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**Reading Your Mind at the Border: Searching Memorialized Thoughts and Memories on Your Laptop and United States v. Arnold**

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READING YOUR MIND AT THE BORDER: SEARCHING MEMORIALIZED THOUGHTS AND MEMORIES ON YOUR LAPTOP AND UNITED STATES v. ARNOLD

[T]he safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.¹

I. INTRODUCTION

In an ancient paradox, technology contemporaneously complicates and simplifies our lives.² More attorneys, lay and business people, child predators, and terrorists are using our technology and carrying innocuous—and sometimes dangerous—information and materials across our nation’s borders every day.³ U.S. Customs and Border Protection (CBP) officers have longstanding authority to search without particularized suspicion for contraband in closed containers and their contents crossing U.S. borders.⁴ But today, many consider their laptops extensions of their own

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4. See United States v. Arnold, 533 F.3d 1003, 1007 (9th Cir. 2008) (recounting judiciary’s acceptance of border searches without particularized suspicion), cert. denied, 129 S. Ct. 1312 (2009). Currently, CBP agents have statutory authority to ensure compliance with federal law by examining “documents, books, pamphlets, and other printed material, as well as computers, disks, hard drives, and other electronic or digital storage devices.” See U.S. Customs and Border Prot., Policy Regarding Border Search of Information (2008), http://www.cbp.gov/link handler/cgov/travel/admissability/search_authority.ctt/search_authority.pdf (establishing CBP procedures for border searches). CBP agents are authorized to conduct searches pursuant to federal law. See 19 U.S.C. § 1581(a) (2006) (“Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the U.S. of within the customs waters or, as he may be authorized, within a customs-enforcement area . . . .”). In United States v. Ramsey, the Court invoked the importance of border searches from our nation’s founding and their distinct nature from other searches. See 451 U.S. 606, 619 (1977) (noting initial customs statute passed in 1789 and precedent that has developed from it).
minds and memories.\(^5\) As a result, individuals may regard their laptops and the information inside to be more private than their luggage, purses, or wallets.\(^6\) This subjective concern for private materials on one’s laptop must be weighed against the government’s obligation to protect society from, among other threats, child pornography and terrorism.\(^7\) The government’s interest in preventing the entry of prohibited persons and property is at its zenith at international borders.\(^8\) Despite the government’s strong interests, the CBP established rules for border searches and has limited the scope of searches to protect privacy interests while remaining a proactive agency enforcing federal law.\(^9\)

The prevailing case law supports the CBP’s searches of tangible documents without particularized suspicion, and courts are adapting this principle to digital files stored on personal laptops.\(^10\) Generally, courts define border searches as either routine or non-routine; non-routine searches require reasonable suspicion before the search is commenced, while routine searches do not.\(^11\) In 2004, the United States Supreme Court flatly re-

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6. See id. at 1003 (analyzing search of laptops as near equivalent of search of person). The district court supported its holding upon the peculiar place laptops hold in modern life. See id. (addressing importance of laptops for many international travelers). The court suggested “some may value the sanctity of private thoughts memorialized on a data storage device above physical privacy.” Id. On appeal, the Ninth Circuit criticized this premise. See Arnold, 533 F.3d at 1007-08 (rejecting district court’s intrusiveness analysis and holding that searches of objects do not implicate same “dignity and privacy” concerns as “highly intrusive searches of the person” (quoting United States v. Flores-Montano, 541 U.S. 149, 152 (2004))).

7. See Torres v. Puerto Rico, 442 U.S. 465, 472-73 (1979) (reaffirming right to protect territorial integrity of United States). A sovereign nation is “entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry.” Id. (quoting Ramsey, 451 U.S. at 620).

8. See Flores-Montano, 541 U.S. at 152 (affirming that searches of persons and property at sovereign nation’s border are reasonable because they occur at physical border).

9. See Policy Regarding Border Search of Information, supra note 4, at 1 (describing procedures for border searches). For example, border searches must be performed by a CBP agent or other authorized agent and, following detention of materials to be searched, agents must protect the materials’ contents. See id. at 3 (stating procedures for border searches). Specifically, agents must return the materials and destroy all copies of them. See id. (same).

10. See, e.g., United States v. Ickes, 393 F.3d 501, 507 (4th Cir. 2005) (holding that search of defendant’s laptop did not require reasonable suspicion). For a discussion of case law relating to searches of laptops without particularized suspicion, see infra notes 32-85 and accompanying text.

11. See United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (reaffirming that routine searches of persons and their effects do not require any level of particularized suspicion). The Montoya de Hernandez Court held the detention of a traveler beyond the scope of a routine search and inspection requires reasonable suspicion. See id. at 541 (holding that some searches of persons will require particularized suspicion). Importantly, the Court emphasized what it did.
jected a routineness analysis (i.e., an analysis to determine whether a search can be considered "routine") for border searches of a vehicle and instead relied on the established principles that permit border searches of effects without particularized suspicion.\footnote{12} In 2005, the Fourth Circuit subsequently adapted this analysis to apply to laptops and permitted the search of a defendant's computer and computer disks without particularized suspicion.\footnote{13} The Fourth Circuit did not characterize the search of the laptop as routine or non-routine; rather, the court relied upon the decreased expectation of privacy at international borders to conclude that the search was reasonable.\footnote{14} Most recently, in 2008, the Ninth Circuit squarely addressed whether any level of particularized suspicion is needed for searches of laptops in \textit{United States v. Arnold}.\footnote{15} In reversing the district court's decision, the \textit{Arnold} court concluded that reasonable suspicion was not needed for border searches of laptops.\footnote{16} Whether other circuits will permit suspicionless searches of laptops at the border remains unclear.\footnote{17} Nevertheless, border searches of laptops are an integral tool to enforce federal law and such

not hold. See id. at 541 n.4 (cautioning that Court did not hold what level of suspicion is required for non-routine border searches). The Court declined to answer what, if any, level of suspicion is needed for non-routine border searches such as strip, body cavity, or involuntary x-ray searches. See id. (holding that there is difference between search that goes beyond scope of routine search and non-routine searches). Thus, the Court enumerated at least three non-routine searches all involving the search of a person. See id. (listing examples of non-routine border searches).

\footnote{12} See \textit{Flores-Montano}, 541 U.S. at 156 (holding that disassembly of gas tank does not require reasonable suspicion where procedure takes one to two hours and does damage car). Particularized suspicion contains two elements. See \textit{United States v. Cortez}, 449 U.S. 411, 418 (1981) (defining particularized suspicion). The assessment must be based upon the totality of the circumstances of objective observation, and that assessment must arouse a reasonable suspicion that the particular person being stopped has committed or is about to commit a crime. See id. (discussing particularized suspicion). Further, the Supreme Court declared "[c]omplex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles." \textit{Flores-Montano}, 541 U.S. at 152 (rejecting balancing test for border search of vehicles). Replacing the routine search analysis, the Court reverted to a judicial determination as to whether the search of property was destructive or conducted in a particularly offensive manner to require particularized suspicion. See id. at 155-56 (discussing possible border searches of property that may be unreasonable).

\footnote{13} See \textit{Ickes}, 393 F.3d at 507-08 (permitting search of laptop without particularized suspicion).

\footnote{14} See id. at 506 (emphasizing decreased privacy expectations at international border). For a further discussion of \textit{Ickes}, see infra notes 91-107 and accompanying text.

\footnote{15} 533 F.3d 1003 (9th Cir. 2008), \textit{cert. denied}, 129 S. Ct. 1312 (2009). For a further discussion of the level of suspicion needed to search a laptop at the international border, see infra notes 135-64 and accompanying text.

\footnote{16} See id. at 1008 (holding that search of Arnold's laptop was reasonable).

\footnote{17} See id. at 1010 (reversing district court's ruling); see also, e.g., John W. Nelson, \textit{Border Confidential: Why Searches of Laptop Computers at the Border Should Require
searches should be permitted absent particularized suspicion, given the relatively low privacy interests in laptops as opposed to the privacy interests involved in intrusive physical searches of persons.18

This Note discusses the Ninth Circuit’s holding in United States v. Arnold and the constitutionality of border searches of laptop computers.19 Part II examines the Fourth Amendment’s implication at the border and also discusses the border search doctrine permitting some searches without particularized suspicion.20 In Part III, this Note explores lower court rulings on searches of laptops.21 Part IV of this Note concludes that border agents should be permitted to search laptops absent particularized suspicion because the nature of laptops does not compel the judiciary to treat laptops differently than any other object crossing the international border.22 Finally, Part V addresses the significant underlying characteristics of laptops, including the various kinds of information they may contain, as well as steps that may be taken to protect travelers’ privacy during suspicionless searches.23

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18. See Arnold, 533 F.3d at 1008 (declining to require reasonable suspicion to justify border search of laptops and other personal electronic storage devices). For further argument that laptop border searches should be permissible without particularized suspicion, see infra notes 165-92 and accompanying text.

19. See id. at 1005 (addressing constitutionality of border search of laptop); United States v. Romm, 455 F.3d 990, 997 (9th Cir. 2006) (suggesting, but declining to conclude, that border search of laptop is routine border search), cert. denied, 549 U.S. 1150 (2007); United States v. Irving, 452 F.3d 110, 124 (2d Cir. 2006) (declining to determine if search of computer disks is routine or non-routine search because reasonable suspicion was present in any case); Ickes, 393 F.3d at 506 (affirming border search of laptop and characterizing search as routine); United States v. Bunty, 617 F. Supp. 2d 359, 364-65 (E.D. Pa. 2008) (upholding border search of laptop absent finding of reasonable suspicion).


21. See Ickes, 393 F.3d at 502 (addressing border search of laptop); United States v. Arnold 454 F. Supp. 2d 999, 1000 (C.D. Cal. 2006) (requiring reasonable suspicion to justify border search of defendant’s laptop), rev’d, 533 F.3d 1003 (9th Cir. 2008). For further discussion of recent court decisions on border searches of laptops, see infra notes 91-164 and accompanying text.

22. See, e.g., Arnold, 533 F.3d at 1009 (stating defendant failed to draw meaningful differences between searches of laptops and luggage, for instance). For further discussion arguing that laptops should be analyzed similar to other objects like luggage, see infra notes 165-92 and accompanying text.

23. See Policy Regarding Border Search of Information, supra note 4, at 1 (describing procedures for border searches, which aim to protect traveler’s personal information while still conducting effective border searches).
II. THE FOURTH AMENDMENT AND BORDER SEARCHES: AN EXCEPTION TO THE GENERAL WARRANT REQUIREMENT

A. Fourth Amendment Jurisprudence

The Fourth Amendment protects the people's right to be free from unreasonable searches and seizures.24 It generally requires that government officials obtain a warrant before a lawful search can be conducted.25 The Fourth Amendment will not apply, however, when the target of the search does not possess a privacy interest that society would accept as reasonable.26 For example, the Supreme Court has held that items exposed to public view are not shielded by a Fourth Amendment privacy interest, and government action targeting such items will not implicate the Fourth Amendment.27

In addition, some searches, where Fourth Amendment protections are engaged, are permitted absent a warrant but require probable cause or

24. See U.S. Const. amend. IV (establishing protections from unreasonable government searches and seizures). The Fourth Amendment sets forth:

The right of the people to be secure in their persons, house, 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.

25. See id. (mandating government obtain warrants in order to conduct reasonable search). Warrantless searches are presumed to be unreasonable; however, some searches can be conducted without a warrant. See Katz v. United States, 389 U.S. 347, 357 (1967) (reasoning that "[o]ver and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,' . . . and that searches 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" (quoting United States v. Jeffers, 342 U.S. 48, 51 (1951))). Justice Harlan's concurrence in Katz noted that the government will not be held to the warrant requirement when the activity is in public view, and applied a two-part subjective and objective privacy test to determine if a person has a reasonable expectation of privacy at the location of the observed activity. See id. at 360-62 (Harlan, J., concurring) (discussing privacy with regard to Fourth Amendment jurisprudence). Justice Harlan declared:

[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Id. at 361.

26. See, e.g., id. (observing Fourth Amendment "protects people, not places," but place must be one with privacy interest).

27. See id. (noting that objects and statements in public view are not protected).
a lower standard of suspicion. This lower standard of suspicion is commonly referred to as "reasonable suspicion," and the scope of searches justified by reasonable suspicion is generally less intrusive than searches justified by probable cause. Warrantless searches are typically justified by policy arguments that the process and requirement of obtaining a warrant in every case would be impracticable or counterproductive to the government's interests. Courts have recognized a variety of warrantless searches, including the border search exception to the general warrant requirement.

