MESSAGE FROM THE CHAIR

Dear Business and Corporate Litigation Committee Members:

I hope that everyone has had a great summer with some time away from the office to recharge the batteries. With Fall fast approaching, we look forward to the Section’s Annual Meeting in our Nation’s Capitol, Washington DC, September 11-13, 2019.

The BCLC will present a top-notch lineup of valuable programming and substantive Subcommittee meetings. Our CLE programs include:

- Sept. 12, Thursday 10:30 AM - Noon – “When Good Deals Go Bad: Ethical Issues Raised by Failed Transactions”
- Sept. 12, Thursday 2:00 PM - 4:00 PM - “The Supreme Court in Review: Cases Affecting Business from the October 2018 Term”
- Sept. 13, Friday 8:30 AM - 10:00 AM – “Streamlining Business Cases for Trial: A View from the Bench”
- Sept. 13, Friday 11:00 AM - 12:30 PM – “Sleeping Better at Night: A Guide to Preventing M&A Litigation”

The BCLC's ever popular joint dinner with the Judges Initiative, Dispute Resolution Committee, and Sports Law Committee will be held on Thursday night at the beautiful law offices of Latham & Watkins, located at 555 11th Street NW. THANK YOU TO THE BCLC DINNER SPONSORS:

- **Summa Cum Laude:**
  - Ankura Consulting Group, LLC
- **Magna Cum Laude:**
  - DLA Piper
  - Nelson Mullins
- **Cum Laude:**
  - Hon. Gail Andler (Ret.) | Arbitrator/Mediator/Special Master
  - McAlpine PC
  - Hon. Donald F. Parsons Jr. and Morris, Nichols, Arsht & Tunnell LLP
- **Juris Doctorate:**
  - Hon. Stephen Schuster
Make sure to purchase your ticket as soon as possible – *THIS EVENT USUALLY SELLS OUT!*

The BCLC meeting – open to all members – will be held on Friday from 4:00 PM-5:00 PM. Multiple BCLC Subcommittee meetings are scheduled, including some with substantive speakers/presentations. All BCLC members are welcome to attend any of the Subcommittee meetings, regardless of whether you are actively involved.

*Welcome to the new Section Business Advisors* – **Hon. Jill Pryor**, Eleventh Circuit Court of Appeals, and **Hon. Peter Reyes**, Minnesota Court of Appeals.

*We are pleased to announce the 2019-2021 Fellows assigned to the BCLC* – **Rachel Blunk**, Forrest Firm, Greensboro, North Carolina and **Jomaire Crawford**, Quinn Emanuel Urquhart & Sullivan, New York City.

This will be my last column as the Chair of the BCLC. I’ve truly enjoyed my three years serving as Chair and meeting/working with so many amazing judges, lawyers and others dedicated to bettering our profession and the practice of law through the Business Law Section. There isn’t enough space to thank everyone who has provided mentorship and valuable assistance/support, but here’s my short list: Past BCLC Chairs **Jim Holzman** (my mentor when I was a Fellow first assigned to the BCLC in 1998), **Mitch Bach, Hon. Elizabeth Stong, Pete Walsh, Bill Johnston and Pat Clendenen**; BCLC Vice Chairs **Stuart Riback** (incoming Chair), **Hon. Gail Andler**, and **Hon. Mac McCoy**; long time BCLC veterans **Paul Masinter, Bret Cohen, Jay Dubow, Melissa Visconti, Robert Witte**; Annual Review Chair **Brad Newman**; Newsletter Editors **Anne Steadman and Sarah Ennis**; the numerous excellent Judges who are active in the BCLC; and, the Subcommittee Chairs/Vice Chairs. Finally, I express sincere gratitude for the tremendous support from the ABA Staff, particularly **Sue Tobias, Leslie Archer, Gina Dickenson, Katie Koszyk, Nicole Nikodem, Kate Chopp, Julia Passamani, Graham Hunt and Mark Page**. It’s been a wonderful run – Thank You to all.

**FUTURE SECTION MEETING DATES:**

**2020 Spring Meeting**
March 26-28
Boston Marriott Copley

**2020 Annual Meeting**
Sept. 10-12
Chicago, Sheraton

*If you’re passing through Phoenix, please let me know and we can grab an iced tea. Enjoy the last remnants of the Summer!*

Best,
Heidi

**Heidi McNeil Staudenmaier - Chair**
Business and Corporate Litigation Committee
American Bar Association, Business Law Section

**Contact:**

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1. Pennsylvania Takes Over Online Health Insurance Exchange
2. How the Global Crisis Has Shaped NY Law Article
3. What Matters More: Preserving a Fundamental Right to Privacy or Tampering With Another's Dignity through Searches Because of "Reasonable Suspicion?"
4. Impressions on Quality of Lawyering: A Students Perspective
5. Camino Reflections
Communications and Technology Subcommittee

Dear Subcommittee Leaders:

We hope you all have been using and enjoying the new Business and Corporate Litigation Committee website and the new ABA Connect website. For those of you have not seen them yet, the Business and Corporate Litigation Committee site is where you go to join a new subcommittee, view recent Newsletters, or find other important Materials and Resources. The website is: https://www.americanbar.org/groups/business_law/committees/bcl/

The ABA Connect website has a forum to post messages to other BCLC members, a place for photos, and a library area for each subcommittee. Here are some suggestions for your libraries:

- Add links to articles from Business Law Today or The Business Lawyer relevant to your Subcommittee, even if not produced by your Subcommittee;
  - If you would like to add links to other articles, please get permission from the original publisher.
- For those of you attending the annual meeting in D.C., make sure you take a few pictures from any meetings or presentations your subcommittee has;
  - Don’t forget to provide captions for smaller group photos identifying names and roles in the committee or subcommittee.
- Add links to program audio or materials from meetings or presentations; and
- Add some narrative on what your Subcommittee is doing or what your Subcommittee focuses on.

It is easy to post things on ABA Connect, but if you are not comfortable doing it yourself you can send text, links, or pictures to Graham Hunt (graham.hunt@americanbar.org) or Laura Readinger (lreadinger@morrisjames.com), and we will make sure they get posted.

Subcommittee to Implement the ABA Model Principles on Labor Trafficking and Child Labor and Working Group to Draft Human Rights Protections in Supply Contracts

E. Christopher Johnson, Jr. (echris39@gmail.com)

David Snyder, chair (dsnyder@wcl.american.edu)

The Corporate Social Responsibility Law Committee will sponsor (and the Corporate Compliance, Corporate Counsel, Corporate Governance, International Business Law, International Coordinating, Intellectual Property, Professional Responsibility and UCC Committees will co-sponsor) a CLE Panel Discussion entitled BUSINESS AND ETHICAL CHALLENGES: HUMAN RIGHTS REQUIREMENTS, DUE DILIGENCE, REMEDIATION AND BRAND PROTECTION during the Business Law Section’s Annual Meeting on Saturday, September 14, 2019 between 8 AM and 10 AM. The Panelists include Shawn MacDonald, CEO of Verite’, Alice A. Kipel, Executive Director of Regulations and Rulings at U.S. Customs and Border Protection, Stephen A. Pike, Partner at Gowling Wlg, Prof. David V. Snyder of American University Washington College of Law, and Emily B. Holland, Senior Associate at White & Case LLP, with E. Christopher Johnson, Jr., former General Counsel of GM-North America and Co-Founder of Center for Justice, Rights & Dignity, serving as the moderator.

This Panel Discussion will (1) provide a brief summary of the cycle of human rights violations in supply chains and summarize the growth of legislative and investor focus on supply chain human rights issues; (2) present feedback
and suggested revisions to the 2018 Report and Model Contract Clauses for International Supply Contracts; (3) provide practical supplier contracting and due diligence recommendations, tools and risk assessment procedures to avoid human rights abuses; and (4) address attorney ethical obligations and the attorney-client privilege in supply chains as well as in merger and acquisition transactions. Informed by the Panelists’ knowledge of global policies and procedures, advice will be provided as to how to develop an enterprise-wide understanding of, and commitment to, human rights (health and safety requirements, anti-forced labor, child labor and indentured labor constraints) while optimizing market-specific approaches. In addition, the Panel will discuss tools for developing meaningful reporting and diligence strategies to complement existing compliance systems and anticipate regulatory and litigation trends. Relevant portions of the Reasonable Care publication from U.S. Customs and Border Protection will be reviewed, and what CPB auditors look for in trying to determine whether imported goods are tainted by convict, forced or indentured labor along with practical steps companies can take in any forced labor inquiry will be addressed. The Panel will also discuss how a lawyer should advise a client given the ethical, business, social and moral issues that are implicated along with the growing legal requirements with particular reference to ABA Model Rules 1.6(b)(1), 1.13(c), 1.16(b)(4) and 2.1.

Later that same day, Noon to 1 PM, there will be a joint meeting of the Working Group to Draft Human Rights Protections in International Supply Contracts and the Subcommittee to Implement the ABA Model Principles on Labor Trafficking and Child Labor. These are ongoing projects and anyone interested in working to improve the initial version of the Model Contract Clauses and other efforts to implement the ABA Model Principles is welcome.
In March of this year, the BCLC presented four programs at the Spring Meeting in Vancouver, B.C. on March 28-30, 2019.

