amount of time a laptop search takes, compared to a routine automobile or pat-down search, could distinguish laptop searches as unreasonable in scope.²⁶²

²⁵⁴ See *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

²⁵⁵ See *id.*

²⁵⁶ See, e.g., *United States v. Price*, 472 F.2d 573, 574–75 (9th Cir. 1973).

²⁵⁷ See *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004).

²⁵⁸ *Id.*

²⁵⁹ *Id.* Note, though, that the Court also reasoned that the search was valid because customs officials caused no permanent damage, which does not apply to laptop searches, where the issues of permanent physical damage, usability, and the user's post-search safety are not applicable. See *id.*

²⁶⁰ See, e.g., *United States v. Romm*, 455 F.3d 990, 993 (9th Cir. 2006).

²⁶¹ *Id.*; see also Gilden, *supra* note 2.

²⁶² See *Flores-Montano*, 541 U.S. at 155; *United States v. Arnold*, 454 F. Supp. 2d 999, 1001 (C.D. Cal. 2006); Email from Orin Kerr, *supra* note 130.

The Court's evaluation of reasonable search methods balances the need to protect the country's borders against unreasonable invasions of privacy.²⁶³ This balance, admittedly favoring the government's interests, limits the extent and manner in which an item may be searched.²⁶⁴ For example, in 1977, in *United States v. Ramsey*, the Court found that a customs official was statutorily permitted to open an envelope to determine if the letter contained narcotics, but the official would not have been permitted to read the letter.²⁶⁵ Similarly, a border official could be allowed to open a computer or examine its exterior to determine if the computer contained an explosive, but could not read its contents.²⁶⁶ If the official's suspicion were related somehow to the contents of the computer—as the U.S. Court of Appeals for the Fourth Circuit determined in the 2005 case *United States v. Iches*—then here too customs officials should be restrained in the scope of a laptop search.²⁶⁷ Their search should be limited to a scope that either confirms or dispels their initial suspicion.²⁶⁸

B. Policy Concerns That Support Limiting the Scope of a Search

Assuming *arguendo* that a laptop search is nonroutine, yet is preceded by the requisite level of reasonable suspicion, then the reasonable suspicion requirement raises an important issue about the policy behind the scope of a laptop search.²⁶⁹ The scope of a nonroutine search must be related to a specific suspicion.²⁷⁰ For example, although a body-cavity search might be intended to confirm or dispel an officer's specific suspicions about a woman suspected of smuggling narcotics,²⁷¹

²⁶³ *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985). According to some, the *Montoya de Hernandez* Court took a strict approach toward a passenger suspected of smuggling drugs into the country, because "she had made her bed Nowhere did the majority mention a human dignity concern arising from the sixteen hour delay preceding the supervising officer seeking a magistrate's order for a search." Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 N.E. L. REV. 740, 772 (2006). Nevertheless, the scope of Ms. Montoya de Hernandez's body cavity and x-ray searches, intrusive as they may seem compared to a laptop search, was presumably related in scope to the official's reasonable suspicion about the passenger. See *Montoya de Hernandez*, 473 U.S. at 541.

²⁶⁴ *Montoya de Hernandez*, 473 U.S. at 540.

²⁶⁵ 431 U.S. 606, 624 (1977).

²⁶⁶ See *id.*

²⁶⁷ See 393 F.3d 501, 507–08 (4th Cir. 2005).

²⁶⁸ See *id.*

²⁶⁹ See *Price*, 472 F.2d at 575.

²⁷⁰ See *Montoya de Hernandez*, 473 U.S. at 541.

²⁷¹ See *id.*

a laptop search would not be an appropriate search for a passenger suspected of smuggling drugs.²⁷² A laptop search of an individual's files and data, assuming this search was preceded by reasonable suspicion, would only be appropriate if customs officials suspect the individual of bringing illegal data or files into or out of the country.²⁷³

In providing policy reasons to justify the border search exception, the Supreme Court has reasoned that the CBP must have the authority to regulate the collection of duties and to prevent the introduction of contraband into this country.²⁷⁴ Nevertheless, Justice Rehnquist's opinions provide additional justifications in each of the border search cases that substantiate the need to search one's property without suspicion.²⁷⁵ In 1985, in *United States v. Montoya de Hernandez*, Justice Rehnquist pointed to a "veritable national crisis" created by international narcotics smugglers.²⁷⁶ Rehnquist's post-September 11th decision in *Flores-Montano* emphasized the government's authority to search vehicles at the border, reasoning that the government's duty to protect the United States from illegal people and items is heightened at the country's borders.²⁷⁷ This argument suggests that the subject matter of triggering events is broad indeed.²⁷⁸ But if the purpose of a search is to seek answers to a particular suspicion unrelated to any national emergency, then a laptop search could be considered unreasonable in scope.²⁷⁹