28. See California v. Carney, 471 U.S. 386, 392-93 (1985) (permitting warrantless search of mobile home where government had probable cause to believe suspect was delivering controlled substance from mobile home); Carroll v. United States, 267 U.S. 132, 162 (1925) (holding search of vehicle without warrant, but with probable cause that vehicle contained contraband, was not unreasonable). In certain instances, the government is not required to develop probable cause to believe a crime has or is being committed; rather, the lower standard of reasonable suspicion is acceptable. See Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that police officer may conduct pat-down search of suspect's outer clothing in some circumstances). The Court declared:

Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. Police officers and other government officials have used the warrant exceptions created by the judiciary to largely promote the general welfare of society. See Warrantless Searches and Seizures, 34 GEO. L.J. ANN. REV. CRIM. PRO. 37, 37 (2005) (enumerating warrantless searches and seizure currently recognized: investigatory detentions of persons, investigatory detentions of property, warrantless arrests, search incident to valid arrest, seizure of items in plain view, exigent circumstances, consent searches, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches, special needs, and abandoned property).

29. See Terry, 392 U.S. at 21-22 (exploring requirements for brief police detention and search of person). Reasonable suspicion is defined as "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." Id. Subjective good-faith belief on the part of the officer is not enough to meet reasonable suspicion. See id. at 22 (citing Beck v. Ohio, 379 U.S. 89, 97 (1964)) (describing limits of what constitutes reasonable suspicion).

30. See id. (recognizing that Terry searches are justified due to government's general interest in crime prevention, as well as for detection and safety of police officers).

31. See, e.g., United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (explaining "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant"); United States v. Ramsey, 431 U.S. 606, 616-19 (1977) (holding first class mail crossing U.S. border may be examined without warrant and on something less than probable cause); Carroll, 267 U.S. at 285 (recognizing that not all searches and
B. The History of the Border Search Exception to the General Fourth Amendment Warrant Requirement

Beginning with this country's founding, Congress considered searches and seizures at the nation's borders deserving of special status. The First United States Congress—the same Congress that proposed the Bill of Rights—passed the nation's first customs statute. The customs statute empowered customs officials to search ships for any goods subject to duty, and it permitted those searches without subjecting them to Fourth Amendment warrant requirements. From that first statute, the wide

seizures require probable cause or issuance of search warrant). The Supreme Court noted:

Travelers 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. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Carroll, 267 U.S. 285. For an enumeration of warrantless search and seizures exceptions, see supra note 28 and accompanying text.

32. See Ramsey, 431 U.S. at 616-17 (describing "plenary customs power" established in 1789, which treated searches at borders apart from Fourth Amendment protections). Importantly, the Ramsey Court placed great weight on the fact that the same congress that passed the customs statute also proposed the Bill of Rights, which includes the Fourth Amendment. See id. (noting historical background of first customs statute). The Court embraced an earlier court's analysis, stating, "it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment." Id. (quoting Boyd v. United States, 116 U.S. 616, 623 (1886)); see also United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (reiterating that searches at border are reasonable "simply by virtue of the fact that they occur at the border"); Carroll, 267 U.S. at 153-54 (recognizing distinction between border searches and searches within interior of country).

33. See Ramsey, 431 U.S. at 616-17 (providing historical pedigree of border search doctrine). "This acknowledgement of plenary customs power was differentiated from the more limited power to enter and search any particular dwelling-house, store, building, or other place where a warrant upon cause to suspect was required." Id.

34. See id. at 616 (citing nation's first custom's statute). Section 24 of 1 STAT. 29, the customs statute, provided in relevant portions:

[Every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial

Id. at 616 n.12 (citing Act of July 31, 1789, c. 5, 1 STAT. 29).
spread authority to search and seize persons and property entering the United States is largely premised on the government's strong interest in enforcing its laws at the border. By logical and practical extension, the authority of border agents to search persons and property encompasses international airports because they are de facto international borders.

Despite the broad power of border agents to conduct border searches, the Supreme Court has limited the scope of searches depending upon the nature of the searches' target. Border searches are roughly

35. See Flores-Montano, 541 U.S. at 152 (noting reasons why searches and seizures at border are not "unreasonable" searches, thus Fourth Amendment general warrant requirement does not apply). Chief Justice Rehnquist argued: "It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." Id. at 153. Further, the Court observed the government's interest in protecting its citizens is at its "zenith at the international border." See id. at 152 (discussing government's need to protect citizens); see also Montoya de Hernandez, 473 U.S. at 538-39 (noting "broad powers [of custom officials] have been necessary to prevent smuggling and to prevent prohibited articles from entry"); Ramsey, 431 U.S. at 616-17 (enumerating "long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country"); United States v. Arnold, 533 F.3d 1003, 1007 (9th Cir. 2008) (observing strong government interest to search persons and property at border), cert. denied, 129 S. Ct. 1312 (2009); United States v. Ickes, 393 F.3d 501, 506 (4th Cir. 2005) ("The government has an overriding interest in securing the safety of its citizens and to do this it must seek to prevent 'the introduction of contraband into this county.'" (quoting Montoya de Hernandez, 473 U.S. at 537)); United States v. Arnold, 454 F. Supp. 2d 999, 1002 (C.D. Cal. 2006) (conceding that government's interest at border is at its zenith, and lessened expectation of privacy exists at border), rev'd, 533 F.3d 1003 (9th Cir. 2008). The rationale of the border search doctrine applies not only to individuals and property entering the country, but also to individuals and their effects leaving the United States. See, e.g., United States v. Beras, 183 F.3d 22, 26 (1st Cir. 1999) (concluding border search exception applies to departing travelers and their property); see also Christine A. Coletta, Laptop Searches at the United States Borders and the Border Search Exception to the Fourth Amendment, 48 B.C. L. Rev. 971, 978-79 (2007) (noting border search exception applies to entering and exiting individuals).

36. See Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (stating "a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a non-stop flight from Mexico City would clearly be the functional equivalent of a border search"); United States v. Johnson, 991 F.2d 1287, 1290 (7th Cir. 1993) (holding that where individual flies non-stop into United States, international airport is functional equivalent of international border); see also United States v. Caminos, 770 F.2d 361, 364-65 (3d Cir. 1985) (establishing that border search is permissible where individual and property landed in Pittsburgh after stops in other major United States airports, there was no evidence property was materially altered within U.S. borders, and Pittsburgh was earliest practical location to search individual and property). But see generally United States v. Cotterman, No. CR 07-1207-TUC-RCC, 2009 WL 465028 (D. Ariz. Feb. 24, 2009) (granting motion to suppress where search occurred 170 miles from international border and at least forty-eight hours from initial stop, thereby requiring reasonable suspicion under extended border search doctrine).

37. See, e.g., Flores-Montano, 541 U.S. at 152-54 (addressing, but not resolving, issue of under what circumstances border search of property will be unreasonable); Montoya de Hernandez, 473 U.S. at 541 (holding that reasonable suspicion is required where detention of individual is beyond scope of routine search).
divided into two major categories: searches of persons and searches of property. 38 Searches of persons are analyzed under an intrusiveness analysis, with an aim to determine whether the search is routine or non-routine.39 An intrusiveness analysis weighs the search's intrusiveness against the suspicion justifying the search.40 When there is a high level of suspicion amounting to reasonable suspicion, body cavity searches are permissible.41 Without particularized suspicion, only less intrusive and limited searches, such as pat-downs, are permitted.42 As to searches of objects, the Court in United States v. Flores-Montano43 appeared to declare that these searches are always treated as routine, thereby not requiring particularized suspicion, with two exceptions for particularly offensive searches and searches that are destructive to the property searched.44

Because the district court in Arnold and several commentators have analyzed searches of laptops as though they are searches of persons, a history of border searches of persons is relevant.45 Border searches of persons can vary in scope, and the level of intrusiveness depends directly


39. See Flores-Montano, 541 U.S. at 152 (rejecting extension of routine/non-routine balancing test to vehicles); Arnold, 533 F.3d at 1008 (stating intrusiveness analysis is inappropriate where border search involves property); WAYNE R. LAFAVE, 5 SEARCHES & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.5(f) (2008) (discussing routine/non-routine framework with regard to property). The commentator asked:

[M]ay it now be said (as the government had argued in Molina-Tarazon) that a search of inanimate objects at the border is always routine and thus never requires individualized suspicion? While the Court's broadly state opening salvo in Flores-Montano, quoted above, might be read as answering that question in the affirmative, it is important to note that the Court actually did not go that far, acknowledging in conclusion that "it may be true that some searches of property are so destructive as to require a different result."

LAFAVE, supra, § 10.5(f) (footnote omitted).

40. See Flores-Montano, 541 U.S. at 152 (discussing other methods of analyzing border searches).

41. See, e.g., Montoya de Hernandez, 473 U.S. at 541 (discussing level of suspicion required for body cavity search).

42. See id. at 541-42 (holding reasonable suspicion is appropriate justification for search conducted).


44. See id. at 152, 155-56 (stating that balancing test to determine what constitutes "routine" search is inappropriate for border searches of vehicles, but noting two examples where border search of property may be unreasonable).

45. See United States v. Arnold, 454 F. Supp. 2d 999, 1003-04 (C.D. Cal. 2006) (holding search of laptop implicates privacy and dignity interest of person), rev'd,
upon the level of suspicion, if any, that the government observes at the border.\textsuperscript{46} Searches of persons are roughly divided into two main kinds of searches: routine and non-routine.\textsuperscript{47} The Supreme Court has not expressly defined what constitutes a non-routine search (as opposed to a routine border search).\textsuperscript{48} Further, the Court has failed to articulate what level of suspicion is needed for non-routine searches of persons.\textsuperscript{49} But in \textit{United States v. Montoya de Hernandez},\textsuperscript{50} the Supreme Court identified three specific examples of a non-routine search: searches of a body cavity, strip searches, and involuntary x-ray searches of persons.\textsuperscript{51}

The \textit{Montoya de Hernandez} Court used the term “routine” to describe certain border searches that it determined could be conducted without reasonable suspicion, probable cause, or a warrant.\textsuperscript{52} In \textit{Montoya de Her-

\footnotesize{533 F.3d 1003 (9th Cir. 2008); see also, \textit{e.g.}, Coletta, \textit{supra} note 35, at 999 (arguing laptop search is deeply intrusive and should require at least reasonable suspicion).}

\textit{46. See Montoya de Hernandez, 473 U.S. at 540-41} (noting intrusiveness of search can vary depending on level of suspicion observed).

\textit{47. See Flores-Montano, 541 U.S. at 152} (refining use of routine and non-routine border searches with regard to search of vehicle); \textit{Montoya de Hernandez, 473 U.S. at 541} (describing border searches as routine and non-routine).

\textit{48. See Montoya de Hernandez, 473 U.S. at 541 n.4} (noting non-comprehensive list of non-routine searches).

\textit{49. See id.} (declining to declare level of suspicion needed for non-routine border search). The Court stated, “we suggest no view on what level of suspicion, if any, is required for non-routine border searches such as strip, body cavity, or involuntary x-ray searches.” \textit{Id.; see also Flores-Montano, 541 U.S. at 152} (reiterating lack of clarity regarding what level of suspicion is needed for non-routine searches); Kelly A. Gilmore, \textit{Preserving the Border Search Doctrine in a Digital World: Reproducing Electronic Evidence at the Border}, 72 BROOK. L. REV. 759, 768 (2007) (addressing non-routine border searches and possibility that reasonable suspicion be required); Harrell, \textit{supra} note 38, at 211 (discussing level of suspicion needed for non-routine searches and routine searches conducted beyond scope of routine search).