On Thursday morning, the BCLC presented a two-hour program, “Taming the Gig Economy: Freelance Isn’t Free.” The program examined legal and business issues arising from the disintermediation of business and the rise of peer-to-peer businesses, with a focus on independent contractor and regulatory issues. Judge Randa Trapp of San Diego Superior Court and Meg Milroy of Verizon chaired the program. Barbara Johnson of BLJohnson Law PLLC in Washington DC moderated. The panel was comprised of Jennifer Baldocchi of Paul Hastings LLP in Los Angeles, David Woolias of Harris & Co. LLP in Vancouver and Richard Rosenblatt of Morgan, Lewis & Bockius LLP in Princeton, NJ.

On Thursday afternoon, the Committee presented its Annual Review of Developments in Business and Corporate Litigation, for which over 200 committee members have participated in presenting written materials published in book form. Bradford Newman of Paul Hastings in Palo Alto and Judge Elihu Berle of California Superior Court, Los Angeles County were co-chairs. This year’s program focused on four high-profile areas of concern to business litigators: trial practice, international law, business divorce and criminal and enforcement litigation.

The trial practice section featured Chelsea Mikula Tomko of Tucker Ellis LLP in Cleveland, Giovanna Ferrari of Seyfarth Shaw in San Francisco and Judge Berle. International law was covered by Stephanie Lapierre of Stikeman Elliott in Montreal and Steven Barber of Steptoe & Johnson in Washington DC. Peter Ladig of Bayard LLP in
Wilmington, Delaware, Vanessa Tirandentes of Gould & Ratner LLP in Chicago and Justice Timothy Driscoll of New York Supreme Court, Nassau County, will discuss business divorce issues. Finally, James Melendres of Snell & Wilmer LLP in Phoenix, Thomas O’Brien of Brown George Ross LLP in Los Angeles and Judge Christopher Yates of Grand Rapids, Michigan addressed criminal and enforcement issues.

Emily Burton of Young, Conaway, Stargatt & Taylor LLP in Wilmington, Delaware, and Stephanie Lapierre of Stikeman Elliott LLP in Montreal co-chaired “Comparing and Contrasting the Role of and Standards for Independent Directors in M&A,” which was presented on Friday morning. The panel examined the critical roles that independent directors have in M&A and the ways that US and Canada laws differ, including: (1) standards for director independence; (2) independent directors’ roles when the company is in play; and (3) the effects of independent directors on judicial review of transactions. Stephanie Lapierre moderated a panel consisting of Britta Wagner of the British Columbia Investment Management Corporation; Hon. Donald Parsons (ret.), formerly Vice Chancellor of the Delaware Court of Chancery and now at Morris Nichols Arsht & Tunnell in Wilmington; Arthur Kohn of Cleary Gottlieb in New York; and Emily Burton.

Rounding out the program, BCLC presented on Friday afternoon “Law & Order: Discovery Victims Unit,” a two-hour dramatization and interactive program presenting a simulated discovery dispute that included points of view from attorneys and clients as well as rulings from judges. The first hour focused on graduated levels of conduct warranting sanctions from the Rule 26(f) conference through the discovery motions practice, seeking to educate the audience as to what conduct is sanctionable versus conduct that may be obnoxious but falls short of being sanctionable. The second hour focused on how sanctionable discovery conduct concerning ESI is addressed under the current version of Fed. R. Civ. P. 37(e)(1)-(2) in the pretrial sanctions hearing and during the mock sidebar at trial. Robert Witte of Strasburger Price in Dallas and Judge Christopher Wilkes of the West Virginia 23rd Circuit Court co-chaired the program. Robert Witte moderated. The panelists included business court judges from all over the country: Judge James Gale of the North Carolina Business Court; Judge Heather Welch of Marion Superior Court in Indianapolis; Judge Louis Bledsoe of the North Carolina Business Court; Judge Christopher Yates of Kent County Circuit Court in Grand Rapids, Michigan; Judge Nancy Alf of the 8th Judicial District Court in Las Vegas, Nevada; Judge Joseph C. Iannazzione of Gwinnet County Superior Court in Lawrenceville, Georgia; Judge Stephen Schuster of Cobb County Superior Court in Marietta, Georgia; Judge Randa Trapp of California Superior Court in San Diego; and Justice Timothy Driscoll of New York Supreme Court in Mineola, New York.

BCLC also cosponsored three programs that other committees are presenting. “Drafting ADR Clauses for Financial M&A and Joint Venture Disputes” was presented by the Dispute Resolution Committee on Thursday. “Advising Boards & management: Ethical Rules & Professional Liability Risks of Corporate Counsel” was presented by the Director & Officer Liability Committee, also on Thursday. On Thursday afternoon the Young Lawyers Committee presented “Tips from the Trial Bench.” The Sports Law Committee also presented “Sexual Abuse and Bullying In Sport: Balancing The Rights Of Accused And Accusers” on Saturday morning.
Two outstanding honorees were selected for the WBCA Reception in Vancouver held immediately before the BCLC/Judges Initiative dinner on March 28, 2019 at the beautiful and historic pavilion at Stanley Park.

The 2019 Honorees:

Anne Giardini

An executive, lawyer, director and writer, Anne Giardini was president of Weyerhaeuser Company Limited after serving as Weyerhaeuser's General Counsel. A long-time leader within Canada’s resource industry, she has served on many related boards including B.C.’s Council of Forest Industries, the Alberta Forest Products Association, the Forest Products Association of Canada, and Sustainable Forestry Initiative, and, as Chair, the Greater Vancouver Board of Trade. She currently serves on the boards of CMHC, TransLink, HydroOne, BC Achievement, and WWF-Canada among others and is an honorary patron of the Seaforth Highlanders of Canada.

Giardini is the author of two novels and co-editor of a collection of writing advice. She has been Chair of the Vancouver Writers Festival and a board member of the Writers Trust of Canada.

In 2009, Giardini was appointed Queen’s Council. She received the Robert V.A. Jones Award in 2011 recognizing leadership in corporate counsel practice, and was named one of Canada's 25 most influential lawyers. Giardini was honoured with a Queen Elizabeth II Diamond Jubilee Medal and a Lexpert Zenith Award in 2013 and served as a member of the Federal Advisory Council for Promoting Women on Boards. In 2014 and again in 2016, she was recognized by WXN as one of Canada's 100 most powerful women. In 2015 she received a Western Canada General Counsel Lifetime Achievement Award. In 2016, Giardini was appointed Officer of the Order of Canada for her contributions to the forestry sector, higher education and the literary community. In 2018, she was recognized with a Business in Vancouver Influential Women in Business Award and was appointed to the Order of British Columbia.

Giardini holds a B.A. in Economics from SFU, LL.B. from UBC, and LL.M. from Cambridge University (Trinity Hall).
Anne Stewart

Anne Stewart, Partner Emeritus with Blake, Cassels & Graydon LLP, is recognized as one of Canada’s best business lawyers and a pioneer in the traditionally male-dominated fields of mergers and acquisitions, corporate structuring and infrastructure and finance. As a Senior Partner for more than 25 years, Anne pioneered the legal framework for infrastructure projects across Canada, guiding her clients through some of the largest transactions in the industry. Anne’s influence on the business landscape over her distinguished career is matched only by her impact on the careers of the many women she has mentored and championed along the way. Always looking to lift those up around her, Anne also co-founded programs that help women return to work and transition to fulfilling retirement.

WBCA Reception in Vancouver, B.C.
Outgoing BCLC Chair Heidi McNeil Staudenmaier and incoming BCLC Chair Stuart M Riback
BCLC to Present Five Programs at the 2019 Annual Meeting

Following the successful programs in Vancouver, the BCLC is looking forward to the 2019 Annual Meeting in Washington, D.C. The Committee expects to present another set of five engaging and compelling programs at the upcoming Annual Meeting, which will take place on September 12-14, 2019.

“Alternative Entities Top Ten: Liability and Governance Issues for Deal Attorneys and Litigators – Interactive!” will be chaired by Judge Meghan A. Adams of the Delaware Superior Court and will take place on Thursday, September 12 from 8:30 AM – 10 AM.


Thursday afternoon from 2:00 PM - 4:00 PM, “The Supreme Court in Review: Cases Affecting Business from the October 2018 Term” will be co-chaired by Chief Justice Myron T. Steel of the Delaware Supreme Court and Todd Lundell of Snell & Wilmer L.L.P. in Costa Mesa, California.

On Friday, from 8:30 AM - 10:00 AM, “Streamlining Business Cases for Trial: A View from the Bench” will be co-chaired by Vice Chancellor Joseph R. Slights of the Delaware Court of Chancery, Chief Justice James L. Gale of the North Carolina Business Court, and Lewis H. Lazarus of Morris James LLP in Wilmington, Delaware.

Rounding out the programs, the BCLC will present “Sleeping Better at Night: A Guide to Preventing M&A Litigation” will take place Friday from 11:00 AM - 12:30 PM and will be co-chaired by Sarah A. Tomkowiak of Latham & Watkins LLP in Washington, D.C. and Edward A. Delbert of Arnold & Porter Kaye Scholer LLP in San Francisco, California.

