



# Border Searches of Laptop Computers and Other Electronic Storage Devices

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## Summary

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

The federal courts have universally held that the border search exception applies to laptop computer searches conducted at the border. Although the Supreme Court has not directly addressed the degree of suspicion needed to conduct a warrantless laptop border search, the federal appellate courts that have addressed the issue appear to have concluded that reasonable suspicion is not needed to justify such a search. The Ninth Circuit, in *United States v. Arnold*, explicitly held that reasonable suspicion is not required to conduct a warrantless search of a laptop at the border.

A bill introduced in the 111<sup>th</sup> Congress, H.R. 239, would impose more rigorous standards for laptop searches than those the federal courts have determined are constitutionally required.

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## Introduction

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

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

## Border Search Exception

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

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

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

<sup>3</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.”).

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

<sup>5</sup> *See* Act of July 31, 1789, ch. 5 §§23-24, 1 Stat. 29, 43 (authorizing custom officials “full power and authority” to enter and search “any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed ... ”); *Carroll v. United States*, 267 U.S. 132, 153-54 (1925) (“Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.”). *Accord* *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971); *Boyd v. United States*, 116 U.S. 616 (1886).

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

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

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

activity when searching the envelopes.<sup>9</sup> This standard, while less stringent than probable cause, was sufficient justification.<sup>10</sup> The border search exception has subsequently been expanded to not only persons, objects, and mail entering the United States, but also to individuals and objects departing from the United States<sup>11</sup> and to places deemed the “functional equivalent” of a border, such as international airports.<sup>12</sup>

As the border search exception has further developed in case law, lower federal courts have recognized two different categories of border searches: routine and non-routine. This distinction is based on language in *United States v. Montoya de Hernandez*, where the Supreme Court applied the border search exception to the overnight detention of a woman suspected of smuggling drugs in her alimentary canal.<sup>13</sup> In the case, customs officials eventually obtained a court order authorizing a rectal examination, which produced a balloon containing cocaine.<sup>14</sup> The Court held that the custom officials’ “reasonable suspicion” that the suspect was smuggling drugs sufficiently supported the search and detention.<sup>15</sup>

“Reasonable suspicion,” which is described as a particularized and objective basis for suspecting wrongdoing, has become the degree of suspicion required before a highly intrusive “non-routine” search can be conducted without a warrant.<sup>16</sup> However, the precise level of intrusion imposed on a person or his effects in order to rise to the level of the non-routine is undefined in the case law.<sup>17</sup> Typically, courts have determined the requisite degree of suspicion needed to justify the search on a case-by-case basis.<sup>18</sup> Nonetheless, a Supreme Court decision indicates that, unlike a search of a person’s body, intrusiveness may not be a dispositive factor when the search of a vehicle or personal effects is non-routine and based on no suspicion whatsoever. Thus, even very invasive

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

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

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

<sup>12</sup> *See* *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973); *United States v. Hill*, 939 F.2d 934, 936 (11<sup>th</sup> Cir. 1991); *United States v. Gaviria*, 805 F.2d 1108, 1112 (2d Cir. 1986). In the context of international airports, the border search exception only applies to searches of persons and effects on international flights, whereas the administrative search exception, which applies to routine searches with purposes unrelated to law enforcement, is used to justify searches of persons and effects on domestic flights. *See* *United States v. Davis*, 482 F.2d 893, 908-12 (9<sup>th</sup> Cir. 1973).

<sup>13</sup> 473 U.S. 531, 541 (1985).

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

<sup>15</sup> *Id.* at 541 (“We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.”).

<sup>16</sup> *See Id.* (citing *Terry*, 392 U.S. at 21 (“And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”)).

<sup>17</sup> *See Id.* at 541 n. 4.