\textit{50. 473 U.S. 531 (1985).}

\textit{51. See id. at 541 n.4} (providing three examples of non-routine searches). Chief Justice Rehnquist continued: “we suggest no view on what level of suspicion, if any, is required for non-routine border searches such as strip, body cavity, or involuntary x-ray searches.” \textit{Id.}

\textit{52. See id. at 540-41} (determining which standard should be used during border searches). The Court used the term “routine” four times. \textit{See id.} (using “routine” throughout opinion). “Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct \textit{routine} searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.” \textit{Id. at 537} (emphasis added). “\textit{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 . . . .” \textit{Id. at 538} (emphasis added). “We have not previously decided what level of suspicion would justify a seizure of an incoming traveler for purposes other than a \textit{routine} border search.” \textit{Id. at 540} (emphasis added). And, also in the court’s holding: “We hold that the detention of a traveler at the border, beyond the scope of a \textit{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 . . . .” \textit{Id. at 541} (emphasis added). Other courts have addressed the use of the word “routine.” \textit{See}
a customs official suspected the defendant was attempting to enter the United States with narcotics concealed in her alimentary canal. Consequently, custom officials observed the defendant for the next sixteen hours, ready to search her stool for evidence of smuggling drugs. Chief Justice Rehnquist concluded that the defendant’s detention exceeded a routine search and seizure, and thus reasonable suspicion was needed to justify the detention. The Court held that reasonable suspicion is re-

Flores-Montano, 541 U.S. at 152 (criticizing lower court’s use of descriptive term “routine” in Montoya de Hernandez opinion to “[fashion] a new balancing test, and [extend] it to search of vehicles”). The Court noted “the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interest of the person being searched—simply do not carry over to vehicles.” Id.

53. See Montoya de Hernandez, 473 U.S. at 534 (recounting factors that led to agent suspecting defendant was “balloon swallower,” including: amount of cash she possessed, fact she did not know anyone in United States, lack of hotel accommodations, only one pair of shoes, cold weather apparel, her entry into United States from direct flight departing Bogota, Columbia, known source of illegal narcotics entering United States).

54. See id. at 534-36 (relating background facts of case). Agents conducted a pat-down and strip search, which resulted in the discovery of a firmness in her abdomen and paper towels lining her crotch area. See id. at 534 (noting type and scope of search conducted). Agents held the defendant in an observation room following her initial detention. See id. at 534-36 (discussing detention of defendant). Agents allowed the defendant to choose one of three options: return to Columbia, consent to an x-ray that could help agents determine if she hid narcotics in her alimentary canal, or produce a monitored bowel movement. See id. (noting facts of case). The defendant chose to return to Columbia, but she remained in detention until the next available flight. See id. (addressing facts of case). Ultimately, the defendant waited sixteen hours, “exhibit[ing] symptoms of discomfort consistent with heroic efforts to resist the usual calls of nature.” See id. (stating unusual circumstances of defendant’s detention) (internal quotations omitted). At the conclusion of her detention, agents received authority to have the defendant examined by a doctor, who subsequently discovered narcotics in her alimentary canal. See id. (describing government’s search). The defendant was subsequently placed under arrest. See id. (noting defendant’s arrest).

55. See id. at 542 (holding that search needed to be justified by reasonable suspicion). Chief Justice Rehnquist determined, “[h]ere, respondent was detained incommunicado for almost [sixteen] hours before inspectors sought a warrant; the warrant then took a number of hours to procure, through no apparent fault of the inspectors. This length of time undoubtedly exceeds any other detention we have approved under reasonable suspicion.” Id. The opinion also concluded reasonable suspicion was present in the instant matter:

The facts, and their rational inferences, known to customs inspectors in this case clearly supported a reasonable suspicion that respondent was an alimentary canal smuggler. We need not belabor the facts, including respondent’s implausible story, that supported this suspicion. The trained customs inspectors had encountered many alimentary canal smugglers and certainly had more than an inchoate and unparticularized suspicion or hunch, that respondent was smuggling narcotics in her alimentary canal.

Id. The Court based its reasonable suspicion requirement upon, inter alia, the government’s commanding interest to protect its territorial borders. See id. at 559-40 (holding reasonable suspicion is required, but suggesting that if search did not occur at international border then higher level of suspicion may be required).
required to search an individual’s alimentary canal because “[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion [beyond the body’s surface] on the mere chance that desired evidence might be obtained.” Moreover, the Court affirmed the authority of customs officials to conduct routine searches of persons absent reasonable suspicion or probable cause. Routine searches are less likely to extensively invade an individual’s privacy, and although it is unclear what precisely constitutes a routine search, searches of body cavities, strip searches, and involuntary x-rays do not appear to qualify. Accordingly, travelers must accept and anticipate many routine searches at the international border.

56. See id. at 540 n.3 (discussing level of suspicion required where traveler’s alimentary canal was searched (quoting Schmerber v. California, 384 U.S. 757, 769 (1966))). Justice Brennan wrote a scathing dissent, cautioning that the majority’s holding condoned “[i]ndefinite involuntary incommunicado detentions,” which he believed was the “hallmark of a police state.” See id. at 550 (Brennan, J., dissenting) (arguing instant search is not permissible merely with reasonable suspicion). Justice Brennan contended the government may “no more confine a person at the border under such circumstances for purposes of criminal investigation than they may within the interior of the country.” See id. (suggesting border search exception should be disregarded under instant circumstances).

57. See id. at 538 (majority opinion) (recognizing government’s power to conduct routine border searches). The Court noted:

Consistently, therefore, with Congress’ power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior. 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.

Id.

58. See, e.g., United States v. Braks, 842 F.2d 509, 511-12 (1st Cir. 1988) (suggesting six factors to determine whether search was non-routine). The First Circuit enumerated the following factors for defining a search: (1) whether the search required the suspect to disrobe or expose any intimate body parts; (2) whether physical contact was made with the suspect during the search; (3) whether force was used; (4) “whether the type of search expose[d] the suspect to pain or danger; (5) the overall manner in which the search [was] conducted; and (6) whether the suspect’s reasonable expectations of privacy, if any, [were] abrogated by the search.” See id. (concluding strip searches and body cavity searches are generally considered non-routine border searches) (footnotes and citations omitted).

59. See Montoya de Hernandez, 473 U.S. at 539-40 (stating that, at border, government’s interests are heightened and individuals have less expectation of privacy); Harrell, supra note 38, at 209-10 (suggesting near certainty that travelers expect some searches at borders and international airports). But see Florida v. Royer, 460 U.S. 491, 515 (1983) (Blackmun, J., dissenting) (citing United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)) (“[T]he defendant was approached in a major international airport where, due in part to extensive antihijacking surveillance and equipment, reasonable privacy expectations are of significantly lesser magnitude, certainly no greater than the reasonable privacy expectations of travelers in automobiles.”).
Apart from border searches of persons, CBP agents are also permitted to search an individual's effects upon crossing the international border. The modern customs statute permits a customs official to board and inspect any vessel or vehicle, to ensure compliance with federal law. Most courts, in light of the government's strong interests at the international border, expansively interpret border search authorization statutes. For example, following Chief Justice Rehnquist's Montoya de Hernandez opinion, some courts adopted a routineness analysis for border searches of property to determine what level of suspicion is required to justify a particular search of an object.

60. See generally United States v. Fortna, 796 F.2d 724, 738 (5th Cir. 1986) (holding search of defendant's baggage permissible simply because search occurred at border). In Fortna, border agents searched the defendant and photocopied documents he carried. See id. at 738 (describing search). Because the defendant had no expectation of privacy that border agents would not inspect the documents, the court concluded the photocopying was permissible. See id. (noting defendant in international airport lacked expectation of privacy that objects carried would remain hidden). Photocopying "merely memorialized the agents' observations and provided a means to verify any subsequent recounting of them." Id. (citing United States v. White, 401 U.S. 745 (1971)).

61. See 19 U.S.C. § 1581(a) (2000) (granting power to border agents to conduct border searches). Section 1581(a) states in relevant part: Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized . . . and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board . . . .

Id. Other officials are authorized by statute to conduct border searches. See 8 U.S.C. § 1357(c) (recognizing that immigration officials may conduct warrantless searches); 14 U.S.C. § 89(a) (stating U.S. Coast Guard is permitted to inspect vessels on high seas or in U.S. territorial waters); 19 U.S.C. § 482 (recognizing that authorized persons may search vehicles suspected of illegally bringing merchandise into country). Custom officials have express statutory authorization to search travelers' baggages. See 19 U.S.C. § 1496 ("The appropriate customs officer may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry thereof has been made."); see also 19 C.F.R. § 162.5 (2007) ("A customs officer may stop any vehicle and board any aircraft arriving in the United States from a foreign country for the purpose of examining the manifest and other documents and papers and examining, inspecting, and searching the vehicle or aircraft."); 19 C.F.R. § 162.6 ("All persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a Customs officer.").

62. See United States v. Ickes, 393 F.3d 501, 505 (4th Cir. 2005) (interpreting customs officials' authority under customs statute to encompass searches of persons). "The realization that important national security interest are at stake has resulted in courts giving the broadest interpretation compatible with our constitutional principles in construing the statutory powers of customs officials." Id. (quoting United States v. Stanley, 545 F.2d 661, 666 (9th Cir. 1976)).

63. See, e.g., United States v. Molina-Tarazon, 279 F.3d 709, 717 (9th Cir. 2002) (holding reasonable suspicion is required for inspection of fuel due to degree of intrusiveness), abrogated by United States v. Flores-Montano, 541 U.S. 149
In 2004, however, in another Rehnquist opinion, the Court refined and clarified the border search exception for searches of property in *United States v. Flores-Montano*. In *Flores-Montano*, the defendant attempted to enter the United States in southern California in his station wagon. Upon inspection at the border, an agent tapped on the vehicle’s gas tank and stated that he believed the tank sounded "solid." The agent requested assistance from an authorized mechanic to disassemble, inspect, and reassemble the vehicle’s gas tank. After disassembly, the mechanic discovered marijuana hidden in the gas tank. The defendant moved to suppress evidence from the search, which the district court

(2004); United States v. Roberts, 274 F.3d 1007, 1014 (5th Cir. 2001) (using routineness analysis where agents searched defendant’s computer disks, which ultimately contained child pornography). But see United States v. Irving, 452 F.3d 110, 123 (2d Cir. 2006) (concluding search of passenger’s effects and property was per se routine and not conducted in offensive manner); United States v. Cortez-Rocha, 394 F.3d 1115, 1122 (9th Cir. 2005) (declining to extend routineness analysis to searches of property and concluding search did not require reasonable suspicion or probable cause where agents cut open spare tire in defendant’s trunk to search for contraband); United States v. Bunty, 617 F. Supp. 2d 359, 364-65 (E.D. Pa. 2008) (accepting reasonableness of search of computer data where agents lacked reasonable suspicion).

64. See *Flores-Montano*, 541 U.S. at 152 (addressing standards for border search of vehicle’s fuel tank); Gilmore, *supra* note 49, at 769 (discussing Court’s rejection of complex balancing tests used in context of at least vehicle border searches); LAFAVE, *supra* note 39, §10.5(f) (addressing Court’s seemingly bright-line rule that all border searches of property are routine, thus reasonable suspicion or probable cause was not required for searches’ justification).

65. See *Flores-Montano*, 541 U.S. at 150-51 (recounting facts of case). The defendant approached the Otay Mesa Port of Entry in southern California where an agent inspected the defendant’s vehicle. See id. at 150 (discussing facts of case). For unknown reasons, the agent directed the defendant and his vehicle for secondary inspections. See id. (noting factual information concerning initial stop at border). At the secondary inspection, the agent concluded the fuel tank was “solid” upon tapping the outer casing of the tank. See id. at 151 (describing border search).

66. See id. (stating facts concerning secondary search of vehicle). The secondary inspection indicated a possible concealment of narcotics in the fuel tank. See id. (noting results of subsequent search). The agent then requested a mechanic, who arrived in approximately twenty to thirty minutes, to disassemble the vehicle’s gas tank. See id. (describing agent’s request for expert).

67. See id. at 150-51 (describing agent’s request of authorized mechanic’s assistance).

68. See id. at 151 (noting evidence discovered subsequent to search). The authorized mechanic utilized a hydraulic lift to detach the vehicle from its gas tank, disconnected several hoses, and discovered an access panel on the top of the tank. See id. (describing techniques used to disassemble gas tank). Beneath the access panel, the mechanic discovered thirty-seven kilograms of marijuana bricks. See id. (summarizing evidence discovered in defendant’s vehicle’s gas tank). The Court noted the authorized mechanic arrived after approximately twenty to thirty minutes and the mechanic spent fifteen to twenty-five minutes disassembling and inspecting the fuel tank, for a total of thirty-five to fifty-five minutes. See id. (recounting total time spent searching defendant’s vehicle).
granted. On appeal, the Ninth Circuit affirmed the decision to grant the defendant’s motion to suppress. The Supreme Court granted certiorari and the defendant argued: (1) he had a privacy interest in his vehicle’s fuel tank that was violated by the search; and (2) the Fourth Amendment protects property as well as personal privacy and thus the search was a significant deprivation of his property interest.