The BCLC will also be co-sponsoring five programs that other committees are presenting:

- “How the Global Financial Crisis Shaped New York Law” will be presented by the Securitization and Structured Finance Committee on Thursday from 8:30 AM – 10 AM.
- “The Tangled Intersection of Mass Torts, Bankruptcy and Regulatory Law: What Can Be Learned From PG&E?” will be presented by the Business Bankruptcy Committee on Friday 4:00 PM – 5:30 PM.
- “Prepping Clients and Crystalizing Issues for Resolution of Corporate Divorce & Complex Ownership Disputes through Mediation and Arbitration” will be presented by the Dispute Resolution Committee on Saturday 8:30 AM - 10 AM.
- “Making Difficult & Distressed Corporate Divorce & Complex Ownership Disputes Resolvable through Mediation and Arbitration, Inside and Outside of Court Litigation: A Case Study / Mock-Dispute Resolution” will be presented by the Dispute Resolution Committee on Saturday 10:30 AM – Noon.
- “Navigating the Conflicting Federal and State Laws for Doing Business With Cannabis Companies” will be presented by the Business Crimes & Investigation Committee on Saturday 10:30 AM – Noon.

Looking forward to seeing you in D.C.!
The Business Lawyer Invites Submissions

The Business Lawyer Editorial Board invites Business Law Section committee, subcommittee, and task force submissions as well as topical, scholarly submissions, including case law analyses and commentary on developing trends, that may be of interest to business lawyers generally and other members of the Business Law Section. An editorial decision is made on lead articles typically within two to four weeks after submission, with detailed substantive editing thereafter. We are looking for interesting, well-researched submissions on areas of topical interest. Lead time with full peer review and professional staff editing is approximately four to six months.

Articles (and questions concerning submissions) should be submitted to Diane Babal, Production Manager, at diane.babal@americanbar.org.

Get Noticed For All The Right Reasons On Business Law Today

Business Law Today (BLT) is the fastest and easiest way for Section members to get noticed by the business audiences that matter the most.

Article authors are featured on their very own author page, allowing you to expand your professional digital footprint beyond your employer’s website and traditional social media. Whether you are a newer lawyer or an existing influencer and thought leader, we encourage you to consider submitting any of the following content types to the BLT Editorial Board for consideration: Month-In-Brief (a 1-paragraph summary concerning recent legal developments within the past 30 days); and Short Articles (750 words or less on a timely business law topic without footnotes or extensive citations).

To get started, email your pitch or original manuscript to Hon. Mac R. McCoy (mac_mccoy@flmd.uscourts.gov) (Executive Editor) and Sara E. Bussiere (Sara.Bussiere@cwt.com) (Managing Editor).
Check out the recent activities and achievements of our BCLC members!

**Judge Jerome Abrams**, State of Minnesota, District Court Judge, was recently named by the American Board of Trial Advocates-Minnesota Chapter “Trial Judge of the Year.”

**Sheryl L. Axelrod**, President and CEO of the Axelrod Firm, PC, Ms. Axelrod, who represents companies in commercial, employment, and bodily injury litigation, was included on the list of the Top 100 Philadelphia Super Lawyers and the Top 50 Women Pennsylvania Super Lawyers of 2019.¹

Ms. Axelrod was also inducted into The League for Entrepreneurial Women of Temple University Hall of Fame (“The League”). The League seeks to address the challenges and interests of entrepreneurial women in the Temple community, the Greater Philadelphia region and beyond.

Ms. Axelrod also received a Peter Perlman Service Award for her work on behalf of the Litigation Counsel of America, an honorary society of top trial lawyers that accepts less than one half of one percent of American lawyers. She was also awarded a diversity award by the Diversity Law Institute (DLI), and her law firm, The Axelrod Firm, PC, was itself awarded a DLI diversity award.

**Ray Blacklidge**, Shareholder, Executive Vice President, General Counsel & Corporate Secretary for American Traditions Insurance Company, also sole proprietor, Raymond M. Blacklidge, Attorney at Law, on Thursday July 11th Ray Blacklidge received a standing ovation after being presented with the Florida Insurance Council’s “Mark Trafton Distinguished Service Award” FIC’s highest honor, presented in recognition and appreciation of his outstanding contributions to the advancement and success of the Florida Insurance Council! “I am greatly humbled and honored to receive the award named after my good friend Mark Trafton,” Blacklidge said. The Florida Insurance Council is the vision and voice of Florida’s insurance community. The Council is Florida's largest company trade association, representing 34 insurers groups - representing 318 companies - which write over $38 billion a year in premium volume and provide all lines of coverage. Council members hold more than 90 percent of the market share in residential and private passenger automobile coverage.

**Steven E. Clark**, Owner of Clark Firm PLLC, was named a Texas Super Lawyer for Labor & Employment 2019, and was a Seminar Author/Presenter for the following programs: “Proving or Disproving Employment Discrimination Claims”; “How to Get Your Social Media, Email and Text Evidence Admitted (And Keep Theirs Out)”; “Trial Preparation from Start to Finish, Effective Use of Evidence”; “Advantageous Uses of LLC’s”; and “What To Do When the Audit Man Comes Knocking”.

**Sarah M. Ennis**, Associate Attorney with Gellert Scali Busenkell & Brown, LLC, ran the Delaware Running Festival Half Marathon in April 2019, the Blue Cross Broad Street Run in Philadelphia in May 2019, and is training to run her first ever full marathon at the Rehoboth Beach Seashore Marathon in December 2019.

**Zhao (Ruby) Liu**, Associate Attorney with the Rosner Law Group LLC, was recently appointed as the ABA Business Fellow for the 2019-21 term.

**Thomas A. Muccifori**, Hiring, Recruitment and Retention Partner, Chair, Trade Secrets and Non-Compete Practice Group Archer & Greiner, “I am humbled to have received on June 12 the New Jersey Law Journal’s 2019 Professional Excellence Award for mentoring in the legal profession and honored to mentor so many talented attorneys here at Archer law, just as he was mentored by so many before them, including my Dad, the late Judge

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¹ No more than 5 percent of attorneys in each state are recognized as Super Lawyers. The Top Lists of Pennsylvania Super Lawyers are determined and recognized through a patented, multiphase selection process involving peer nomination, independent research, and peer evaluation. In short, the Pennsylvania Super Lawyers who receive the highest point totals during the merit-based selection process are recognized on Pennsylvania Super Lawyers Top Lists.
Thomas J. Muccifori and his friends and colleagues for 50 years at the Lomell Law firm including D-day hero Leonard (Bud) G. Lomell and Judge Robert A. Fall who each taught me great lessons from the greatest generation.

Jim O’Sullivan, Shareholder at Tiffany & Bosco, PA, recently received the 2019 Diversity and Inclusion Leadership Award from the State Bar of Arizona. This award is presented annually by the Board of Governors to an attorney, judge, employer, organization, or bar association that significantly advances diversity and inclusion in the Arizona legal community through creative, strategic, or innovative efforts. Jim is honored to share this award with the Honorable Randall M. Howe of the Arizona Court of Appeals.

Heidi McNeil Staudenmaier, Partner at Snell & Wilmer L.L.P. in Phoenix, Arizona, and Chair of the Business & Corporate Litigation Committee has been honored with the following awards/recognition:

- ABA Business Law Section Jean Allard Glasscutter (2019)
- Maricopa County Bar Association Hall of Fame (2019)
- Alumni Achievement Award – University of Iowa College of Law (2019)
- The Best Lawyers in America – Phoenix Lawyer of the Year for Gaming Law (2020)
- AZ Business Leaders (2020)

Judge Elizabeth Stong, U.S. Bankruptcy Judge, Eastern District of New York, traveled to Beijing in April 2019 to participate in a Fulbright program to address the reasons to consider adopting a consumer bankruptcy law. She held a large public forum at the US Embassy’s “Beijing-US Center,” and held a workshop with high-level policy makers, academics, and lawyers.

Judge Stong also spent several days in Bahrain in April and a week in Kazakhstan in May with ABA ROLI in connection with judicial education and capacity-building.

Additionally, Judge Stong completed the Brooklyn Half Marathon and the New York Half Marathon and will be running her first ever full marathon at the New York Marathon in November 2019.

In late June, Judge Stong and her daughter, Margaret, walked the last 100 miles of the Camino de Santiago, a medieval pilgrimage route to Santiago de Compostela. Judge Stong’s reflections from Camino are included in this edition of the Newsletter, so be sure to check it out!

Alan S. Pralgever, Equity Partner with Greenbaum Rowe Smith & Davis, LLP, was recently named Co-Chairman of Cyber Security Group; Cannabis Group; Employment Group; and Business Litigation Group.
Meghan Adams Appointed as Superior Court Judge in Delaware

Delaware Governor John Carney issued the following statement on the Senate’s vote to confirm the Governor’s nomination of Meghan Adams Perry to serve as a Superior Court Judge in New Castle County:

“Meghan has the experience, judgment and temperament necessary to serve as a judge on the Superior Court, and I am confident she will serve our state well. I want to thank Meghan for her willingness to serve, and members of the Delaware Senate for voting to confirm her nomination.”