<sup>18</sup> *Id.* (requiring “reasonable suspicions” for the detention of a traveler at the border, beyond the scope of a routine customs search and inspection). *See also* *Henderson v. United States*, 390 F.2d 805 (9<sup>th</sup> Cir. 1967) (holding that strip searches may be conducted only upon a real suspicion); *United States v. Adekunle*, 980 F.2d 985 (5<sup>th</sup> Cir. 1992), on reh’g, 2 F.3d 559 (5<sup>th</sup> Cir. 1993) (requiring reasonable suspicion to justify a strip search); *United States v. Asbury*, 586 F.2d 973, 975-976 (2d Cir. 1978) (requiring reasonable suspicion for strip searches); *Rivas v. United States*, 368 F.2d 703 (9<sup>th</sup> Cir. 1966) (requiring a clear indication of the possession of narcotics to justify an alimentary canal search).

“routine” searches of personal property can be conducted without a warrant and be based on no suspicion whatsoever.<sup>19</sup>

Although the Court in *Montoya de Hernandez* focused on a “non-routine” detention of a traveler at the border, lower federal courts, interpreting *dictum* in that case, began distinguishing unusually intrusive searches from “routine” searches.<sup>20</sup> These courts thereby expanded the border search exception by concluding that a customs official may conduct “routine” warrantless searches of persons or effects without any reason for suspicion.<sup>21</sup> The Supreme Court further developed this doctrine in *United States v. Flores-Montano*, where the disassembly and examination of an automobile gasoline tank was determined to be a routine warrantless vehicle search and therefore did not require reasonable suspicion.<sup>22</sup> The Court concluded that the gasoline tank search was no more intrusive than a routine vehicle search because there was no heightened expectation of privacy surrounding the contents of a gasoline tank, even though the search involved a time-consuming disassembly of the vehicle.<sup>23</sup> *Flores-Montano* illustrates that extensive, time-consuming, and potentially destructive warrantless searches of objects and effects can therefore be considered “routine” and can be conducted without any particularized suspicion.

## Judicial Developments on Laptop Searches

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

The Supreme Court has yet to address this issue. Most lower federal courts, however, have concluded that searches of laptops, computer disks, and other electronic storage devices fall under the border search exception, which means neither a warrant nor probable cause is necessary to support the search.<sup>24</sup> Nonetheless, these courts have not explicitly established the degree of suspicion required to justify a warrantless search of a laptop at the border; rather, they found the particular searches before them supported by reasonable suspicion.<sup>25</sup> Even when the courts

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<sup>19</sup> *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

<sup>20</sup> *Montoya de Hernandez*, 473 U.S. at 538 (“Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant, and first-class mail may be opened without a warrant on less than probable cause.”).

<sup>21</sup> See *United States v. Ezeiruaku*, 936 F.2d 136 (3d Cir. 1991); *Berisha*, 925 F.2d 791. See also *United States v. Chaplinksi*, 579 F.2d 373 (5<sup>th</sup> Cir. 1978); *United States v. Lincoln*, 494 F.2d 833 (9<sup>th</sup> Cir. 1974); *United States v. Chavarria*, 493 F.2d 935 (5<sup>th</sup> Cir. 1974); *United States v. King*, 483 F.2d 353 (10<sup>th</sup> Cir. 1973).

<sup>22</sup> 541 U.S. at 154.

<sup>23</sup> *Id.* (“It is difficult to imagine how the search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile’s passenger compartment”).

<sup>24</sup> See, e.g., *United States v. Ickes*, 393 F.3d 501, 505 (4<sup>th</sup> Cir. 2005); *United States v. Romm*, 455 F.3d 990, 997 (9<sup>th</sup> Cir. 2006); *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006) (“An airport is considered the functional equivalent of a border and thus a search there may fit within the border search exception”); *United States v. Furukawa*, No. 06-145, slip op. (D. Minn., November 16, 2006), 2006 U.S. Dist. LEXIS 83767; *United States v. Hampe*, No. 07-3-B-W, slip op. (D. Me., April 18, 2007), 2007 U.S. Dist. LEXIS 29218.