In rejecting the defendant’s arguments, the Court emphasized that the search in question was a border search, citing the government’s long-standing right to protect its residents from dangerous persons and their effects. According to the Court, the government’s interest is not easily counterbalanced by an individual’s right to be free from unreasonable searches and seizures pursuant to the Fourth Amendment. Further, the Court noted a person has no more privacy interest in a vehicle’s gas tank than in a valid search of a vehicle’s passenger compartment, and the total search of the vehicle’s fuel tank was quick and did not destroy the safety or operation of the vehicle. Specifically, Chief Justice Rehnquist cited two

69. See id. (discussing procedural history of case).

70. See id. (discussing procedural history of case).

71. See id. at 154-55 (noting defendant’s arguments on appeal). The defendant contended he had an expectation of privacy in his vehicle’s fuel tank, unlike his vehicle’s passenger compartment. See id. at 154 (arguing privacy interests in defendant’s vehicle are not outweighed by government interests when searched pursuant to border search exception). The defendant also alleged the disassembly of his vehicle’s fuel tank was a significant deprivation of his property interest. See id. (arguing disassembly of defendant’s gas tank is unreasonable because search could damage the vehicle). Specifically, the defendant asserted the standard procedure of removing a vehicle’s fuel tank may damage the vehicle. See id. at 154-55 (arguing government’s search could damage vehicle’s gas tank).

72. See id. at 152 (observing strong governmental interest in preventing unwanted persons and contraband from entering nation).

73. See id. at 152-53 (emphasizing necessary national security function of border searches). Although the Court continued to uphold the government’s right to search persons and property entering the United States, it also rejected the routine balancing test formulated by some lower courts. See id. at 152 (dismissing creation of balancing test from use of descriptive word “routine”). In particular, the Court concluded, “[c]omplex balancing tests to determine what is a ‘routine’ search of a vehicle, as opposed to a more ‘intrusive’ search of a person, have no place in border searches of vehicles.” Id.; accord United States v. Arnold, 533 F.3d 1003, 1008 (9th Cir. 2008) (holding intrusiveness analysis is not warranted for property searches because property “does not implicate same ‘dignity and privacy concerns’ as ‘highly intrusive searches of the person’” (quoting Flores-Montano, 541 U.S. at 152)), cert. denied, 129 S. Ct. 1312 (2009).

74. See Flores-Montano, 541 U.S. at 154-56 (noting manner in which agents searched gas tank did not have high risk of substantially damaging property). The Court briefly noted that “[w]hile the interference with a motorist’s possessory interest is not insignificant when the Government removes, disassembles, and reassembles his gas tank, it nevertheless is justified by the Government’s paramount interest in protecting the border.” Id. at 155; see also Arnold, 533 F.3d at 1008 (recognizing Flores-Montano Court’s interpretation that intrusiveness or routine balancing tests are inapplicable in circumstances where property has been subjected to suspicionless border search).
examples where a border search of property will be unreasonable.\textsuperscript{75} First, a border search of property may be unreasonable if it is conducted in a particularly offensive manner.\textsuperscript{76} Nonetheless, the Court declined to define what a particularly offensive border search would look like.\textsuperscript{77} Second, the Court declared that a border search of property may be unreasonable if it causes serious damage to, or destruction of, the property.\textsuperscript{78} The Court concluded that the suspicionless search of the fuel tank was within the scope of the border search exception to the general warrant requirement, and failed to meet the offensive or destructive exceptions it had carved out, which would have required reasonable suspicion.\textsuperscript{79}

Accordingly, the target of the border search will determine how a court will analyze the case, and the characterization of the target as either property or person is crucial to the defendant.\textsuperscript{80} Searches of property are reasonable with two identified—though generally undefined—exceptions.\textsuperscript{81} Border searches of persons, on the other hand, are analyzed under an intrusiveness analysis where highly intrusive body searches implicate Fourth Amendment privacy concerns and require perhaps at least reasonable suspicion, while less intrusive searches of persons will not require any particularized suspicion.\textsuperscript{82} Courts and commentators do not agree on the specific analysis that should be applied to border searches of

\textsuperscript{75} See Flores-Montano, 541 U.S. at 155-56 (addressing defendant's arguments on appeal); see also United States v. Ramsey, 431 U.S. 606, 618 n.13 (1977) (discussing—but declining to comment on—circumstances when border search is particularly offensive and therefore unreasonable).

\textsuperscript{76} See Flores-Montano, 541 U.S. at 155 n.2 (addressing offensive searches (quoting Ramsey, 431 U.S. at 618 n.13)).

\textsuperscript{77} See id. at 155-56 (describing circumstances where border search of property may be unreasonable without justification by some level of particularized suspicion). Importantly, the Court addressed the possibility that a border search of property could be unreasonable. See id. (noting border searches of property are limited). The Court declined to address "whether, and what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out." Id. at 155 n.2 (citing Ramsey, 431 U.S. at 618 n.13).

\textsuperscript{78} See id. at 155-56 (concluding border search could be unreasonable if search causes serious damage to property). The Court also stated that a border search of property may be unreasonable if the search is "so destructive," but the disassembly of the vehicle's fuel tank was not considered "so destructive" as to render the search unreasonable. See id. at 156 (concluding destructive exception was not applicable to instant search).

\textsuperscript{79} See id. at 155-56 (noting search was reasonable).

\textsuperscript{80} See, e.g., United States v. Arnold, 535 F.3d 1003, 1008 (9th Cir. 2008) (rejecting district court's characterization of laptop search as akin to search of person, and concluding laptop was searchable absent particularized suspicion), cert. denied 129 S. Ct. 1312 (2009).

\textsuperscript{81} See, e.g., Flores-Montano, 541 U.S. at 155-56 (describing possible analyses for border searches of property).

\textsuperscript{82} See United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985) (holding reasonable suspicion required for detention of person at border is "beyond the scope of a routine customs search and inspection").
laptops. Some prefer to analyze searches of laptops under the intrusiveness analysis typically applied to searches of persons. Others believe laptops should be subject to the same analysis applied to searches of property.

III. THE CREATION OF NEW PRIVACY CONCERNS WITH THE ADVENT OF WIDESPREAD USE OF LAPTOPS IN INTERNATIONAL TRAVEL

In recent years, an increasing number of international travelers carry laptops and other portable electronic devices containing various types of information in electronic form. Ultimately, some of those laptop computers crossing the U.S. border contain contraband materials, such as child pornography. Some defendants prosecuted for federal crimes related to child pornography have argued that a search of a laptop must be analyzed as though the search were an intrusive search of a person. A number of courts and commentators have grappled with this contention, suggesting reasonable suspicion is needed to justify such searches, while others argue no particularized suspicion is needed to justify the searches. Thus, the fundamental aspects of these defendants' arguments remain a battle not yet resolved by our judiciary.

A. RECENT DECISIONS INVOLVING LAPTOPS AND THE BORDER SEARCH DOCTRINE

1. THE FOURTH CIRCUIT AND UNITED STATES V. ICKES

In 2000, John Woodward Ickes, Jr. attempted to enter the United States near Detroit, Michigan with child pornography hidden on a com-

83. See generally Alzahabi, supra note 38, at 170-76 (analyzing different approaches taken by various circuits). But see Arnold, 533 F.3d at 1003 (resolving potential circuit split between Fourth and Ninth Circuits).

84. See, e.g., id. (likening, for analytical purpose, search of person and search of laptop to use balancing test to determine intrusiveness of border search); Coletta, supra note 35, at 999-1001 (arguing laptop search is nearly as intrusive as body cavity search).

85. See generally Alzahabi, supra note 38, at 170-76 (analyzing different approaches taken by various circuits). For further discussion of treating laptops searches as searches of mere property, see infra notes 108-34 and accompanying text.

86. See Press Release, Travel Indus. Ass'n, supra note 3 (discussing proliferation of portable electronic information in travel context).


88. See, e.g., Arnold, 533 F.3d at 1006 (arguing search of laptop required reasonable suspicion because distinguishable from other containers).

89. See Coletta, supra note 35, at 994-95 (describing conflicting rulings of three lower federal courts).

90. See United States v. Bunty, 617 F. Supp. 2d 359, 365 (E.D. Pa. 2008) (noting that "the Supreme Court has not addressed specifically the search of computer equipment at the border").
puter hard drive and computer disks.\textsuperscript{91} Border agents conducted a brief inspection of Ickes's vehicle, which uncovered a video camera with a tape that "focused excessively on a young ball boy."\textsuperscript{92} Subsequently, the agent subjected Ickes to an additional, more thorough search of his vehicle.\textsuperscript{93} The agents discovered marijuana seeds, drug paraphernalia, a Virginia warrant for Ickes's arrest, and a photo album of nude prepubescent boys.\textsuperscript{94} The agents arrested Ickes and subsequently searched the remaining items in his vehicle, including his computer and computer disks.\textsuperscript{95} The computer and disks contained additional child pornography.\textsuperscript{96} At trial, Ickes moved to suppress the contents of the computer, arguing that the warrantless search violated his First and Fourth Amendment rights.\textsuperscript{97} The district court denied Ickes's motion, and Ickes was subsequently convicted of transporting child pornography.\textsuperscript{98}

On appeal, the Fourth Circuit specifically rejected Ickes's Fourth Amendment argument that Congress did not authorize the search of his computer and disks.\textsuperscript{99} The court interpreted the relevant statute authorizing the search and concluded that the statute should be interpreted expansively to permit searches of computers.\textsuperscript{100} Applying the statute, the court firmly characterized the computer as "cargo," which the statute per-

\textsuperscript{91} See Ickes, 393 F.3d at 502 (noting factual background of case). Ickes arrived at the Ambassador Bridge port of entry near Detroit, Michigan. See id. at 502 (discussing facts of case).

\textsuperscript{92} See id. (noting factual background of case). The Court noted this tape led the border agent to request the help of other agents and subject Ickes's vehicle to a more thorough search. See id. (discussing facts that led to further search of Ickes's vehicle).

\textsuperscript{93} See id. (describing search of Ickes's vehicle).

\textsuperscript{94} See id. at 503 (enumerating results of border search of Ickes's vehicle).

\textsuperscript{95} See id. (describing actions taken by border agents following search). The agents discovered approximately seventy-five computer disks containing more child pornography. See id. (listing contents of computer disks).

\textsuperscript{96} See id. (noting that "one of the disks ultimately revealed a home-movie of Ickes fondling the genitals of two young children").

\textsuperscript{97} See id. (stating Ickes's arguments to suppress evidence resulting from border search). The district court held that the search fell under the border search doctrine and was permissible. See id. (noting district court's ruling on Ickes's motion to suppress evidence).

\textsuperscript{98} See id. (stating Ickes's conviction at trial). The court convicted Ickes of violating 18 U.S.C. § 2252(a)(1), transporting child pornography, and sentenced him to 130 months of imprisonment. See id. (discussing Ickes's specific convictions).

\textsuperscript{99} See id. at 503-04 (noting "sweeping" language of authorizing statute).