Prior to her appointment, Judge Adams practiced at the Delaware law firm Morris James LLP, where she focused on corporate and commercial litigation in the Delaware Court of Chancery, the Delaware Superior Court, the Delaware Supreme Court, and the U.S. District of Delaware.

A graduate of Dover High School, Judge Adams earned a bachelor’s degree in business administration from the University of North Carolina at Chapel Hill. Judge Adams earned her law degree from the Delaware Law School at Widener University.

Delaware Governor John Carney with Judge Meghan Adams
Meet the New Business Advisors to the Business Law Section

JILL A. PRYOR

Jill Pryor was nominated by President Barack Obama to be a Circuit Judge on the United States Court of Appeals for the Eleventh Circuit and unanimously confirmed by the Senate on September 8, 2014. Before joining the Court, she was a partner with Atlanta law firm of Bondurant, Mixson & Elmore, where she practiced business litigation in the state and federal trial and appellate courts for 25 years. Before entering private practice, Judge Pryor served as a law clerk to the Honorable J.L. Edmondson of the Eleventh Circuit.

A former President of the Georgia Association for Women Lawyers and past Chair of the State Bar of Georgia’s Appellate Practice Section, Judge Pryor currently serves on the State Bar of Georgia’s Board of Governors, chairs its Standing Committee on Access to Justice, and is a member of the American Law Institute. She is a graduate of Yale Law School and the College of William and Mary.

PETER M. REYES, JR.

The Honorable Peter M. Reyes, Jr. is a judge on the Minnesota Court of Appeals. He began his career as a judicial law clerk for the Honorable Salvador M. Rosas then joined Robins Kaplan as an associate in the Intellectual Property (IP) Litigation Department. He subsequently worked as a senior IP lawyer at Cargill, Incorporated and as a partner at Barnes & Thornburg LLP.

Judge Reyes is an active member of a number of local, state, and national bar associations and nonprofit organizations. He served as president of the Minnesota Hispanic Bar Association (MHBA) from 2000-2003, on the Board of Trustees for William Mitchell College of Law from 2005-2014, and national president of the Hispanic National Bar Association (HNBA) from 2012-2013. Judge Reyes is active in the American Bar Association (ABA) as a member of the House of Delegates, the ABA Judicial Division, Section of IP Law, and TIPS, among others. He served on the ABA Commission on Hispanic Legal Rights and Responsibilities and the ABA Council for Diversity in the Educational Pipeline. He will serve on the Commission on Women in the Legal Profession beginning in 2019. Judge Reyes is an American Bar Foundation (ABF) Fellow and serves on the ABF Fellows Research Advisory Council. He currently serves on the Executive Council for the Minnesota Historical Society.

Among his recognitions, Minnesota Lawyer named Judge Reyes as one of the “Top Ten Minnesota Attorneys of the Year” in 2001, one of the “Attorneys of the Year” in 2012, 2016, and 2017, and as a recipient of the inaugural “Diversity & Inclusion Award” in 2017. In 2012 and 2013, Poder Magazine named him as one of the 100 Most Influential Hispanics in America. Judge Reyes received the Ohtli Award in 2016, the highest award given out by the Mexican government to a non-Mexican citizen. He received the “HNBA Latino Judge of the Year Award” in 2018. And in 2019, Judge Reyes received the “MHBA Courage in Leadership Award” and the ABA 2019 “Spirit of Excellence Award.”

Judge Reyes received his undergraduate degree in Chemistry from the University of St. Thomas and his law degree from Mitchell-Hamline College of Law, graduating with Honors.
LEADERSHIP ROSTER
BUSINESS AND CORPORATE LITIGATION COMMITTEE
ABA BUSINESS LAW SECTION
(as of September 24, 2018)

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<td>Alternative Dispute Resolution</td>
<td>Jeffrey G. Benz</td>
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Hon. Clifton Newman
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Hon. Alvin Thompson

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**Term 2017-2019**
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- Indira K. Sharma
- Mian R. Wang

**Term 2018-2020**
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- Mareesa A. Frederick

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Sept. 2017 – Sept. 2019 Term
- Roberta Cooper Ramo
**Business Court Representatives**

2017 – 2019 Term (appointed after Fall Meeting 2017 through Fall Meeting 2019)
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Hon. Randa Trapp  
Hon. Heather Welch

2018 – 2020 Term (appointed after Fall Meeting 2018 through Fall Meeting 2020)
Hon. Lita M. Popke  
Hon. Saliann Scarpulla

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<p>| Costa Mesa, CA 92626| 600 Anton Boulevard, Suite 1400 |
| 7689                 | Costa Mesa, CA 92626 | Suite 1000          |
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| FAX: (213)457-9885   |                      | FAX: (302) 357-3288  |</p>
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<td><strong>WOMEN BUSINESS AND COMMERCIAL ADVOCATES VICE CHAIRS</strong></td>
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<th><strong>TASK FORCE ON DIVERSITY CLERKSHIP PROGRAM CHAIRS</strong></th>
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<td>Hon. Christopher Yates</td>
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<tr>
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<td>Kent County Courthouse</td>
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Pennsylvania Takes Over Online Health Insurance Exchange

By Robert J. Hobaugh, Jr.

Pennsylvania established its own online health insurance exchange (the “New Exchange”) under Act 42 of 2019 (the Act”) to deliver premium savings to Pennsylvanians who seek health insurance from the exchange previously operated by the federal government (the “Federal Exchange”). That Federal Exchange has served about 400,000 Pennsylvanians who purchase policies compliant the Affordable Health Care Act (“AHCA”) through Healthcare.gov. The Governor’s Office estimates that the federal government took 3.5 % of the premiums paid in the Commonwealth, totaling $94 million in 2019, to operate the Federal Exchange but that the Commonwealth can operate the New Exchange for $30 million to $35 million with reimbursement liability between 20% and 25%. Pennsylvanians who purchase coverage through Healthcare.gov under the New Exchange could benefit from a 5% to 10% reduction in premiums according to the Governor’s Office.

The Federal Exchange has operated in Pennsylvania under the AHCA since 2014. Under the AHCA and the Public Health Service Act (the “Federal Acts”), states may operate their own exchanges for providing approved medical and dental insurance. The Insurance Department of the Commonwealth (the “Department”) approves such insurance with coverage in Pennsylvania (“Qualified Plans”). The purpose of the Act is to maintain sovereignty over the regulation of health insurance in the Commonwealth, recognizing the uniqueness of the insurance marketplace in Pennsylvania and to keep that sovereignty while working within the requirements of the Federal Acts to stabilize insurance premiums in the Commonwealth.

To achieve these goals, the Act authorizes (1) the New Exchange to facilitate or assist in facilitating enrollment in Qualified Plans; and (2) the Commonwealth Health Insurance Reinsurance Program (the “Reinsurance Program”) for implementation of waivers and establishment of reinsurance. Further, the Act creates (a) the Pennsylvania Health Insurance Exchange Authority (the “Exchange Authority”) to create, manage and maintain the New Exchange; (b) an advisory council (“the “Council”) to advise the Exchange Authority regarding the New Exchange; and (c) the Pennsylvania Health Insurance Exchange Fund (the “Exchange Fund”) for deposit of reinsurance monies and disbursement according to the Act. The Reinsurance Program is intended to subsidize health insurance premiums so that enrollees qualified under the AHCA (each a “Qualified Enrollee”) can better afford health insurance authorized under the Federal Acts.

The Exchange Authority exists to “facilitate or assist in facilitating the purchase of on-exchange [Q]ualified [P]lans by [Q]ualified [E]nrollees in the individual market or the individual and small groups market.” 40 Pa.C.S.A. §9302(b)(2). Pennsylvanians without employer-provided health insurance coverage typically seek insurance under AHCA. The Exchange Authority is governed by a board (“Exchange Board”) consisting of 11 members: four appointed
by the General Assembly, four appointed by the Governor and three ex officio members. The Board members appointed by the Governor represent a cross-section of the insurance industry, including a consumer advocate. The Board has corporate powers, programmatic duties and shall enforce the sovereignty of the Commonwealth as it complies with the Federal Acts. Board members receive no compensation but may be reimbursed for travel expenses from the Exchange Fund.

The Council advises the Exchange Authority on its request in the areas of initial operation decisions, ongoing financial decisions and other decisions for which the Board seeks advice. The Council consists of four consumer representatives appointed by political officers, one representative selected by the Pennsylvania Medical Society, one representative selected by the Pennsylvania Chamber of Commerce and Industry from a small employer group, and one representative selected by the Pennsylvania Association of Health Underwriters. As with members of the Board, Council representatives receive no compensation but may be reimbursed for travel expenses from the Exchange Fund.