<sup>25</sup> See, e.g., *Irving*, 452 F.3d at 124 (“Because these searches were supported by reasonable suspicion, we need not (continued...)”).

concluded that the laptop searches were routine, they also found reasonable suspicion supporting the search.<sup>26</sup> The one exception to this trend is *United States v. Arnold*, in which the Ninth Circuit explicitly held that reasonable suspicion was not needed to support a warrantless border search of laptops and other electronic storage devices.<sup>27</sup> Thus, the courts of appeals have not yet handed down decisions on whether reasonable suspicion is always required or whether a lower degree of or no suspicion is sufficient to justify a warrantless search. Because laptop border search cases are a developing area of case law, a closer look at the facts of these cases and the approaches the courts use is warranted.

### *United States v. Ickes*

One of the first federal appellate cases to discuss the border search of laptops is *United States v. Ickes*.<sup>28</sup> In *Ickes*, a customs official, without a warrant, searched the defendant's van near the Canadian border after discovering during a routine search a videotape that focused excessively on a young ballboy during a tennis match.<sup>29</sup> His suspicions raised, the official requested the assistance of a colleague. They then proceeded to conduct a more thorough search in which they uncovered marijuana paraphernalia, a photo album containing child pornography, a computer, and several computer disks.<sup>30</sup> Other customs officials proceeded to examine the contents of the computer and disks, all of which contained additional child pornography.<sup>31</sup> The defendant later filed a motion, which was denied by the trial court, seeking to suppress the contents of the computer and disks on both First and Fourth Amendment grounds.<sup>32</sup>

The Fourth Circuit held that the search of the defendant's computer and disks did not violate either the First or Fourth Amendment. The court rejected the defendant's contention that the First Amendment bars the border search exception from being applied to "expressive" materials. The court stated that a First Amendment exception would "create a sanctuary for all expressive materials—including terrorist plans" and that it would cause an excessive amount of administrative difficulties for those who would have to enforce it.<sup>33</sup> Regarding the Fourth Amendment challenge, the court noted that the border search exception applied in this case.<sup>34</sup> The court concluded by opining that "[a]s a practical matter, computer searches are most likely to occur where—as here—the traveler's conduct or the presence of other items in his possession

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(...continued)

determine whether they were routine or non-routine."); *Furukawa*, slip op. at \*1-2 ("[T]he court need not determine whether a border search of a laptop is 'routine' for purposes of the Fourth Amendment because, regardless, the magistrate judge correctly found the customs official had a reasonable suspicion in this case.").

<sup>26</sup> *Ickes*, 393 F.3d at 507 (noting that the computer search did not begin until the customs agents found marijuana paraphernalia and child pornography which raised a reasonable suspicion); *Hampe*, slip op. at \*4-5 (holding that even though the laptop search did not implicate any of the serious concerns that would characterize a search as non-routine, the peculiar facts of the case gave rise to reasonable suspicions).

<sup>27</sup> 533 F.3d 1003, 1008 (2008) ("We are satisfied that reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage device at the border.").

<sup>28</sup> 393 F.3d 501 (4<sup>th</sup> Cir. 2005).

<sup>29</sup> *Id.* at 502.

<sup>30</sup> *Id.* at 503.

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

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

<sup>33</sup> *Id.* at 506.

<sup>34</sup> *Id.* at 505.

suggest the need to search further,” indicating that the court believes that such searches will typically occur only when a customs official has reasonable suspicion.<sup>35</sup>