\textsuperscript{100} See id. at 504 (analyzing relevant statute in liberal manner to permit searches of computers). For further discussion of the customs statute, see supra notes 61-62 and accompanying text. The court rejected Ickes's argument that because the statute did not expressly enumerate computer equipment, it cannot be searched pursuant to 19 U.S.C. § 1581(a). See id. (interpreting statute broadly). Specifically, the court determined the repeated use of the word "any" in the statute made it "unreasonable to construe the list restrictively." See id. (explaining justifications to interpret statute broadly).
mists to be searched.\textsuperscript{101} Finally, the court recognized the importance of the border search exception and concluded the search was reasonable.\textsuperscript{102}

Moreover, the court declined to accept Ickes's contention that even if the search were permitted under the statute, the search was unconstitutional because it involved the search of expressive material, and therefore violated both his First and Fourth Amendment rights.\textsuperscript{103} Specifically, Ickes argued that border agents should not be permitted to search expressive material without probable cause.\textsuperscript{104} The court rejected Ickes's argument primarily because of the adverse practical implications such an exception would have on border agents.\textsuperscript{105} Effectively, border agents would be required to determine if the object to be searched is expressive material, whether a First Amendment exemption applies, and then deter-

\begin{itemize}
  \item \textsuperscript{101} See id. ("[I]t is undisputed that Ickes's computer and disks were being transported by his vehicle. We are unpersuaded that these particular transported goods are somehow exempt from the ordinary definition of 'cargo'.")
  \item \textsuperscript{102} See id. at 505 ("We construe § 1581(a) against the back-drop of an 'impressive historical pedigree of the Government's power and interest' at the border." (quoting United States v. Flores-Montano, 541 U.S. 149, 153 (2004))).
  \item \textsuperscript{103} See id. at 506 (arguing that First Amendment prohibits searches of expressive material pursuant to border search exception).
  \item \textsuperscript{104} See id. at 506-07 (suggesting that First Amendment exception would protect privacy interest of individuals at border). The court declared that "[f]ollowing Ickes's logic would create a sanctuary at the border for all expressive material—even for terrorist plans. This would undermine the compelling reasons that lie at the very heart of the border search doctrine." \textit{id.} at 506.
  \item \textsuperscript{105} See id. (noting practical improbability of enforcement of Ickes's proposed First Amendment exception). Ickes also contended that United States v. Ramsey, 431 U.S. 606 (1977), permitted a higher standard of protection at the border for expressive material. See Ickes, 393 F.3d at 507 (declining to adopt First Amendment exception). The pertinent regulations addressed in Ramsey prohibited officials from reading the content of mail without a warrant. See id. (noting Ramsey Court's analysis and facts of case). In Ramsey, the Court declined to address whether the First Amendment affords protection for expressive materials at the border. See Ramsey, 431 U.S. at 624 (declining to discuss applicability of First Amendment to case). Further, the \textit{Ickes} court recognized it was unlikely that the Supreme Court would agree with Ickes given its decision in \textit{New York v. P.J. Video}, 475 U.S. 868 (1986). See Ickes, 393 F.3d at 507 (declining to create First Amendment exception). In \textit{P.J. Video}, the Court held an application for a warrant should be reviewed under the normal probable cause standard regardless of the fact that the object of the search was arguably expressive material protected by the First Amendment. See \textit{P.J. Video}, 475 U.S. at 874 (holding irrelevant that item sought to be searched may be expressive material for Fourth Amendment purposes).
\end{itemize}
mine if probable cause exists. As a result, the court declined to adopt a First Amendment exception and affirmed Ickes’s conviction.

2. *The Case that Upset the Applecart: United States v. Arnold*

On October 2, 2006, the United States District Court for the Central District of California held, as a matter of first impression in the Ninth Circuit, that the government cannot search a person’s laptop at the border absent particularized suspicion. In July 2005, the defendant, Michael Timothy Arnold, returned to the United States on an international flight from the Philippines. After picking up his luggage, Arnold approached a customs checkpoint. Following the standard customs checkpoint, the CBP agent selected Arnold for an additional screening.

106. See *Ickes*, 393 F.3d at 506 (hypothesizing practical requirements of Ickes’s First Amendment exception to border search exception). In the court’s view, border agents would be “divert[ed]” from their primary task, which is to protect the nation’s borders. See id. (noting difficulties limitations on border search would create). The court rejected Ickes’s argument—that without his First Amendment exception every traveler would be subject to a laptop search—because “[c]ustoms agents have neither the time nor the resources to search the contents of every computer.” See id. at 507 (rejecting Ickes’s argument on appeal).

107. See id. at 507-08 (rejecting Ickes’s claims and affirming his 130 month imprisonment).

108. See United States v. Arnold, 454 F. Supp. 2d 999, 1003 (C.D. Cal. 2006) (holding that border search of laptop is non-routine search that implicates personal privacy interests and requires reasonable suspicion), rev’d, 533 F.3d 1003 (9th Cir. 2008). “[H]ighly intrusive searches of persons implicate dignity and privacy interests. Likewise, opening and viewing confidential computer files implicates dignity and privacy interests.” Id. (citation omitted). But see Alzahabi, supra note 38, at 174 (suggesting *Arnold* correctly concluded that reasonable suspicion requirement for border search of laptop is appropriate); Coleta, supra note 35, at 992 (arguing district court’s ruling was not reversal but extension of border search exception jurisprudence). “While *Arnold* was the first case to find a traveler’s privacy interests implicated in a laptop search, this may be because the trend of carrying laptops while traveling has only recently become widespread.” Alzahabi, supra note 38, at 179 (emphasizing novelty of district court’s decision).

109. See *Arnold*, 454 F. Supp. 2d at 999 (reciting background facts); see also *Arnold*, 533 F.3d at 1005 (discussing facts of case). On July 17, 2005, Michael Timothy Arnold arrived at Los Angeles International Airport following a twenty-two hour flight. See id. (noting Arnold’s flight length). The district court described Arnold, noting he wore clean, casual clothes, and was cleanly groomed with a goatee. See id. (describing Arnold’s appearance). But see Government’s Opening Brief, United States v. Arnold, 523 F.3d 941 (9th Cir. 2008) (No. 0:05-CR-007772), 2007 WL 1407234, at *4 (noting CBP agents described Arnold as “nervous” and “fidgety”).

110. See *Arnold*, 454 F. Supp. 2d at 999, 1001 (enumerating facts of border search). CBP Agent Laura Peng was the first agent to see Arnold and instigate the additional search. See id. (noting fact of case).

111. See id. (describing border search). But see Government’s Opening Brief, supra note 109, at *4 (depicting Arnold as suspicious). “[CBP Agent Peng] selected [Arnold] for inspection because he was a single male traveling alone who, according to [CBP Agent] Peng, appeared ‘nervous’ and ‘fidgety,’ and ‘kept looking around.’ In her experience, [CBP Agent] Peng had encountered numerous
During the screening, the agent questioned Arnold about his travels and requested that Arnold boot up his laptop. Upon the laptop's start-up, the agent inspected the computer's folders entitled "Kodak Pictures" and "Kodak Memories." The subsequent search allegedly revealed a photograph of two nude— and potentially underage—women. The agents called special agents with the Immigration and Customs Enforcement agency (ICE) to question, investigate, and detain Arnold for several hours. ICE permitted Arnold to leave but kept Arnold's laptop and accessories after discovering more photographs of alleged child pornography.

single male travelers returning from Asia on trips involving sexual activity." Id. at *3-4 (citations omitted).

112. See Arnold, 454 F. Supp. 2d at 1001 (addressing when CBP Agent Peng first approached Arnold). CBP Agent Peng asked “Arnold where he had traveled, the purpose of his travel, and the length of his trip. Arnold stated that he had been on vacation for three weeks visiting friends in the Philippines.” Id.; see also Government's Opening Brief, supra note 109, at *4 (describing observations of CBP Agent Peng). The Government provided the following more detailed account of the instant border search:

Officer Peng asked to see [Arnold's] passport and custom's declaration and followed up with standard customs questions about the location, purpose and length of his trip. According to Peng, [Arnold] appeared nervous during questioning and his answers struck her as evasive. For instance, [Arnold] said that he had been visiting friends in Manila, but did not volunteer much detail about those friends. When asked questions about his employment, [Arnold] reportedly replied that he was unemployed but had worked as a math teacher and a night auditor; according to Peng, however, he could not recall the name of the company where he worked as a night auditor. Peng therefore decided to search [Arnold's] baggage.

Government's Opening Brief, supra note 109, at *4 (citations omitted).

113. See Arnold, 454 F. Supp. 2d at 1001 (noting search of Arnold's laptop). Arnold attempted to enter the United States with his laptop, an external hard drive, a USB drive (commonly referred to as "flash drive"), and six compact discs. See id. (listing objects ultimately searched). While Arnold's laptop booted up, CBP Agent Peng enlisted the help of CBP Agent John Roberts to continue the search of the laptop while Agent Peng continued the search of Arnold’s remaining luggage. See id. (discussing border search); Government's Opening Brief, supra note 109, at *5 (describing search of Arnold's property). On the laptop's desktop Arnold placed personal photographs. See Arnold, 454 F. Supp. 2d at 1001 (describing information on Arnold's laptop). According to the government, the pictures depicted “[Arnold] engaged in sexual activity with what appeared to be young Filipino women not obviously of legal age. When asked if the women depicted were minors, [Arnold] claimed that they were of legal age.” See Government's Opening Brief, supra note 109, at *5 (describing pictures on Arnold’s laptop).

114. See Arnold, 454 F. Supp. 2d at 1001 (noting search of Arnold's laptop). When the agents discovered the photographs of the nude, possibly underage women, they notified Immigration and Customs Enforcement (ICE) to continue the investigation. See id. (discussing request for additional help to search laptop).

115. See id. (recounting ICE's investigation of Arnold). ICE detained Arnold and his belongings for several hours and continued their search of Arnold's laptop for child pornography. See id. (describing detention of Arnold's laptop). A subsequent search of Arnold's person revealed a flash drive containing more alleged child pornography. See Government's Opening Brief, supra note 109, at *6 (arguing Arnold carried child pornography).
phy.116 Agents subsequently obtained a search warrant for Arnold’s computer and arrested Arnold.117 Before trial, Arnold moved to suppress the evidence obtained pursuant to a search warrant for his laptop at the initial detention.118

The district court addressed whether a border search of a laptop and its electronic contents qualifies under the border search exception, rendering a finding of particularized suspicion unnecessary.119 Beginning with a Fourth Amendment analysis, the court acknowledged that the government’s interest at the international border is higher than other places within the country.120 Nevertheless, the court noted that a border search

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116. See Arnold, 454 F. Supp. 2d at 1001 (recounting ICE’s investigation of Arnold).


118. See Arnold, 454 F. Supp. 2d at 1001 (describing circumstances of motion to suppress). Arnold filed a motion to suppress all evidence obtained from the search of his laptop at the border. See id. at 1000 (explaining motion to suppress). Arnold argued that the search of his laptop was similar, for Fourth Amendment purposes, to an invasive body search because of the private information stored on his laptop and the vast amounts of information which was stored on his laptop. See Government’s Opening Brief, supra note 109, at *6-7 (discussing Arnold’s argument on appeal). Arnold suggested that the district court should conclude that the search was non-routine, thus requiring some level of particularized suspicion. See id. at *9 (addressing Arnold’s arguments). On the other hand, the government argued that the search should be characterized as a routine search, thus not requiring any particularized suspicion. See id. at *7 (suggesting laptops should be treated as other objects).

119. See Arnold, 454 F. Supp. 2d at 1000 (noting that validity of border search of laptop without at least reasonable suspicion is matter of first impression in Ninth Circuit). District Judge Dean D. Pregerson stated the issue as: “whether the government can conduct a border search of the private and personal information stored on a traveler’s computer hard drive or electronic storage devices without Fourth Amendment review.” Id. The Government, in its appellate brief to the Ninth Circuit substantially agreed with Arnold as to the issue of the case: “Whether the Fourth Amendment requires customs officers at the international border to have reasonable suspicion to view electronic files stored on computers and similar storage devices.” See Government’s Opening Brief, supra note 109, at *1 (stating issue on appeal).

120. See Arnold, 454 F. Supp. 2d at 1002 (laying analytical background of border search exception to general Fourth Amendment warrant requirement). “A border search is made in the enforcement of customs laws, as distinct from general law enforcement, and for the purposes of regulating the collection of duties and preventing the introduction of contraband into the United States.” Id. (citing United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).
is unreasonable when the need for the search is outweighed by the invasion that the search necessitates. 121

Regarding the instant search, the district court characterized it as “highly intrusive” because “some may value the sanctity of private thoughts memorialized on a data storage device above physical privacy.” 122 The search revealed private information on a scale unlike that which could be carried in non-electronic form. 123 The court placed substantial emphasis on both the vast amount of information and the various kinds of documents potentially stored on electronic devices. 124 To illustrate this point, the court enumerated the following types of documents it suggested are frequently contained on laptops: diaries, personal letters, medical information, photographs, financial information, confidential attorney-client information, confidential information obtained by news reporters, and investors’ and corporate executives’ trade secrets. 125 Because of these concerns unique to laptops, the district court characterized the search as non-routine and, consistent with Ninth Circuit border search jurisprudence, required at least reasonable suspicion to justify the search. 126

To support its conclusion, the district court reasoned that a sliding scale of intrusiveness was appropriate to determine the permissible scope of the search. 127 The court concluded that some level of suspicion is needed for non-routine border searches of objects, in contrast to routine border searches of objects such as luggage, wallets, and pockets. 128 Addi-

121. See id. at 1002 (reaffirming limits of border search exception to where intrusiveness of search outweighs government interest). One example where the intrusiveness of the search outweighs the government interest to protect the country’s borders is when the government conducts a strip search of a traveler without particularized suspicion. See id. (discussing border searches where particularized suspicion is needed to justify search).