The Exchange Authority is subject to strict confidentiality standards. Its papers shall be confidential, not subject to subpoena or the Right-to-Know Law, shall not be discoverable or admissible in evidence and may not be made public by the Exchange Authority or any other person. Subject to confidentiality, to determine eligibility of individuals for the New Exchange or any government program, information may be shared (a) among the Exchange Authority, the Department and various state agencies and (b) between the Exchange Authority and specified federal agencies. Disclosure is authorized in connection with the annual audit of the Exchange Authority or with the consent of the company or person to which the information pertains. That audit must assess compliance and identify weaknesses and deficiencies and ways to correct the same. The cost of the audit is payable from the Exchange Fund. That audit and an annual report must be disclosed to the public and specified public officials. The Board, Council, Department and others are protected from liability while working within the scope of their authority under the Act.

The Act establishes the Exchange Fund as a special, non-lapsing fund within the Pennsylvania Treasury Department ("Treasury"). Money held there shall not be part of the general fund. Instead, all deposits of appropriated and non-appropriated money, interest and accrued and future earnings shall be used only for the purposes set forth in the Act. Investments by the Pennsylvania Treasurer must be consistent with guidelines of the Board. All money and interest are appropriated to the Exchange Authority.

The Reinsurance Program is designed to facilitate economies of the New Exchange. The Department is authorized to apply to the United States Secretary for Health and Human Services ("HHS") for a state innovation waiver to (1) waive provisions of the AHCA for health care coverage in the Commonwealth, (2) establish the Reinsurance Program in accordance with the approved waiver, and (3) maximize federal funding for the Reinsurance Program. The
Department shall establish and administer the Reinsurance Program upon approval by HHS of the waiver application. That administration includes maximizing federal reinsurance funding, making reinsurance payments to insurers offering Qualified Plans who participate in or are affiliated with an insurer that participates in the New Exchange ("Eligible Insurers"), resolving disputes and submitting invoices under the innovation waiver.

Not less than 60 days before Qualified Insurers are required to submit premium rates for the following year, the Department is required to determine with respect to annual benefits for an insured enrolled to receive benefits under a participating health care policy (each, an “Enrollee”), the following: (1) the threshold amount for claims costs incurred by an Eligible Insurer above which claims are eligible for reimbursement payments (the “Attachment Point”), (2) the upper limit for claims costs incurred by an Eligible Insurer over which reimbursement payments are not eligible (“Reinsurance Cap”), and (3) the percentage rate at which an Eligible Insurer may be reimbursed above the Attachment Point and below the Reinsurance Cap (the “Coinsurance Rate”). The Department must publish the Attachment Point, Reinsurance Cap and Coinsurance Rate (collectively, the “Parameters”) based on information provided by insurers and may not change the Parameters less favorable to the Eligible Insurers than as set before or during the benefit year. The Eligible Insurers must implement and document reasonable care management practices for Eligible Enrollees and submit reimbursement requests to the Department which pays what it calculates as eligible reimbursement amounts. Those claims are confidential and aggrieved insurers may submit requests for review under the Administrative Agency Law, 2 Pa.C.S.A. §§101 et seq.

The Department is subject to confidentiality in its treatment of such information provided by insurers. That information is not subject to subpoena, the Right-to-Know Law, discoverable or admissible in evidence in a private civil action. The Department may share such information with the Centers for Medicaid and Medicare Services, each Qualified Insurer, and the Exchange Authority. Such information may be disclosed (1) in connection with the Department’s annual audit, (2) the Department’s annual report in an aggregate and de-identified form and (3) in circumstances other than (1) and (2) only with the consent of the company or person to which it pertains.. Other than in a legal action to compel obligations of the Reinsurance Program, immunity applies to the Department, Commonwealth agencies, persons or entities under contract with the Department for the Reinsurance Program for actions or omissions “done in good faith and in the performance of powers and duties under [the Act], or for the reasonable and good faith use of any information pertaining to the [Re]insurance [Program].” 40 Pa.C.S.A. §9514(a). The Department has rulemaking and enforcement powers.

The United States Court of Appeals for the Fifth Circuit is presently deliberating a challenge to the AHCA based on the recent removal of the individual mandate penalty. That litigation could result in overturning the AHCA entirely or those provisions dependent on the mandate such as coverage of pre-existing conditions. The insurance coverage of about 20 million people could be lost if AHCA is overturned. Accordingly, the Act provides sunset provisions if
terms of the AHCA integral to the Exchange Authority or Reimbursement Program (1) are repealed or defunded by Congress, (2) are invalidated by a federal court of competent jurisdiction, or (3) are repealed or defunded by the Executive Branch of the federal government.

HB No. 3 was co-sponsored by House Majority Chair Bryan Cutler (R-Lancaster) and House Minority Chair Frank Dermody (D-Allegheny). The Act received bipartisan support and was signed in the Senate and the House on June 28, 2019. Governor Tom Wolf supported the legislation and approved it on July 2, 2019. It took effect immediately. Reinsurance proceeds are estimated to be $150 to $250 million. Eight insurers participated in the Federal Exchange covering Pennsylvanians in 2019 for the benefit of 366,000 private insurance purchasers and about one million persons having affordable coverage with expanded Medicaid and premium subsidies. Pennsylvania is the 13th state to operate its own exchange and four other states are developing an exchange. Pennsylvania is the only state to use cost savings from its operation of an exchange to fund its share of the Reimbursement Program.

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How the Global Financial Crisis Has Shaped New York Law

By: Zachary Rosenbaum, Jennifer Delgado, and Meg Slachetka of Lowenstein Sandler

The global financial crisis that began over a decade ago has shaped how market participants, the government, and the public at large conceptualize and respond to risk. The crisis has also shaped the law in the most prominent financial center in the country, if not the world – New York.

Historically, in the days before securitization – i.e., the bundling of debt instruments such as residential mortgage loans – the primary risk accompanying a mortgage loan inured to the lending bank. The lending bank therefore had a vested interest in the borrower’s creditworthiness and the value of her collateral. If the borrower defaulted, then the bank suffered the loss. Structured products coupled with derivatives exponentially multiplied and expanded the risk accompanying residential mortgage loans. In the modern financial system, individual borrowers’ defaults crippled not only banks, but pension funds and their investors, insurance companies and their stakeholders, sovereign wealth funds and their citizens, down the line.

Now, more than a decade after the crisis began, the litigation brought in its wake has ambled its way through the courts, resulting in binding precedent – stare decisis – that will resonate for decades. A number of legal issues that reached the highest courts in New York have wide-ranging impact beyond the structured products space, including issues of contract interpretation, statutes of limitations, and privilege.

This article addresses several issues decided in the wake of the crisis, all of which arose from cases involving securitized mortgage loans, and all of which have applications that extend well beyond those particular financial products and the crisis.

Defenses – Statute of Limitations

Perhaps the most impactful decisions in New York emanating from the crisis are those involving New York’s statute of limitations.

In 2015, the New York Court of Appeals harmonized two cases with different outcomes that it decided in the late nineteenth century, over a hundred years earlier, by holding that even where a demand with a cure period is contractually required to invoke a remedy for breach of representations and warranties, the cause of action accrues not when the demand is made and refused, but when the initial representations and warranties were made. This is so, the Court added, irrespective of whether, when, and how the claimant became aware that the representations and warranties were false. Emphasizing the importance of certainty and predictability, the Court concluded that the defendant’s breach of contract occurred, if at all, on the closing date and not
when it subsequently refused to repurchase breaching mortgages and New York’s six-year statute of limitations for breach of contract ran from that date. The case is *ACE Securities Corp. v. DB Structured Products, Inc.*, 25 N.Y.3d 581 (2015).

Then in late 2018, the New York Court of Appeals in a split decision went a step further when it addressed whether parties can contractually define when a cause of action for breach of representations and warranties accrues. The Court affirmed the lower courts’ rulings dismissing the case as time-barred, even though the parties had an “Accrual Clause” in their agreement conditioning the accrual of a cause of action on demand for compliance with the parties’ agreement. Although the case would have been timely had that provision been enforced, the Court of Appeals held that to the extent the parties intended to delay the commencement of the statute of limitations by agreeing when a cause of action “shall accrue,” their attempt to do so was prohibited by New York law and its public policy. In a biting dissent, Judge Rowan D. Wilson wrote:

> Both here and in our prior decision in *ACE* we have fundamentally misinterpreted the structure of RMBS agreements and, as a result, have created bad law: bad because it neither hews to the intent of the contracting parties nor of the investors in securities issued thereby; bad because it serves no public policy; bad because it disserves a very important public policy—the preservation of New York’s role as the commercial center of the nation.

Judge Wilson concluded, “were I advising a party to a prospective RMBS agreement today, I would tell my client that the law of Delaware is clear . . . , and the law of New York is not.” The case is *Deutsche Bank National Trust Co. v. Flagstar Capital Markets Corp.*, 32 N.Y.3d 139 (2018).

Separately, in 2018, the New York Court of Appeals decided that the statute of limitations for non-scienter based enforcement actions brought by the New York Attorney General pursuant to the Martin Act (N.Y. GBL § 23-A) is three years, not six as argued by the government. The Court thus dismissed as time-barred the government’s non-scienter based claims. The case is *People v. Credit Suisse Sec.*, 31 N.Y.3d 622 (2018).