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

The Ninth Circuit has also addressed this issue in *United States v. Romm*.<sup>36</sup> The defendant in the case had arrived at an airport in British Columbia when a Canadian customs agent, after discovering that he had a criminal history, conducted a search of the defendant’s laptop.<sup>37</sup> During the search, the Canadian customs agent uncovered child pornography sites in the laptop’s “internet history”; the defendant was consequently denied entry into Canada and flown to Seattle.<sup>38</sup> The Canadian authorities informed U.S. Immigration and Customs Enforcement (ICE) of the contents of the defendant’s laptop. When the defendant arrived in Seattle, ICE detained the defendant and managed to convince him to allow ICE agents to examine his laptop without a warrant.<sup>39</sup> ICE agents then used a forensic analysis, which recovered deleted child pornography from the laptop. The defendant later filed a motion that sought to suppress the evidence obtained from his laptop, which the trial court denied.<sup>40</sup>

The Ninth Circuit held that the forensic analysis used by the ICE agents fell under the border search exception.<sup>41</sup> The court noted that airport terminals were “the functional equivalents” of a border, allowing customs agents to conduct routine border searches of all deplaning passengers.<sup>42</sup> The court then proceeded to classify the search of the defendant’s laptop as “routine.”<sup>43</sup> However, the court reached this conclusion only after noting that the defendant had failed to brief his argument that the laptop search should have been classified as non-routine. Thus, the court’s “routine” determination had no precedential effect.<sup>44</sup>

### ***United States v. Arnold***

In *United States v. Arnold*, another Ninth Circuit case, the court, apparently disregarding the traditional routine/non-routine distinction used in most border search cases, expressly held that reasonable suspicion was not required to support a warrantless laptop border search.<sup>45</sup> Here, the defendant was returning from the Philippines when a customs agent chose him for secondary questioning after the defendant had gone through the customs checkpoint.<sup>46</sup> The customs agent, without a warrant, ordered the defendant to “turn on the computer so she could see if it was

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<sup>35</sup> *Id.* at 507.

<sup>36</sup> 455 F.3d 990 (9<sup>th</sup> Cir. 2006).

<sup>37</sup> *Id.* at 994.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 997.

<sup>42</sup> *Id.* at 996.

<sup>43</sup> *Id.* at 997.

<sup>44</sup> *Id.* (declining to consider the issue because arguments not raised by a party in its opening briefs are deemed waived).

<sup>45</sup> 533 F.3d 1003 (9<sup>th</sup> Cir. 2008).

<sup>46</sup> *Id.* at 1005.



functioning.”<sup>47</sup> While the defendant’s luggage was being inspected, another customs agent searched the laptop’s contents and found pictures of nude adult women.<sup>48</sup> The defendant was then detained for several hours while special agents from ICE conducted a more extensive search of the laptop and discovered material they believed to be child pornography.<sup>49</sup>

The Ninth Circuit first stated that warrantless “searches of closed containers and their contents can be conducted at the border without particularized suspicion under the Fourth Amendment.”<sup>50</sup> Nonetheless, the court noted that the Supreme Court has recognized two situations where reasonable suspicion is required to conduct a search of property: (1) when the search is destructive, and (2) when the search is conducted in a particularly offensive manner.<sup>51</sup> Outside of these two situations, reasonable suspicion is not required for a search of property, regardless of the nature of the property being searched. Thus, the Ninth Circuit refused to recognize any special qualities of laptops that may distinguish them from other containers, such as a laptop’s capability to store large amounts of private data; the court did not find a search of a laptop to be intrinsically “offensive” simply because a laptop had a large storage capacity.<sup>52</sup> Instead, the court treated laptop border searches no differently from any other type of border search.<sup>53</sup>

The Ninth Circuit also rejected the use of a “intrusiveness analysis.” An intrusiveness analysis would require that the potential intrusiveness of each search be evaluated on a case-by-case basis in order to determine whether reasonable suspicion would be needed to justify the search.<sup>54</sup> The court instead adopted a categorical approach to warrantless border searches: so long as the search is of a physical object rather than a person’s body, reasonable suspicion is not required if the search is not physically destructive or particularly offensive. The Ninth Circuit also refused to apply a “least restrictive means” test to evaluate the constitutionality of a border agent’s chosen method of conducting the search.<sup>55</sup> Thus, a border agent can conduct a search without having to determine whether a less intrusive means is available. The argument in favor of this categorical approach is that it is easier for border agents. On the other hand, the breadth of the Ninth Circuit’s border search doctrine allows border agents almost total discretion in determining both when, and in what manner, to conduct a search, so long as the border agent only searches a physical object and not a person’s body.