122. See id. at 1003 (noting privacy interests in laptop) (emphasis added). “Indeed, some may value the sanctity of private thoughts memorialized on a data storage device above physical privacy.” Id. Judge Pregerson concluded that information stored on laptops and other electronic devices are per se more intrusive than searches of other objects a traveler may carry. See id. (discussing privacy interests in property).

123. See id. at 1003-04 (distinguishing borders searches of laptops from other tangible objects).

124. See id. (describing storage capabilities of laptops).

125. See id. at 1004 (listing possible types of information stored on traveler’s laptop).

126. See id. at 1003-04 (declaring search of laptop more intrusive than search of other tangible objects and more closely related to non-routine searches of persons). The Court accepted the Ninth Circuit’s requirement that non-routine border searches require at least reasonable suspicion. See id. at 1003 (citing United States v. Ramos-Saenz, 36 F.3d 59, 61 (9th Cir. 1994)) (noting that in Ninth Circuit, invasive non-routine searches at border require at least reasonable suspicion).

127. See id. (noting that as intrusiveness of search increases, so does need for higher degree of suspicion).

128. See id. at 1002-03 (requiring reasonable suspicion); see also United States v. Irving, 452 F.3d 110, 123 (2d Cir. 2006) (providing examples of routine searches including searches of outer clothing, luggage, purses, and wallets); Harrell, supra
tionally, non-routine border searches must be reasonable in scope, and are reasonable only if it is "no more intrusive than necessary to obtain the truth respecting the suspicious circumstances." The court determined that because the laptop search was both non-routine and invasive, it implicated dignity and privacy interests, thus necessitating a Fourth Amendment analysis. Under such an analysis, reasonable suspicion was required in Arnold's situation.

In the decision's final section, the court concluded that the government failed to show that reasonable suspicion was present. The court refused to place significant weight on one of the CBP agent's accounts of the search because the agent failed to contemporaneously write a memorandum, could not accurately remember events or specifics while testifying, and contradicted herself while testifying. Thus, the district court held that the government did not have the requisite reasonable suspicion

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note 38, at 210 (describing routine searches, including searches of outer clothing, luggage, purses and wallets, pockets, and shoes). The justification for routine searches, Harrell argues, is to "allow law enforcement agents to properly patrol the borders of the United States because agents may prevent citizens and non-citizens alike from furthering crimes, introducing contraband into the United States, or threatening national security." Harrell, supra note 38, at 210.

129. See Arnold, 454 F. Supp. 2d at 1003 (summarizing border search jurisprudence). The intrusiveness of a non-routine search must reasonably relate to the facts that border agents have to conduct the search. See id. (describing scope of non-routine search). The district court provided the following example: a border agent conducted a pat-down search of a traveler after observing that the traveler's eyes were glassy, the traveler looked like he was on drugs, and his story regarding his trip was unusual. See id. (citing United States v. Vance, 62 F.3d 1152, 1155 (9th Cir. 1995)) (providing example of border search). Under these circumstances, mere minimal suspicion was required to conduct a pat-down of the traveler; a more intrusive search would require a heightened level of suspicion. See id. (noting required level of suspicion for example).

130. See id. (recognizing that non-routine searches implicate dignity and privacy interests); see also United States v. Flores Montano, 541 U.S. 149, 152 (2004) (indicating that highly intrusive searches of person implicate dignity and privacy interests); Irving, 452 F.3d at 123 (noting that intrusive searches such as strip searches "substantially infringe" on privacy).


132. See Arnold, 454 F. Supp. 2d at 1006-07 (concluding that CBP Agent Peng did not have "articulable reasonable suspicion" that Arnold carried child pornography).

133. See id. at 1004-06 (addressing CBP Agent Peng's testimony where she did not complete written customs report by herself for nearly one year after incident, Peng's inability to accurately recall facts of search, and disagreeing with Peng's conclusion that Arnold's answers to questions were suspicious).
to search the laptop, and, consequently, it granted Arnold's motion to suppress the evidence stemming from the search.134

3. Removing the Bad Apple from the Cart: The Ninth Circuit Reverses

Following the district court's bold decision altering border search jurisprudence, the government appealed to the Ninth Circuit.135 Judge O'Scannlain, writing for the circuit court, generally accepted the factual findings of the district court, including the ultimate finding that Arnold's laptop contained child pornography.136 The issue before the Ninth Circuit was whether border agents may examine a traveler's laptop without reasonable suspicion.137

Arnold supported his position that his motion to suppress should be affirmed with a three-pronged defense.138 First, Arnold contended that the border search invaded his dignity and privacy interests because his laptop is different from other closed containers.139 Second, Arnold argued that no court had sufficiently addressed the level of suspicion required for border searches of laptops and urged the court to adopt a heightened standard of suspicion.140 Lastly, he claimed that a First Amendment exception should be created for searches of expressive materials and that reasonable suspicion is an appropriate level of suspicion for

134. See id. at 1006-07 (holding that border search of Arnold's laptop violated Fourth Amendment, and granting motion to suppress evidence resulting from illegal search).


136. See id. at 1005 (recounting facts of case, including involvement of CBP Agent Peng, questioning and detention of Arnold and laptop, and discovery of pornographic images on laptop).

137. See id. at 1006 (addressing argument of both parties and issues to be resolved).

138. See Appellee Arnold's Answering Brief at 1-2, United States v. Arnold, 533 F.3d 1003 (9th Cir. 2008) (No. 06-50581), 2007 WL 2195716, at *7-8 (summarizing Arnold's argument on appeal); see also Arnold, 533 F.3d at 1006 (restating Arnold's arguments on appeal). Additionally, the Ninth Circuit addressed Arnold's other ancillary arguments, including Arnold's assertion that a laptop is "fundamentally different from traditional closed containers, and analogized them to home and the human mind." See id. (noting Arnold's issues on appeal) (quotations omitted). Further, Arnold contended that a First Amendment exception should be created to require reasonable suspicion when the border search involves expressive material. See id. (arguing for First Amendment exception).

139. See id. (summarizing core arguments on appeal).

140. See Appellee Arnold's Answering Brief, supra note 138, at *7-8 (asserting no court has addressed suspicionless border searches of laptops). Arnold also argued that Flores-Montano does not stand for the principle that non-destructive border searches of property could be conducted without particularized suspicion for all property. See id. at *10 (distinguishing Flores-Montano). For further discussion of Flores-Montano, see supra notes 64-79 and accompanying text.
border searches of a laptop's contents. Arnold concluded that the border search of his laptop violated the Fourth Amendment and therefore all evidence from that search should be suppressed.

The Ninth Circuit reviewed the basic framework for a border search analysis and noted the inherent authority of the United States to protect its borders. The court articulated the Supreme Court's holding in *United States v. Ross*, which held that a traveler's attempt to conceal information or items in luggage at the border is immaterial because a border agent may search a traveler's luggage without particularized suspicion. Next, the court cited a list of cases where suspicionless searches of closed containers and their contents have been upheld, including the contents of a briefcase. Judge O'Scanlaim noted that the framework of limitations to the border search exception focused on searches of persons. For example, some searches of persons, specifically the search of a person's alimentary canal, require reasonable suspicion. Significantly, the court characterized intrusive searches of property under a different rubric. According to the court, border searches of property are unlike searches of property within the United States and may be unreasonable when the search is destructive or conducted in a particularly offensive manner.

141. See Arnold, 533 F.3d at 1006 (describing Arnold's final argument on appeal).
142. See id. (arguing motion to suppress evidence should be affirmed on appeal because border agents lacked reasonable suspicion).
143. See id. at 1006-07 (reiterating basic Fourth Amendment jurisprudence and border search exception to general warrant requirement); see also United States v. Flores-Montano, 541 U.S. 149, 153 (2004) (noting heightened federal authority to protect and guard international borders); United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (noting long tradition permitting border searches without probable cause or warrant).
144. 456 U.S. 798 (1982).
145. See Arnold, 533 F.3d at 1007 (discussing irrelevance of type of package carried by travel across international border); see also Ross, 456 U.S. at 823 ("The luggage carried by a traveler entering the country may be searched at random by a customs officer; the luggage may be searched no matter how great the traveler's desire to conceal the contents may be.").
146. See Arnold, 533 F.3d at 1007 (enumerating border searches permitted without particularized suspicion, including: (1) contents of traveler's briefcase and luggage; (2) traveler's purse, wallet, or pockets; (3) papers found in containers such as pockets; and (4) pictures, films and other graphic materials) (citations omitted).
147. See id. (providing established limitations of border searches of persons).
148. See id. (noting Fourth Amendments protects against invasive search of person's alimentary canal by requiring at least reasonable suspicion).
149. See id. (discussing differences between border searches of persons and property). The Court held that any routine or non-routine distinctions for searches of property are inappropriate in light of Flores-Montano. See id. (rejecting use of routine searches for searches of property).
150. See id. at 1007-08 (acknowledging two instances where border searches of property may require particularized suspicion). A border search of property that is destructive or conducted in a particularly offensive manner could require particu-
The Ninth Circuit attacked the district court’s reasoning, emphasizing that the district court’s sliding scale analysis utilizing the level of the intrusiveness of the property search to determine when reasonable suspicion is required was “erroneous.”151 Relying upon Flores-Montano, the court reiterated that complex balancing tests to determine if reasonable suspicion is required have no place in border searches of property.152 Further, the court noted that the distinction between routine and non-routine searches is inapplicable to searches of property, and that the Supreme Court had previously rejected an intrusiveness analysis to determine the requisite level of suspicion, if any, needed to conduct a search has previously been rejected by the Supreme Court.153

Whereas the district court attempted to distinguish Flores-Montano on the fact that the case involved a search of a vehicle, the Ninth Circuit rejected the distinction because Flores-Montano’s rationale was based on the fact that the target of the search was property in general, not the specific type of property searched.154 The court categorically held that any intrusiveness analysis, or routine/non-routine classification to determine the reasonableness of property searches conducted pursuant to the border search exception, is inappropriate.155 Thus, the court held that border searches of property do not need to be justified by particularized suspicion.156

See id. (discussing border searches of property that may be unreasonable depending on level of suspicion used to justify search).

151. See id. at 1008 (holding that “[the district court’s] reliance on such cases . . . to support its use of a sliding intrusiveness scale to determine when reasonable suspicion is needed to search property at the border is misplaced.”) (citation omitted). The district court relied upon United States v. Vance, which analyzed a border search of a traveler, and held as a search progresses from a “pat-down” to a strip the level of suspicion must increase accordingly. See United States v. Vance, 62 F.3d 1152, 1156 (9th Cir. 1995) (determining different levels of suspicion can justify more intrusive searches of person).

152. See Arnold, 533 F.3d at 1008 (holding that balancing tests are not appropriate method of analysis for border searches of vehicles). “Complex balancing tests to determine what is a ‘routine’ search of a vehicle, as opposed to a more ‘intrusive’ search of a person, have no place in border searches of vehicles.” Id. (quoting United States v. Flores-Montano, 541 U.S. 149, 152 (2004)).

153. See id. (discussing inapplicability of intrusiveness analysis in border searches of property). The Ninth Circuit acknowledged that the Supreme Court rejected the circuit’s method of distinguishing between routine and non-routine searches of property. See United States v. Chaudry, 424 F.3d 1051, 1054 (9th Cir. 2005) (recognizing that Flores-Montano expressly limits characterizations of searches as routine or non-routine to searches of persons), cert. denied, 547 U.S. 1083 (2006).

154. See Arnold, 533 F.3d at 1008 (rejecting district court’s reasoning); Chaudry, 424 F.3d at 1054 (interpreting Flores-Montano to apply to searches of property and not narrowly to only searches of vehicles)

155. See Arnold, 533 F.3d at 1008 (rejecting need for intrusiveness analysis or routine/non-routine classification).

156. See id. (rejecting “least restrictive means” test for border searches and holding that routine/non-routine distinction is inapplicable to border searches of property). The “least restrictive means” test requires the government to use the
After striking down the application of any intrusiveness analysis, the court addressed two possible types of property searches which may, nonetheless, require reasonable suspicion: destructive and offensive property searches. Because Arnold did not raise the issue of whether the search was destructive, the Ninth Circuit chose not to address the issue. Arnold, nevertheless, argued that the CBP agents conducted the search in a particularly offensive manner. The court rejected his argument, noting that nothing about the search was especially more offensive than other suspicionless border search of luggage or other personal property.