Finally, the New York Court of Appeals is presently considering a case that will define the bounds of New York’s borrowing statute, N.Y. C.P.L.R. 202. The borrowing statute requires, in the case of a non-resident plaintiff suing in New York, that the court apply the shorter of New York’s statute of limitations or that of the place where the claim arose. And generally, under New York law, a claim arises where the plaintiff is injured, which is typically the plaintiff’s place of residence. Here, the trial court applied an exception to that general rule, finding that in the case of a securitization trustee suing for the benefit of investors concerning a New York common law trust that was created in New York, the place of injury if not New York is fact intensive and could not be decided on a pleadings motion. The Appellate Division, First Department disagreed and found
that the claim arose in California where the trustee maintained its principal place of business and where a number of the securitized mortgage loans were issued. The Court of Appeals granted certification of the issue and is expected to hear the case in the fall of 2019. The case is entitled *Deutsche Bank National Trust Company, solely in its capacity as Trustee of Securitized Asset Backed Receivables LLC Trust 2007-BRI v. Barclays Bank PLC*, Index No. 651338/2013 (N.Y. Sup Ct.).

**Contractual Interpretation - Reimbursement of Attorneys’ Fees**

Three recent New York appellate decisions have upheld trustees’ rights to recover their attorneys’ fees and litigation expenses from the defendants, who are securitization sponsors and mortgage originators. These decisions add clarity to New York’s application of the “American Rule” under which, absent a statutory or contractual mandate, parties bear their own attorneys’ fees. In these cases, the Appellate Division, First Department concluded that the operative contractual language was sufficiently clear to evidence intent that defendants reimburse plaintiff trustees for their litigation fees and expenses. The cases are *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, 34 N.Y.S.3d 428, 429 (1st Dep’t 2016) (“HEAT”), *Wilmington Trust Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 152 A.D.3d 421 (1st Dep’t 2017) (“MSM”), and *Deutsche Bank National Trust Co. v. EquiFirst Corp.*, 154 A.D.3d 605 (1st Dep’t 2017) (“EQLS”), and have not been appealed to New York’s Court of Appeals. As such, they are binding law in New York County – *i.e.*, in Manhattan.

**The Common Interest Privilege**

In 2016, the New York Court of Appeals was called upon to consider whether the common interest privilege extended to protect communications between parties with a common business interest, even if there were no litigation pending or anticipated. This trend has evolved in the recent developments in the Second, Third, Seventh and Federal Circuits, where litigation is not required to establish the application of common interest. The Court declined to expand the privilege, holding that litigation must be reasonably anticipated in order to invoke the privilege. The case is *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616 (2016).

***

A distinguished panel of New York practitioners will discuss these binding decisions and other important case law that shaped New York law in the wake of the financial crisis. The program is part of the ABA Business Law Section Annual Meeting, and is called *How the Global Financial Crisis Has Shaped New York Law*. The program is scheduled for 8:30 a.m. on Thursday, September 12, 2019.
WHAT MATTERS MORE: PRESERVING A FUNDAMENTAL RIGHT TO PRIVACY OR TAMPERING WITH ANOTHER’S DIGNITY THROUGH SEARCHES BECAUSE OF “REASONABLE SUSPICION?”

DARIANNE DE LEON*

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INTRODUCTION

The Fourth Amendment is included in the United States Bill of Rights to guarantee an individual’s right to privacy.1 Fourth Amendment protections consequently require law enforcement officers to secure a search warrant, justified by probable cause, to conduct lawful searches and seizures.2 However, there are several exceptions to the warrant requirement.3 The border search exception is one of these exceptions, permitting officers to lawfully screen individuals at an international border without probable cause or a warrant, so long as the search is reasonable.4

On August 25, 2009, the United States Department of Homeland Security (hereinafter “DHS”) issued a Privacy Impact Assessment (hereinafter “PIA”) mandating that travelers entering or exiting a United States border or its functional equivalent, such as an airport, would be subject to a search of their electronic devices by Customs Border Protection (hereinafter “CBP”) and Immigration and Customs Enforcement (hereinafter “ICE”) officers for

1. See generally Wayne R. LaFave, The Fourth Amendment: “Second to None in the Bill of Rights,” 30 ADVOCATE 5 1987 (reiterating the importance of the Fourth Amendment, explaining that the Amendment determines the kind of society in which we live, and is second to the Bill of Rights).

2. See U.S. CONST. amend. IV (stating, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause”).

3. See generally Jeanette Doran Brooks, Valid Searches and Seizures Without Warrants, INST. OF GOV’T (Nov. 2004) (explaining the different exceptions to the warrant rule such as: (1) Exigent circumstances; (2) Search incident to arrest; (3) Automobile searches; (4) Consent searches; (5) Border searches; 6) Open fields; (7) Plain view, and (8) Special needs).

the purpose of maintaining national security. Circuit courts have interpreted DHS’s policy differently when determining the level of suspicion required for officers to conduct lawful electronic device searches at the border.

Specifically, circuit courts are split as to whether reasonable or individualized suspicion is needed to lawfully conduct forensic electronic device searches at the border. Generally, officers conduct two types of searches at the border: routine or manual searches of electronic devices and forensic searches of electronic devices, commonly referred to as nonroutine searches. Manual searches of electronic devices at the border allow officers to unlock a traveler’s electronic device and scroll through their personal contact list, call log, messages, emails, and browsing history without requiring any level of suspicion as a prerequisite. Forensic searches of electronic devices are conducted away from the border and allow officers to connect a traveler’s electronic device to external equipment that extracts stored information from the device. The forensic search allows officers to


7. See United States v. Kolsuz, 890 F.3d 133, 133 (4th Cir. 2018) (referring to circuit cases that disagree on the legal standard of the border search exception).

8. See U.S. CUSTOMS AND BORDER PROTECTION: CBP DIRECTIVE NO. 3340-049A, BORDER SEARCH OF ELECTRONIC DEVICES (Jan. 4, 2018) (explaining the difference between a “basic” search and “advanced” search. Note, basic searches are also referred to as manual or routine search; an advance search is also referred to as forensic, extended or nonroutine searches).

9. See id. (stating that during a basic search, an officer may analyze information encountered at the border).

10. See id. (explaining that even if a forensic search is conducted away from the border, the search is still valid because most port-of-entries are not sourced with forensic
review, copy, and analyze contents of an electronic device without needing a warrant.11 While DHS maintains that a reasonable suspicion standard governs the forensic search, various circuit courts conclude differently when determining whether an individualized, reasonable, or no suspicion standard applies.12

This Comment argues that the Eleventh Circuit’s approach to analyzing forensic electronic device searches at the border is inconsistent with the Fourth Amendment’s protections against unreasonable searches because the court’s standard does not require any level of suspicion for electronic device searches and thus, denies privacy protections guaranteed to individuals.13 Part II examines the relationship between the government interest in promoting national security and an individual’s fundamental right to privacy during manual and forensic searches at the border.14 Part III argues that the Eleventh Circuit’s lack of any level of suspicion for forensic electronic device searches at the border violates the Fourth Amendment because electronic devices store an individual’s private and personal information, triggering fundamental privacy protections.15 Part IV recommends that circuit courts conform to a uniform, objective standard when conducting electronic device border searches by adopting the individualized suspicion standard used in United States v. Kolsuz.16 Part V concludes that the Eleventh Circuit’s approach in not requiring any level of suspicion to conduct electronic device border searches is unconstitutional and reiterates the need for circuit courts to uniformly apply an individualized suspicion

equipment).

11. See id. (explaining that forensic searches are more advanced and are mandated to be performed in the presence of a supervisor).

12. See id. (explaining that officers are allowed to perform an advanced search where there is reasonable suspicion such that there is a threat to national security).


14. See U.S. CONST. amend. IV (emphasizing the fundamental right to protect one’s self); see generally United States v. Ortiz, 422 U.S. 891, 891 (1975) (emphasizing that the purpose of the Fourth Amendment “is to protect liberty and privacy from arbitrary and oppressive interference by government officials”); Katz v. United States, 389 U.S. 347, 350 (1967) (reiterating the constitutional basis of the Fourth Amendment “person’s general right to privacy . . . to be let alone”).

15. See infra Part III (demonstrating the courts should develop a streamlined procedure and process for border searches that are not subjective based on CBP officers).