Some might argue that a laptop could contain a bomb or other explosive device, and that the customs officials have plenary powers to

²⁷² See *id.*

²⁷³ See *Arnold*, 454 F. Supp. 2d at 1007. The type of search plays a critical role in characterizing the scope as reasonable or not. See *id.* at 1001. For example, if every single file is searched electronically by special software scanning the entire hard drive, its cache, and Internet browsing history, the scope of that search is much more intrusive than one in which a customs officer simply opens files that appear immediately suspicious on the computer's desktop. See *id.* Both are intrusive, but the former, a more comprehensive scan, is more like an x-ray or body-cavity search than a routine wallet search or opening of an envelope. See *id.*

²⁷⁴ *Montoya de Hernandez*, 473 U.S. at 537 (citing *Ramsey*, 431 U.S. at 616-617).

²⁷⁵ *Id.* at 538.

²⁷⁶ *Id.*

²⁷⁷ 541 U.S. at 152.

²⁷⁸ *Id.* Some have interpreted Rehnquist's decisions after September 11, 2001 as "more restrictive of Fourth Amendment rights," suggesting that the Court's recognition of increased governmental authority at the borders is a response to national security concerns. See Madhavi M. McCall & Michael A. McCall, *Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323, 348 (2006).

²⁷⁹ See *Flores-Montano*, 541 U.S. at 152. In a random laptop search, the customs official presumably does not expect to find a specific type of contraband. See *Arnold*, 454 F. Supp. 2d at 1007.

seek out threats against the country.²⁸⁰ Certainly, scanning a computer in an x-ray machine for explosives would be a permissible customs search, because it is routine.²⁸¹ A physical search of the device is neither intrusive nor unreasonable in scope, and would thus be constitutional.²⁸² A more difficult question concerns appropriateness of searching a laptop belonging to an individual suspected of smuggling illegal data, files, or plans.²⁸³ Customs officials in those circumstances should be required to articulate particularized suspicion as it relates to the desired digital search.²⁸⁴

Justice Rehnquist's opinions upholding government searches at America's borders confirm the reasons behind the border search jurisprudence, but they also relate to national concerns at issue at the time they were authored.²⁸⁵ After Chief Justice Rehnquist passed away in September 2005, John Roberts, Jr. was selected and confirmed to replace him as Chief Justice on the U.S. Supreme Court.²⁸⁶ It is difficult to predict how the Roberts Court might address the issue of suspicionless border searches, including laptop searches.²⁸⁷ Nevertheless, clues from Justice Roberts's tenure on the U.S. Court of Appeals for the District of Columbia Circuit indicate that he, too, would likely rule in favor of the government.²⁸⁸ Although Roberts's judicial philosophy has

²⁸⁰ See *Montoya de Hernandez*, 473 U.S. at 538. In the situation where customs officials found plans for explosives on the computer of an individual suspected of smuggling cash, the justification for the search is more founded, although here too there was reasonable suspicion precedent to the laptop search. See Trahan, *supra* note 135.

²⁸¹ See *Arnold*, 454 F. Supp. 2d at 1007.

²⁸² See *id.*

²⁸³ See Trahan, *supra* note 135.

²⁸⁴ See *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968).

²⁸⁵ See *Montoya de Hernandez*, 473 U.S. at 537 (citing *Ramsey*, 431 U.S. at 616–617).

²⁸⁶ Linda Greenhouse, *A Ceremonial Start to the Session as the Supreme Court Welcomes a New Chief Justice*, N.Y. TIMES, Oct. 4, 2005, at A25; Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES, Sept. 4, 2005, at A1.

²⁸⁷ See Thomas K. Clancy, *Hints of the Future?: John Roberts, Jr.'s Fourth Amendment Cases as an Appellate Judge*, 35 U. BALT. L. REV. 185, 185–86 (2005). One scholar, "in the manner of reading tea-leaves" examined Roberts's Fourth Amendment jurisprudence for clues about how he might address search and seizure cases that come before the Supreme Court. *Id.* at 186.