Finally, the Ninth Circuit refused to recognize a First Amendment protection of expressive materials searched at the border. Similar to the reasoning in *Ickes*, the court held that doing so could protect terrorist communications, create an unworkable standard for government agents, and contravene Supreme Court precedent.<sup>56</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1007.

<sup>51</sup> *Id.* at 1007-08.

<sup>52</sup> *Id.* at 1009.

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

<sup>54</sup> *Id.* at 1008.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1010.

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

U.S. Customs and Border Protection (CBP), the primary agency entrusted with border security, has disclosed a policy document which outlines the procedures to be used when conducting laptop border searches. The policy, dated July 16, 2008, states that it is meant to provide guidance for CBP officers regarding “the border search of information contained in documents and electronic devices.”<sup>57</sup>

The policy paper states that CBP officers who are conducting a warrantless border search of information, may, without any individualized suspicion of wrongdoing,<sup>58</sup> “review all information transported by any individual attempting to enter, reenter, depart, pass through or reside in the United States.” If necessary, these officers also have the discretion to detain documents and electronic devices “for a reasonable period of time” in order to conduct a thorough border search. This information will only be returned, and copies destroyed, if it is determined after review of the information that there is no probable cause of wrongdoing.

Pursuant to this policy, individualized suspicion is not required if a CBP officer needs to detain information that must be translated or decrypted. If the information is not in a foreign language and is unencrypted, but otherwise technical in nature, a CBP officer may only detain the information for subject matter assistance if there is a reasonable suspicion of wrongdoing. If assistance from another agency is required, CBP should receive it within 15 days of the detention of the information. If more time is required, CBP can extend the detention for seven-day terms. If upon review of the information a CBP officer determines that there is probable cause of wrongdoing, the CBP officer may retain the originals and all copies of the relevant information. Absent probable cause, the CBP officer may only retain information related to immigration matters.

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

CBP has characterized the policy paper as an “internal policy statement” that creates no private right. To the extent that CBP’s characterization of this document as an internal policy statement is

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<sup>57</sup> Policy Regarding Border Search of Information (July 16, 2008). Customs and Border Protection Policy Document. Available at [http://www.customs.gov/linkhandler/cgov/travel/admissibility/search\\_authority.ctt/search\\_authority.pdf](http://www.customs.gov/linkhandler/cgov/travel/admissibility/search_authority.ctt/search_authority.pdf).

<sup>58</sup> Presumably, an “individualized suspicion” standard is synonymous with or perhaps even weaker than a reasonable suspicion standard.

correct, an individual who alleges a violation of this policy by a CBP officer would not have a cause of action available under the Administrative Procedure Act to seek redress.<sup>59</sup>

## Legislative Proposals

A bill introduced in the 111<sup>th</sup> Congress, the Electronic Device Privacy Act of 2009 (H.R. 239), would prohibit laptop searches based solely on border search authority.<sup>60</sup> The legislation would establish “fundamental rules” prohibiting a federal border officer from searching or seizing a “digital electronic device” or “electronic storage media” based solely on the power of the United States to search and seize the effects of individuals seeking entry into the country. Instead, the legislation would allow such searches only in cases where border officers have reasonable suspicion that a device contains criminal evidence. Devices could be seized only if constitutional authority other than border search authority provided a justification. The bill would direct the Secretary of Homeland Security to promulgate rules regarding: maximum time periods during which border officers can detain devices; owners’ rights to retrieve detained devices; and strategies for maintaining the integrity of all information detained and shared with other government agencies.