16. See infra Part IV (explaining that the Supreme Court has the power to overturn the Eleventh Circuit’s application of the Fourth Amendment along the border while conducting electronic device searches).
standard when conducting these types of searches.17

II. BACKGROUND

A. The Fourth Amendment Right to Privacy and the Border Search Exception

The Fourth Amendment prohibits unreasonable searches and seizures against one’s person, property, and effects.18 A court needs to analyze the reasons for initiating the search and the scope of the search to determine reasonableness.19 Evolving caselaw has determined that border officials may lawfully conduct searches without a warrant so long as the search is reasonable.20 Reasonable suspicion requires border officials to have reason or cause to suspect that contraband exists in the particular place being searched.21 On the other hand, individualized suspicion is centralized on law enforcement officers making judgments based on a person’s unique actions, character, and situation.22 Individualized suspicion is designed to eliminate assumptions based on stereotypes, race, religion, and socio-economic background.23

The increase in technology has led to controversy in the legality of border searches involving electronic devices under the Fourth Amendment.24 Under

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17. *See infra* Part IV (concluding that the Supreme Court should review and extend their *Riley* decision to searches of electronic devices at the border).
18. *See U.S. Const.* amend. IV (stating, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause”).
19. *See Katz*, 389 U.S. at 357 (stating that searches conducted without a warrant are unlawful).
20. *See United States v. Touset*, 890 F.3d 1227, 1229 (11th Cir. 2018) (concluding with precedent that border searches are part of the warrantless exception rule and do not require anything else but reasonable suspicion to conduct a search of an electronic device at the border).
21. *See United States v. Vega-Bravo*, 729 F.2d 1341, 1351-52 (11th Cir. 1984) (Hatchett, J., dissenting) (explaining that the reasonable suspicion standard is usually used when a subject behaves in a suspicious manner).
23. *See id.* (reiterating that individualized suspicion requires examining both reasonable suspicion and probable cause).
24. *See Riley v. California*, 537 U.S. 373, 403 (2014) (holding that a warrantless digital search of a person’s cell phone is unconstitutional and violates the Fourth Amendment); *see also* Arizona v. Gant, 556 U.S. 332, 332 (2009) (holding that the search
the border search exception, CBP officers are allowed to conduct warrantless searches of travelers and their belongings to protect national security.25

The border search exception to the Fourth Amendment first emerged in United States v. Ramsey.26 In Ramsey, the defendant transported drugs into the United States via mail.27 The Supreme Court concluded that mail entering the United States is subject to the border search exception.28 The Court reasoned that the sole purpose of the border search exception is to protect the sovereign and thus, the mode of transportation does not matter.29 Merely crossing the border is sufficient for an officer to conduct a lawful search without needing probable cause or a warrant.30

In United States v. Kolsuz, the Fourth Circuit concluded that individualized suspicion is necessary when conducting a forensic search of electronic devices at the border because these searches are highly intrusive.31 In Kolsuz, border patrol detained the defendant at Washington Dulles Airport of a defendant’s vehicle while handcuffed in a patrol car was unreasonable; even though the facts of this case are different from the typical electronic device search cases, it is still applicable because most travelers who are stopped at the border feel as though they cannot “freely” remove themselves from a CBP officer; United States v. Kolsuz, 890 F.3d 133, 133 (4th Cir. 2018) (explaining that a forensic search of a traveler’s electronic device at the border is only permissible if the officer has reasonable suspicion).


26. See United States v. Ramsey, 431 U.S. 606, 606-07 (1977) (holding that customs inspector had reasonable cause to suspect that there was merchandise or contraband in the envelopes).

27. See id. at 609 (describing the transcontinental transportation of drugs into the United States by the defendant. Noting that the envelopes were heavier and fatter than regular mail).

28. See id. at 607 (stating that when mail crosses the border, probable cause is not needed to search the contents of the mail).

29. See id. at 606-07 (explaining that the border search exception is grounded in the recognized duty to protect the sovereign; moreover, the border exception is not an extension of the exigency doctrine).

30. See id at 618. (emphasizing that entering [and exiting] the country makes a resulting search “reasonable”).

while attempting to board an international flight to Turkey in 2016. Before the border officers searched the defendant’s electronic devices, the officers searched his luggage, revealing restricted firearm parts. After the border patrol searched the defendant’s luggage, he admitted that he was transporting firearm parts without a license and the officers arrested him. The court noted that the arrest did not preclude the border search exception because the defendant was at the functional equivalent to a border, the airport. Prior to his arrest, Kolsuz was well-known to government authorities; in 2012 and 2013 agents found illegal firearm parts in his luggage while traveling between Miami and Turkey. On both occasions, agents explained to him that he needed to comply with the licensing requirements to transport such equipment. In 2016, CBP agents used Kolsuz’s history and his third attempt to cross the border with illegal contraband as sufficient evidence to forensically search his electronic devices. The court concluded that CBP’s forensic search was based on individualized suspicion because they had “good” reason to support their notion that Kolsuz was attempting to export illegal contraband, the paramount basis for the border search exception. Alternatively, the Ninth Circuit concluded that border patrol needs reasonable suspicion, rather than individualized suspicion to conduct a forensic search. Furthermore, the Ninth Circuit reasoned that individualized suspicion is not required for border searches involving

32. See Kolsuz, 890 F.3d at 139 (explaining that the defendant had been warned twice before his arrest of the mandatory requirements for transporting firearms).

33. See id. at 139 (explaining that because of the defendant’s prior history, an email was sent to airport agents alerting them to be aware that the same illegal transportation of goods could occur).

34. See id. (noting that Agent Cogan and Budd found 18 handguns barrels, calibers, and a conversion kit).

35. See id. at 143 (stating that regardless of Kolsuz’s arrest, the border search exception still applies because he was exiting the functional equivalent of a border).

36. See id. at 140 (providing the history of Kolsuz to help show that he was pre-warned of the required license twice before his actual arrest).

37. See id. at 140-41 (showing that regardless of the warnings, Kolsuz had the intent to continue transporting illegal goods at the border).

38. See id. at 140-41 (explaining that the forensic search revealed a 900-page report of Kolsuz’s electronic device history).

39. See id. at 143 (stating that Kolsuz’s history shows that he intended to violate the protection of the United States therefore, he posed a national security risk).

40. See United States v. Cotterman, 637 F.3d 1068, 1074 (9th Cir. 2011), aff’d on reh’g, 709 F.3d 952, 957 (9th Cir. 2013) (en banc) (stating that the CBP officers relied on ICE’s confirmation that electronic media can be searched without individualized suspicion).
electronic devices because ICE published an official memorandum reaffirming that officers may seize electronic media at the border without having individualized suspicion. In sharp contrast to both the Fourth and Ninth Circuits, the Eleventh Circuit emphasized that CBP officers do not need to justify any form of electronic device search at the border, and thus, no reasonable or individualized suspicion is required.

B. The Eleventh Circuit

Traditionally, law permitted warrantless border searches simply because they occurred at the border. However, technology advances have changed this rhetoric. In United States v. Touset, the defendant made several money transfers from a Western Union account to a Philippines-based phone number to further sex tourism and child pornography in the country. Law enforcement became aware of the defendant’s illegal engagements via private investigations. While at the border, the CBP officers manually inspected the defendant’s electronic devices, but no child pornography was found. The officers seized and searched the defendant’s two laptops and external hard drives. The defendant argued that forensic searches of

41. See id. (stating customs officers acted presumptively without considering the level of suspicion because they relied on ICE’s manual for reaffirmation that individualized suspicion was not needed).
42. See United States v. Touset, 890 F.3d 1227, 1229 (11th Cir. 2018) (arguing that the courts’ precedent on border searches makes clear that no suspicion is necessary to search electronic devices at the border).
44. See U.S. Customs and Border Protection: CBP Directive No. 3340-049A, supra note 8 (explaining that as the use of technology increases, so does the strictness of our border laws).
45. See Touset, 890 F.3d at 1230 (providing additional detail about the investigations conducted against Touset: Touset made frequent low money transfers and created an “iloveyousomuch0820@yahoo.com” email account to document his transfers to clients in child pornography).
46. See id. at 1230 (stating that several private organizations and government agencies investigated Touset’s whereabouts and suggested that he had been involved with the transportation of child pornography. These organizations included “Xoom” and Cyber Center investigation team).
47. See id. (asserting that even though through a manual search no contraband was found, the agents still conducted a forensic search without having reasonable suspicion).
48. See id. (noting that CBP Officer Escobar did not find traces of child pornography when he performed a manual inspection of Touset’s two iPhones, a camera, and two tablets. Escobar returned the items to Touset and sent the additional electronic devices to a different agency to perform a forensic search).
electronic devices required reasonable suspicion.\(^{49}\) The Eleventh Circuit rejected the defendant’s argument, and ruled that no form of suspicion is required to search electronic devices at the border.\(^{50}\) The court followed the reasoning in\(^{51}\) Ramsey by concluding that searches at the border are reasonable when CBP agents have knowledge of illegal goods crossing a United States border or its functional equivalent. For example, both Ramsey and Touset involved defendants having a history with a country that was known to traffic either illegal narcotics (Ramsey) or child pornography (Touset).\(^{52}\) Moreover, the Ramsey Court concluded that by now, it is not necessary to require any additional explanation for suspicionless border searches because it only matters that they occur at the border.\(^{53}\)

In Touset, the court created a three-part test to determine whether a search was intrusive.\(^{54}\) To find that a search is intrusive, there must be: 1) physical contact between the searcher and person; 2) exposure of intimate body parts; and 3) use of force.\(^{55}\)

C. The Ninth Circuit

In 2013, the Ninth Circuit reheard United States v. Cotterman, a case in which the government had a lookout alert on the defendant for child pornography and molestation.\(^{56}\) CBP agents conducted two searches at the border.\(^{57}\) The first search included a vehicle search, during which the agents

\(^{49}\) See id. (stating that Touset relied on the Supreme Court’s holding in their Riley v. California decision).

\(^{50}\) See id. at 1229 (relying on the border exception to the Fourth Amendment).