Lastly, the Ninth Circuit avoided creating a circuit split with the Fourth Circuit by declining to carve out a First Amendment exception to the border search doctrine that would require a higher level of suspicion to justify searches of expressive material. The Ninth Circuit, consequently, adopted the Fourth Circuit's reasoning as its own. Thus, the least restrictive means to conduct a search. See United States v. Cortez-Rocha, 594 F.3d 1115, 1123 (9th Cir. 2005) (discussing least restrictive means test with regard to border search).

157. See Arnold, 533 F.3d at 1007 (recognizing circumstances where reasonable suspicion could be required for border searches of property). "We again leave open the question whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out." Flores-Montano, 541 U.S. at 155 n.2 (declining to define particularly offensive manner of border search). Further, the Supreme Court left open the possibility that a border search of property may be "so destructive as to require [particularized suspicion]." See id. at 155-56 (recognizing some border searches of property may be unreasonable without higher level of suspicion).

158. See Arnold, 533 F.3d at 1009 (foregoing analysis of whether border search of Arnold's laptop was so destructive as to require reasonable suspicion).

159. See id. (noting that Arnold insisted CBP agents conduct search of his laptop and accompanying computer accessories in particularly offensive manner).

160. See id. (rejecting Arnold's argument concerning allegedly offensive manner in which border search was conducted). Specifically, the court held, "[w]hatever 'particularly offensive manner' might mean, this search certainly does not meet that test. Arnold has failed to distinguish how the search of his laptop and its electronic contents is logically any different from the suspicionless border searches of travelers' luggage that the Supreme Court and we have allowed." Id. Also, the court refused to treat Arnold's laptop as a home, and therefore highly protected, reasoning that the Fourth Amendment does not extend to objects not capable of functioning as a home. See id. (declining to accept Arnold's argument that Fourth Amendment protections of homes should be extended to laptops). The Ninth Circuit noted that Arnold's laptop, unlike a home, was readily mobile, and Arnold had a lessened expectation of privacy at the international border. See id. (stating court's reasoning for rejecting Arnold's argument); see also United States v. Carney, 471 U.S. 386, 393-94 (1985) (permitting search of vehicle without warrant). In Carney, the Supreme Court concluded that a mobile home's mobility and its owner's reduced expectation of privacy in the mobile home account for lesser Fourth Amendment protection. See Carney, 471 U.S. at 391 (addressing factors which permitted warrantless search of mobile home).

161. See Arnold, 533 F.3d at 1010 (declining to create circuit split with Fourth Circuit regarding First Amendment exception to border search doctrine).

162. See id. (concurring with Fourth Circuit's resolution of First Amendment exception issue). "We are persuaded by the analysis of our sister circuit and will follow the reasoning of Ickes in this case." Id.
Ninth Circuit concluded that the instant border search was a search of property, where no property search exception could be found, and a First Amendment exception should not be created for border searches.\textsuperscript{163} Accordingly, the Ninth Circuit reversed the district court’s ruling and denied Arnold’s motion to suppress evidence resulting from the suspicionless border search of his laptop.\textsuperscript{164}

IV. LAPTOPS: A NEW MEDIUM FOR THE SAME OLD TECHNOLOGY

Laptops are vessels of information and personal thoughts that otherwise could be found in physical documents.\textsuperscript{165} In most circumstances, these personal thoughts and documents are voluntarily placed on the laptop’s hard drive by the user or with the user’s permission.\textsuperscript{166} Finally, the amount of information contained in a laptop should not be a dispositive factor in determining whether to analyze such a search as an object not requiring a finding of particularized suspicion to justify the search.\textsuperscript{167}

An object, such as laptop, does not implicate the same dignity and privacy concerns as a highly intrusive search of a person.\textsuperscript{168} Further, the nature of the object should not determine whether dignity and privacy concerns are implicated.\textsuperscript{169} Privacy interests in a particular object, such as

\textsuperscript{163} See \textit{id.} (rejecting Arnold’s arguments on appeal).

\textsuperscript{164} See \textit{id.} (reversing district court’s decision to grant Arnold’s motion to suppress evidence obtained pursuant to lawful border search at Los Angeles International Airport).

\textsuperscript{165} See United States v. Arnold, 454 F. Supp. 2d 999, 1003-04 (C.D. Cal. 2006) (illustrating various kinds of personal, business, and confidential information that could be contained on travelers’ laptops), \textit{rev’d}, 533 F.3d 1005 (9th Cir. 2008); Press Release, Travel Indus. Ass’n, \textit{supra} note 3 (presenting polling data maintaining common usage of laptops among travelers).

\textsuperscript{166} See Gilmore, \textit{supra} note 49, at 784 (noting laptop users put information on laptops intentionally and some software puts information on hard drive without user’s awareness).

\textsuperscript{167} See Arnold, 533 F.3d at 1010 (declining to use quantity of information in laptop as factor to determine if search is conducted in particularly offensive manner); Gilmore, \textit{supra} note 49, at 784 (arguing that vast amount of information capable of being stored on laptops weighs in favor of lower suspicion standards).

\textsuperscript{168} See United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (distinguishing reasons to require reasonable suspicion for some border searches of person do not carry over to searches of vehicles crossing international border); United States v. Montoya de Hernandez, 473 U.S. 531, 540 (1985) (analyzing search of traveler’s alimentary canal and requiring reasonable suspicion where detention goes beyond scope of routine border search); \textit{Arnold}, 533 F.3d at 1008 (recognizing distinction between border searches of persons and property); United States v. Irving, 452 F.3d 110, 123 (2d Cir. 2006) (accepting distinctions between routine searches of property and more intrusive searches of persons); United States v. Fortna, 796 F.2d 724, 738-39 (5th Cir. 1986) (noting traveler had no expectation that documents would be kept private from custom agents); cf. \textit{Arnold}, 454 F. Supp. 2d at 1002-03 (declining to hold distinction between searches of persons and property at border).

\textsuperscript{169} See Flores-Montano, 541 U.S. at 152 (distinguishing border searches of person and searches of vehicles); \textit{Arnold}, 533 F.3d at 1008 ("The Supreme Court’s analysis was not based on the unique characteristics of vehicles with respect to
a car, do not change with the varying subjective beliefs of its owner, unless it is a subjective belief of privacy that society is ready to accept as reasonable.\textsuperscript{170} Rather, concrete distinctions between border searches of persons and property must be upheld to provide a practical guide to CBP agents.\textsuperscript{171} Arnold’s argument that laptop searches are akin to searches of the person, and therefore should be analyzed as such, would sink CBP agents into a legal quagmire without a clear set of guidelines of how to inspect, investigate, and search international travelers.\textsuperscript{172} Moreover, the district court’s adoption of Arnold’s assertion that laptops should not be characterized as ordinary objects flies in the face of recent decisions.\textsuperscript{173}

Ultimately, a laptop is no more than a digital version of previously invented ideas or objects.\textsuperscript{174} For example, like traditional photo albums, other property, but was based on the fact that a vehicle, as a piece of property, simply does not implicate the same ‘dignity and privacy’ concerns as ‘highly intrusive searches of the person.’” (quoting Flores-Montano, 541 U.S. at 152); Gilmore, supra note 49, at 770-71 ("[D]istinguishing the search of objects from that of people is critical to expand CBP’s authority to examine laptop computers."). But see Harrell, supra note 38, at 227-28 (arguing that nature of object should be determinative in border search analysis); Nelson, supra note 17, at 137, 141-42 (arguing that laptops, though objects, implicate dignity and privacy interests on par with physical intrusions).

170. See United States v. Ross, 456 U.S. 798, 822 (1982) (maintaining that traveler with toothbrush in paper bag has same protections from intrusion as executive with locked attaché). Thus, a search pursuant to the border search doctrine would treat the paper bag and locked attaché equally despite the executive’s greater desire to conceal materials from the public view; both are subject to search absent particularized suspicion. See id. at 822-23 (suggesting Fourth Amendment protects every container that conceals contents from plain view from searches, but protection varies in different settings, such as at international borders where search can be conducted at random).

171. See generally United States v. Ickes, 393 F.3d 501, 506-07 (4th Cir. 2005) (suggesting creation of complicated First Amendment exception for border searches would “divert customs officials from their charge of policing our borders and protecting our country”). Further, the Ickes court rejected Ickes’s argument that without a First Amendment exception, all laptops would be subject to search because customs agents do not have the resources to conduct such searches of every laptop. See id. (refusing to create First Amendment exception); see also Government’s Opening Brief, supra note 109, at *46-51 (arguing laptops searches without particularized suspicion is necessary to protect national security interests).

172. See Ickes, 393 F.3d at 506 (recognizing that creating a heightened standard to conduct border search would “create a sanctuary at the border . . . [that] would undermine the compelling reasons that lie at the very heart of the border search doctrine”); United States v. Cortez-Rocha, 394 F.3d 1115, 1120 (9th Cir. 2005) (fearing that reasonable suspicion requirement at border to search inside spare tire would “remove the significant deterrent effect of suspicionless searches” and could entice criminals to use spare tire to smuggle contraband).

173. See Flores-Montano, 541 U.S. at 152-53 (avoiding balancing tests for border searches of property in light of heightened government interest); Ickes, 393 F.3d at 506 (recognizing Flores-Montano Court’s refusal to encumber border searches of property with additional intrusion tests and not convey special status to laptops).

174. See United State v. Arnold, 454 F. Supp. 2d 999, 1003-04 (C.D. Cal. 2006) (listing various kinds of information that could be on laptop which already exist in non-digital format: diaries, letters, photos, and financial records), rev’d, 593 F.3d
laptops may contain personal pictures. Like date books, laptops may contain letters and calendars with scheduled appointments. Like handwritten diaries, laptops may contain a record of one's thoughts and feelings. Finally, laptops contain web browsing histories of their users; this browsing information could often be discovered in print. For example, a person may have a copy of The New York Times in his or her briefcase or carry receipts from retail stores. One commentator has contended that a laptop presents new and novel information; however, this argument is misleading. A laptop is simply a new medium through which old ideas, information, habits, and practices are used and recorded.

Even if, as some commentators argue, a laptop warrants a greater privacy interest than other objects, that argument belies the fact it is the individual user who makes the laptop personal. One commentator notes that a laptop, even when purchased by an employer, may become very personal and private, but only after the user places his or her photos, letters, or other items on it.

1003 (9th Cir. 2008); Coletta, supra note 35, at 988-89 (conceding laptops are different only with regard to quantity of information that can be stored on hard drive); Gilmore, supra note 49, at 781 (noting laptops are unique because of quantity and nature of information they contain). But see Thomas K. Clancy, The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer, 75 Miss. L.J. 193, 204 (2005) (suggesting quantity and varied types of material make it "fundamentally different form of writing").

175. See Arnold, 454 F. Supp. 2d at 1003-04 (listing various kinds of information that could be on laptop).

176. See id. (listing items contained on laptop).

177. See id. (listing items stored on laptop).

178. See id. (same).

179. See id. (same).

180. See, e.g., Alzahabi, supra note 38, at 178-79 (suggesting combination of quantity and personal information on a laptop creates an object with privacy interests). "Before the advent of the laptop computer, it is unlikely that one would travel carrying all of his or her intimate letters, confidential financial information, and all of his or her family albums." Id. at 179.

181. See Arnold, 454 F. Supp. 2d at 1003-04 (illustrating various types of personal information on laptops including diaries, financial records, photos, among others). For further discussion of laptop usage, see supra note 165 and accompanying text.

182. See Alzahabi, supra note 38, at 179-80 (suggesting difficulty of leaving sensitive information off computer when traveling). The commentator argues:

Thus, while papers are sometimes searched during a routine border search, a laptop search is very different. One can easily control which papers he or she carries in a purse or pocket, but it is not possible to do the same when it comes to a laptop, which may contain an immense amount of information.

notes, and other thoughts on the hard drive. While many travelers' laptops carry memorialized thoughts, the operator voluntarily places such information on the laptop. Therefore, international travelers knowingly place information on their laptops that could be searched by border agents. Moreover, travelers with laptops freely cross international borders; all international travelers should be on notice that some searches may be conducted by CBP agents. Accordingly, in the border search context, courts should analyze a laptop as an object, subject only to the two exceptions laid out by the Flores-Montano Court, i.e., those searches that are destructive of and particularly offensive to property.