²⁸⁸ See *id.* As an appellate judge, Judge Roberts reviewed eight Fourth Amendment cases, and in each one he upheld the government's right to search or seize the property in question. See *United States v. Jackson*, 415 F.3d 88, 101 (D.C. Cir. 2005); *United States v. Lawson*, 410 F.3d 735, 736 (D.C. Cir. 2005); *United States v. Moore*, 394 F.3d 925, 926 (D.C. Cir. 2005); *Hedgepeth v. Wash. Metro. Area Transit*, 386 F.3d 1148, 1149 (D.C. Cir. 2004); *United States v. Holmes*, 385 F.3d 786, 787 (D.C. Cir. 2004); *United States v. Brown*, 374 F.3d 1326, 1326 (D.C. Cir. 2004); *United States v. Riley*, 351 F.3d 1265, 1266 (D.C. Cir. 2003); *Stewart v. Evans*, 351 F.3d 1239, 1240–41 (D.C. Cir. 2003). In one now famous case, then-Judge Roberts upheld a government official's arrest of a twelve-year-old girl who ate a

not yet been detailed by his written opinions, Roberts's jurisprudence is closely aligned with that of his former mentor, William Rehnquist.²⁸⁹ With the addition of Justice Samuel Alito in 2006, who replaced Justice Sandra Day O'Connor, the Court's holdings could shift even further to the right.²⁹⁰ While a more conservative panel does increase the possibility that, in a border laptop case, the Court would side with the government in the interest of national security and the government's plenary powers, that result is not guaranteed.²⁹¹ The Supreme Court has the opportunity to recognize the unique challenges presented by new and constantly evolving technology, and should respond in a way that limits the government's authority to impede upon an individual's Fourth Amendment rights at the country's borders.²⁹²

CONCLUSION

At the borders, the government's interest in regulating individuals and their possessions is strong. This has been acknowledged by both the U.S. Supreme Court and lower federal courts. In response to the government's interest, the courts have allowed CBP and ICE officials broad plenary authority to conduct routine searches without suspicion at the borders. But where a border search is not routine, because it is invasive, intrusive, or implicates dignity and privacy concerns, the customs official must have some reasonable suspicion before selecting that passenger and conducting the search. A laptop is categorically different from a wallet or handbag, because it is a deeply personal device with a seemingly unlimited capacity for private and potentially embarrassing information. The standard of review for the intrusiveness of a search should not be based on simply its physical effect, but also the impact on the individual's dignity, which is implicated by a laptop search. Because

french fry on the Washington, D.C. subway. *Hedgepeth*, 386 F.3d at 1159. Roberts denied that the arrest violated her Fourth Amendment rights, in part because the police officer had probable cause to believe the child was violating the law. *Id.*

²⁸⁹ Charles Lane, *Short Record as Judge Is Under a Microscope*, WASH. POST, July 25, 2005, at A01.

²⁹⁰ Michiko Kakutani, *Court No Longer Divided: Conservatives in Triumph*, N.Y. TIMES, Jan. 23, 2007, at E1; David D. Kirkpatrick, *Alito Clears Final Hurdle for Confirmation to Court*, N.Y. TIMES, Jan. 31, 2006, at A1.

²⁹¹ See *Brendlin v. California*, 127 S. Ct. 2400, 2410 (2007). In a unanimous decision, the Court decided that when an automobile is stopped by a police officer, every passenger in the car has standing to challenge that stop under the Fourth Amendment. *Id.* The decision's recognition of an individual's Fourth Amendment rights suggests that the Court is willing to expand its definition of those protected by the Fourth Amendment, even in light of increased national security concerns. See *id.*

²⁹² See *supra* notes 195–291 and accompanying text.

of this, a laptop search is more akin to searching inside an individual's diary or brain, and should thus be considered nonroutine. Laptop searches should therefore be predicated by some reasonable suspicion by the customs officer conducting the search.

In addition to the legal analysis described above, two additional factors might substantially affect the future of border searches of laptop computers. First, considering that Justice Rehnquist was the author of some of the Supreme Court's most significant border search cases, the different composition of the Court since his passing might change the direction of the jurisprudence in this area. Second, the political and legal landscape has changed significantly since September 11, 2001. The Court's 2004 decision in *United States v. Flores-Montano* is to date the only post-September 11th case that questions—and ultimately affirms—the plenary powers of customs officials. In light of the policy issues surrounding widening customs officials' powers, future jurisprudence will likely take into account the myriad of technology that travelers carry along on a trip and inform travelers what, if any, items will remain private as they traverse America's borders.

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