This legislation is identical to a bill (H.R. 6702) introduced during the 110<sup>th</sup> Congress.<sup>61</sup> Two related bills introduced during the 110<sup>th</sup> Congress, H.R. 6588 and H.R. 6869, addressed border searches of laptops and other electronic devices. H.R. 6588 would have prohibited laptop searches based on the United States’ border search authority but permitted laptop searches conducted under any other federal authority.<sup>62</sup> H.R. 6869 would have directed the Homeland Security Department to issue rules regarding the scope and procedural requirements associated with border security searches of electronic devices.<sup>63</sup>

## Conclusion

It is arguable that there is a higher expectation of privacy surrounding the contents of laptops than other types of physical property, such as vehicle interiors. Even when a vehicle search involves an onerous and time consuming inspection of a gasoline tank, the expectation of privacy surrounding the vehicle and its contents does not appear to be as high as the expectation of privacy regarding the contents of a laptop, which often contains private or otherwise privileged information. On the other hand, laptop searches are not as intrusive as a strip- or body-cavity searches, where the expectation of privacy is so high, and the search so invasive, that both clearly fall within the realm of the non-routine.<sup>64</sup>

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<sup>59</sup> While CBP characterizes this statement as a policy statement, it is conceivable that some might argue that this document is a substantive rule that could only be put into effect through notice and comment rulemaking procedures. Such substantive rules are reviewable under the APA. For more information on the distinction between policy statements and substantive rules, see Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 94 (4<sup>th</sup> ed. 2006).

<sup>60</sup> The Electronic Device Privacy Act of 2009, H.R. 239, 111<sup>th</sup> Cong. (2009).

<sup>61</sup> Securing Our Borders and Our Data Act of 2008, H.R. 6702, 110<sup>th</sup> Cong. (2008).

<sup>62</sup> Electronic Device Privacy Act of 2008, H.R. 6588, 110<sup>th</sup> Cong. (2008).

<sup>63</sup> Border Security Search Accountability Act of 2008, H.R. 6869, 110<sup>th</sup> Cong. (2008).

<sup>64</sup> *Chase*, 503 F.2d 571 (strip searches require reasonable suspicion); *Montoya de Hernandez*, 473 U.S. 531 (alimentary canal search justified by reasonable suspicion).

In addition to privacy interests, courts have taken a range of policy concerns into account when determining whether reasonable suspicion must justify a warrantless border search. For example, when courts have conducted border search analyses, they have frequently considered potential harms resulting from illegal materials smuggled into the United States through laptops and electronic storage devices. As stated in *Ramsey*, “[t]he border search exception is grounded in the recognized right of the sovereign to control ... who and what may enter the country.”<sup>65</sup> Laptops can present a challenge to the nation’s ability to control what enters its borders because the vast and compact storage capacity of laptops can be used to smuggle illegal materials. In light of this, courts have held that routine searches of laptops at the border may be justified because of the strong government interest in preventing the dissemination of child pornography and other forms of “obscene” material that may be contained in laptops.<sup>66</sup> Another justification may be to facilitate searches of laptops owned by suspected terrorists, which may contain information related to a planned terrorist attack.<sup>67</sup>

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

The Ninth Circuit, by equating the privacy interest implicated in personal information with that surrounding normal personal effects, has adopted a categorical approach to the border search doctrine. The court has concluded that the search of all physical objects does not require reasonable suspicion unless the search is conducted in a manner that is destructive or particularly offensive. So far, the Ninth Circuit is the first circuit to have explicitly stated that such searches do not require reasonable suspicion. Whether other federal circuits adopt this approach or fashion other methods to ascertain whether a particular border search requires reasonable suspicion is an open question.

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<sup>65</sup> *Ramsey*, 431 U.S. at 611.

<sup>66</sup> *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 765 (1982) (holding that child pornography does not enjoy First Amendment protections because the government has a compelling state interest in preventing the sexual abuse of children and that the distribution of child pornography is intrinsically related to that state interest).

<sup>67</sup> *See Ickes*, 393 F.3d at 506.