Additionally, the amount of private information contained on or in the property subject to search is irrelevant to the border search exception. Since the nation's founding, border agents have had the author-

183. See Alzahabi, supra note 38, at 179-80 (describing process by which person may obtain impersonal laptop and create by usage private storage container of memorialized thoughts); see also Arnold, 454 F. Supp. 2d at 1003-04 (implying information stored on laptops are voluntarily placed on hard drive). The Arnold court listed information that could be contained on a laptop and implicitly acknowledged that the user controls what is placed on the hard drive. See Arnold, 454 F. Supp. 2d at 1003-04 (listing various information stored on laptops). The court 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.

184. See Gilmore, supra note 49, at 784 (addressing laptop's ability to store information intentionally gathered by user). "In addition to information intentionally downloaded or entered onto the device by the user, many operating systems and programs store information about how and when the device has been used, including information about the user's interest, habits, and online activity—all of this unknown to the user himself." Id. (emphasis added).

185. See id. (noting computer programs store information on user's habits).


188. See Robbins v. California, 453 U.S. 420, 425-26 (1981) (declining to create rule whereby personal nature of object affords object greater or lesser Fourth Amendment protection), overruled on other grounds, United States v. Ross, 456 U.S. 798 (1982); Arnold, 533 F.3d at 1010 (finding storage capacity of laptop does not make manner of border search particularly offensive); Gilmore, supra note 49, at
ity to inspect and search large sailing vessels from foreign ports containing hundreds, perhaps thousands, of objects.¹⁸⁹ Recent border search doctrine jurisprudence does not address the amount of information subject to search as a particularly key focus for a border search analysis.¹⁹⁰ As the Ninth Circuit aptly opined, "the defendant] has failed to distinguish how the search of his laptop and its electronic contents is logically any different from the suspicionless searches of travelers' luggage."¹⁹¹ Instead, the proper focus of a border search analysis should be the dignity and privacy concerns implicated by the search, and although such concerns justify requiring particularized suspicion in order to conduct searches of persons, the same justification does not extend to searches of property.¹⁹²

V. IMPACT AND FUTURE STEPS: PROTECTING OUR ELECTRONIC THOUGHTS AND OUR SAFETY

While commentators and courts continue to address the proper analytical framework, the ultimate issue of how a court characterizes a laptop will generally determine the result in a given case.¹⁹³ Despite the cutting edge features and mobility that a laptop offers its users, substantial national security interests are prevalent at the international border.¹⁹⁴ Thus, although some protections are necessary to alleviate concerns regarding loss of privacy, Americans should expect the government to conduct border searches in pursuit of enforcement of federal law.¹⁹⁵

783-84 (concluding large quantity of information that could be stored on laptops provides additional reason to uphold border search doctrine).

¹⁸⁹. See United States v. Villamonte-Marquez, 462 U.S. 579, 592 (1983) ("In a lineal ancestor to the statute at issue here the First Congress clearly authorized the suspicionless boarding of vessels, reflecting its view that such boardings are not contrary to the Fourth Amendment."). See generally Ramsey, 431 U.S. at 618-19 (describing custom officials' powers before and after Fourth Amendment). For further discussion of the first customs statute, see supra note 34 and accompanying text.

¹⁹⁰. See, e.g., Arnold, 533 F.3d at 1009 (declining to attribute quantity of information possibly stored on laptop as determinative of whether manner of border search is particularly offensive).

¹⁹¹. Id. at 1009 (failing to find distinction between searches of laptops and other property at border).

¹⁹². See, e.g., Flores-Montano, 541 U.S. at 152 (holding that dignity and privacy interests of person are reasons for some level of suspicion for border searches of persons and should not be extended to property).

¹⁹³. See Coletta, supra note 35, at 999-1000 (discussing various characterizations of laptops courts may adopt such as akin to invasive search of person, search of wallet, or something in between).

¹⁹⁴. See Flores Montano, 541 U.S. at 152 (declaring "[g]overnment's interest in preventing the entry of unwanted person and effects is at its zenith at the international border"); Gilmore, supra note 49 at 787-88 (discussing use of electronic equipment such as laptops by Islamic terrorists in attack of United States).

¹⁹⁵. See Policy Regarding Border Search of Information, supra note 4 (listing procedures for border search). For further discussion of remedial measures taken by the government to protect privacy, see infra note 207 and accompanying text.
In addition to the impracticalities that would occur if laptops were given a novel and unique status unlike other objects crossing the international border, strong national security interests are another reason why particularized suspicion for searches of laptops should not be required.\textsuperscript{196} Child pornography and terroristic plans are a serious threat to the nation.\textsuperscript{197} Over 500 million people enter or exit the United States every year.\textsuperscript{198} A small percentage of those entering the United States will bring contraband and other documents and information on their laptops in attempts to harm citizens.\textsuperscript{199} Given the strong historical roots of the border search doctrine and the need to prevent laptops containing dangerous materials from entering the United States, the ability to search without particularized suspicion is paramount.\textsuperscript{200}

The district court in \textit{Arnold} reasoned that the widespread use of the internet makes it unlikely such contraband would be carried across the border.\textsuperscript{201} The court implied that because the contraband could be sent

\textsuperscript{196} See \textit{Flores-Montano}, 541 U.S. at 152-53 (recognizing government’s interest to protect nation from unwanted persons and property is at its “zenith” at border); United States v. Ickes, 393 F.3d 501, 506 (4th Cir. 2005) (noting national security interests at border to prevent terrorist communication and documents from entering nation); Gilmore, \textit{supra} note 49, at 787-88 (concluding that justification of reasonable suspicion would severely hamper policing nation’s border putting citizens at risk from terrorist acts and damaging effects of illegal drug use). \textit{But see} Alzahabi, \textit{supra} note 38, at 186 (“The government also has a very strong interest in preventing terrorism; yet, this must be kept within the confines of a reasonable suspicion to protect the majority of travelers, most of whom are innocent of any terrorist activities.”). The commentator argues the government interest at the border does not exceed the traveler’s interest in a laptop because the material on the laptop could enter the United States—via the internet—regardless of the traveler crossing an international border. See \textit{id.} (noting criminal uses of internet should increase expectation of privacy at international border).


\textsuperscript{199} See, \textit{e.g.}, Alzahabi, \textit{supra} note 38, at 186 (stating that clearly not everyone crossing border carries contraband).

\textsuperscript{200} See, \textit{e.g.}, United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (holding that government has strong interest to protect nation from contraband since its inception).

\textsuperscript{201} See United States v. Arnold, 454 F. Supp. 2d 999, 1007 (C.D. Cal. 2006) (discussing how contraband can enter United States via internet, which weakens argument against requiring reasonable suspicion), \textit{rev’d}, 538 F.3d 1003 (9th Cir. 2008).
via the internet, the government's interest at the border is lessened.\textsuperscript{202} In reality, border agents have discovered child pornography on laptops even though the alleged offenders could have sent the files via the internet.\textsuperscript{203} In recognition of this continuing threat, CBP agents should be permitted to search without particularized suspicion subject to the judicially established exceptions for destructive and particularly offensive searches.\textsuperscript{204}

But where laptops will be searched without particularized suspicion, some safeguards are necessary to protect privileged information and trade secrets.\textsuperscript{205} In particular, the protection of the attorney-client privilege is crucial to providing an effective and candid attorney-client relationship.\textsuperscript{206} Thus, when documents are searched and copied, the government has promulgated regulations to ensure the destruction of those documents when an active investigation has ended.\textsuperscript{207}

Despite this protection by the government, business travelers may be forced to take additional steps to ensure confidentiality of business and

\begin{itemize}
\item \textsuperscript{202} See id. ("In our information age, such contraband can flow with the click of a mouse through the Internet."); Alzahabi, supra note 38, at 175 (concluding government interest at border is decreased by possibility of sending information electronically to inside United States).
\item \textsuperscript{204} See Arnold, 553 F.3d at 1010 (holding border search was lawful despite lack of reasonable suspicion); Gilmore, supra note 49, at 787-88 (concluding border agents should be permitted to search contents of laptops without particularized suspicion); Policy Regarding Border Search of Information, supra note 4 (declaring that agents are permitted to search persons and property without individualized suspicion subject to certain limitations).
\item \textsuperscript{205} See Gilmore, supra note 49, at 797 (discussing CBP protections of traveler's privacy through policy of destroying any and all copies of documents where prosecution is not appropriate).
\item \textsuperscript{206} See, e.g., Model Rules of Prof'L Conduct R. 1.6 (2008) (addressing attorney's ethical obligation to keep communications confidential). Justice Rehnquist stated:
\begin{quote}
The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.
\end{quote}
\item \textsuperscript{207} See Policy Regarding Border Search of Information, supra note 4. ("[I]f after reviewing the information there is not probable cause to seize it, any copies of the information must be destroyed."). But see Harrell, supra note 38, at 231 (arguing traveler's should password protect files and hope they are not selected for suspicionless search of laptop). For examples of promulgated regulations, see supra note 61.
\end{itemize}
trade secrets. Specifi cally, one commentator suggests that if it is impossible to allow a CBP agent to view the information, then the information should be encrypted and sent via the internet to another computer. Such action, however, may raise suspicion, thereby subjecting the traveler to a more intrusive search. At least one court has also noted that sending files to a remote computer still leaves fragments of the document on the hard drive, which the CBP agents could detect. CBP agents, however, are overburdened and the likelihood that an agent would want to search deleted files is remote and would likely only be conducted after obtaining a search warrant. Accordingly, business travelers should prepare for the possibility of a search and take steps to ensure conf dential or secret information will not be on the hard drive.

Notwithstanding the efforts of the judiciary, Congress is considering af rmative action toward requiring border searches of laptops to be justifi ed by reasonable suspicion. Specifi cally, Senator Russell Feingold proposed a bill that limits CBP’s authority to search all electronic equipment unless there is reasonable suspicion. In response, CBP asserted in a statement to the United States Senate that the agency needs to conduct border searches of laptops in order to enforce over 600 federal laws.

208. See Harrell, supra note 38, at 232 (discussing possibility that border search may disclose trade secrets); see also Baker, supra note 182, at 1 (addressing disclosure and prevention of business secrets during border search).

209. See Baker, supra note 182, at 4 (suggesting travelers use new laptops when traveling and access needed documents via internet).

210. See Harrell, supra note 38, at 231 (cautioning that password protecting documents on laptop may invite additional suspicion of traveler).

211. See United States v. Romm, 455 F.3d 990, 995 (9th Cir. 2006) (describing recovery of allegedly deleted files of child pornography with advanced forensic techniques at government’s disposal).

212. See United States v. Ickes, 393 F.3d 501, 507 (4th Cir. 2005) (discussing practical concerns of border searches of laptops by CBP agents); Gilmore, supra note 49, at 793-94 (discussing strains reasonable suspicion standard would create on overtaxed CBP agents). As a practical matter, computer searches are most likely to occur where—as here—the traveler’s conduct or the presence of other items in his possession suggest the need to search further.” Ickes, 393 F.3d at 507.


216. See Laptop Searches and Other Violations of Privacy Faced by Americans Returning from Overseas Travel: Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary 110th Cong. (2008) (statement of
The agency noted that its agents are professionals and often will not conduct laptop searches unless facts and circumstances create individualized suspicion—a standard not required by law. Finally, the agency remarked that laptop searches have proven helpful, protected American citizens, and resulted in many convictions.

Border agents should continue to conduct suspicionless searches of laptops at the border. National security interests remain high at our borders to protect U.S. citizens and residents. If Americans are willing to expose their dirty socks at the airport, they should prepare for searches of laptops without particularized suspicion.

Erick Lucadamo

Jayson P. Ahern, Deputy Comm'r, U.S. Customs and Border Prot.), available at http://www.cbp.gov/xp/cgov/newsroom/congressional_test/laptop_searches.xml (stating that CBP is charged with enforcement of over 600 federal laws and with sovereign integrity of United States).

217. See id. (describing precautions taken to limit scope of laptop searches while continuing to fulfill agency's mission).

218. See id. (providing examples of convictions resulting from border search of laptops).

219. See, e.g., Gilmore, supra note 49, at 797 ("The border search exception to the Fourth Amendment must be preserved in our increasingly digitized world.").

220. See, e.g., United States v. Flores-Montano, 541 U.S. 149, 152 (stating that government has strong interest to enforce federal law at international border). For further discussion of the government's interest at the international border, see supra notes 32-85 and accompanying text (discussing nation's strong interest in protecting international borders).