\(^{51}\) See id. (explaining that the sole purpose of the border exception is to protect against national security risks).

\(^{52}\) See id. at 1232 (reiterating that border searches are different; officers are required to prevent contraband from entering the border).

\(^{53}\) See United States v. Ramsey, 431 U.S. 606, 616 (1977) (explaining that the suspicionless border searches has been a long-standing right of the sovereign; therefore, no further explanation is needed).

\(^{54}\) See Touset, 890 F.3d at 1234 (listing the elements that are most prevalent to identify whether a person’s dignity was violated).

\(^{55}\) See id. (emphasizing that these elements help to identify whether a forensic search was intrusive).

\(^{56}\) See United States v. Cotterman, 709 F.3d 952, 957 (9th Cir. 2013) (noting that Howard Cotterman was a registered sex offender in the state of California, and was convicted for two counts of sexual misconduct against a minor).

\(^{57}\) See id. at 957-58 (stating that the first search fell within the Fourth Amendment border exception, and therefore the second search was just an extension of the first search even though it was performed away from the border).
discovered two laptop computers and three digital cameras. The second search involved manual inspection of the defendant’s electronic devices. The search did not reveal any child pornography on the devices, mainly because the electronic devices were password protected. At this time, the CBP agent seized the defendant’s laptop for a forensic search, which was conducted 170 miles away from the original border search. The defendant offered to help the CBP Agent unlock the computer by providing the password, but the Agent refused because she feared that the defendant would tamper with the evidence. The Ninth Circuit concluded that CBP agents must have reasonable suspicion before administering a forensic search of an electronic device at the border. The court reasoned that while the border search exception’s purpose is to protect government interests, reasonable suspicion is needed so that the government cannot seize property on a “whim” for an indefinite period of time.

D. The Fourth Circuit

Given the extensiveness of a forensic electronic device search, the Fourth Circuit takes the Ninth Circuit’s holding one step further by concluding that officers must have individualized suspicion before conducting device searches of forensic electronics at the border. In Kolsuz, CBP officers

58. See id. at 957; see also 19 U.S.C. § 1433(b) (2010) (noting that vehicles entering the United States are subject to an inspection and detention if necessary).

59. See id. (explaining that the agent used Cotterman’s history of transporting child pornography to justify the manual search of his electronic device).

60. See CBP Directive No. 3340-049, at 5.3.2.2 Technical Assistance – With or Without Reasonable Suspicion, (Aug. 25, 2009) (acknowledging that during an electronic device search, officers may encounter technical issues such as password protection that require them to transmit copies of information for further federal agency assistance).

61. See Cotterman, 709 F.3d at 956 (noting that the original search at the border did not uncover any incriminating material).

62. See id. at 958 (finding that Agent Riley had three concerns: (1) Cotterman could delete the files, without her knowledge; (2) laptops might be “booby trapped”; and (3) she would be unable to access files).

63. See id. at 968 (finding that the intrusive nature of forensic searches created a reasonable suspicion requirement); United States v. Alfonso, 759 F.2d 728, 734 (9th Cir. 1985) (holding that the “extended border searches must be justified by ‘reasonable suspicion’”)

64. See Cotterman, 709 F.3d at 957 (showing the court’s reluctance to equate the border exception as an “anything goes” policy).

65. See United States v. Kolsuz, 890 F.3d 133, 144 (4th Cir. 2018) (stating that individualized suspicion is a higher requirement to meet and focuses on how intrusive the search was).
detained a Turkish national when they found firearm parts in his luggage as he attempted to cross the border.\textsuperscript{66} Upon the defendant’s arrest, the agents seized the defendant’s smartphone and performed a month-long forensic search.\textsuperscript{67} The Government asserted that the thirty-day forensic search was lawful because it had reasonable suspicion that a crime had already occurred or was about to occur.\textsuperscript{68} The defendant argued that the forensic search was unconstitutional because the government performed the search without a warrant.\textsuperscript{69} The defendant further argued that because the government conducted the forensic search away from the border, the law should exclude it from the exception.\textsuperscript{70} The Fourth Circuit held that CBP agents are permitted to conduct electronic device searches at the border—conditioned upon the agents having individualized suspicion; and, in \textit{Cotterman}, the agents’ reliance on the firearm parts provided sufficient evidence of potential criminal activity based on individualized suspicion.\textsuperscript{71}

Furthermore, the court agreed with \textit{Cotterman}’s reasoning that a search’s proximity to the border is irrelevant and does not bar the search.\textsuperscript{72}

\textbf{III. ANALYSIS}

\textit{A. The Eleventh Circuit Improperly Interpreted and Applied the Reasonable Suspicion Standard to Forensic Electronic Device Border Searches by Failing to Require Officers to Have Any Level of Suspicion to Perform These Searches, Which Violates an Individual’s Fundamental Privacy Rights.}

Under the border exception to the Fourth Amendment, an officer may lawfully conduct a search at the border so long as the search is reasonable.\textsuperscript{73}

\begin{itemize}
  \item \textsuperscript{66} See \textit{id}. at 139 (explaining that defendant tried to smuggle firearms out of the country without a license).
  \item \textsuperscript{67} See \textit{id}. at 141 (noting that the defendant was in custody for the duration of the forensic search).
  \item \textsuperscript{68} See \textit{id}. at 143 (noting that the district court emphasized that a “nonroutine” search of electronic devices at the border is justified by reasonable suspicion).
  \item \textsuperscript{69} See \textit{id}. at 142 (explaining that if the border search exception did not apply to this search, standard Fourth Amendment rules would apply).
  \item \textsuperscript{70} See \textit{id}. (noting the courts’ holding that regardless of distance and proximity to the border, the border search exception still applies).
  \item \textsuperscript{71} See \textit{id}. at 143-44 (asserting that forensic border search of cell phones must be treated as a nonroutine border search which is permissible only upon showing of individualized suspicion).
  \item \textsuperscript{72} See \textit{Kalszu}, 890 F.3d at 142 (stating that a forensic border search can be conducted days after a manual search and miles away from the border).
  \item \textsuperscript{73} See CBP \textbf{DIRECTIVE NO. 3340-049A}, \textit{supra} note 8 (explaining the expectation
In *Touset*, the Eleventh Circuit held that officers can perform forensic electronic device searches at the border without any level of suspicion.\(^7^4\) While the Eleventh Circuit does not address manual electronic device border searches, it unconstitutionally determined that officers conducting forensic searches of electronic devices at the border never require reasonable or individualized suspicion.\(^7^5\) Applying the new standard, in *United States v. Vergara*, the Eleventh Circuit concluded that officers conducting forensic searches of electronic devices at the border do not require probable cause or a warrant.\(^7^6\) The Eleventh Circuit’s reasoning relies on its precedent and the First Congress’s intended purpose of the Fourth Amendment.\(^7^7\) According to the Eleventh Circuit, the First Congress empowered customs officials to conduct warrantless stops and searches of any vessel or cargo suspected of transporting illegal goods at the border or its functional equivalent.\(^7^8\)

The Eleventh Circuit fails to consider the significance and connection between modern electronic devices and a traveler’s right to privacy at the border.\(^7^9\) The Eleventh Circuit’s legal standard is inconsistent with the Fourth Amendment because it fails to recognize that cell phones, computers, and other electronic devices require the same Fourth Amendment protections as a home.\(^8^0\) Presently, most people store all of their personal and

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\(^7^4\) See *United States v. Touset*, 890 F.3d 1227, 1233 (11th Cir. 2018) (stating that the Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border), see also *United States v. Vergara*, 884 F.3d 1309, 1310 (11th Cir. 2018) (asserting that the border search exception allows for a lower standard of reasonable suspicion).

\(^7^5\) See *Touset*, 890 F.3d at 1234 (citing *United States v. Ramsey*, 431 U.S. 606, 616 (1977)) (distinguishing searches of property from searches of one’s person).

\(^7^6\) See *Vergara*, 884 F.3d at 1312 (stating that the Court’s rhetoric has existed long before the Fourth Amendment and only searches that are “highly intrusive” to the body require a reasonable suspicion requisite).

\(^7^7\) See *Touset*, 890 F.3d at 1236 (explaining that the Eleventh Circuit relies on precedent to conclude that warrantless forensic searches of electronic devices are permissible at the border because they are not highly intrusive nor bodily).

\(^7^8\) See *id.* (stating that the Eleventh Circuit relies heavily on the historical importance of Congress’s intention to create a border search exception, even when electronic devices were not popularly used or even invented).

\(^7^9\) See *id.* at 1233 (stating that a traveler’s right to be left alone does not prevent the search of traveler’s luggage and materials).

\(^8^0\) Compare *id.* (reiterating that the Eleventh Circuit does not distinguish between border searches of different kinds of property) with *United States v. Kolsuz*, 890 F.3d 133, 145 (4th Cir. 2018) (explaining that electronic devices that contain highly personal information are ubiquitous and require Fourth Amendment protection).
professional information on a portable electronic device and thus, courts should consider it as an “effects” under the Fourth Amendment’s privacy protections.81

Moreover, the Eleventh Circuit incorrectly concludes that a forensic search of an electronic device at the border is not intrusive.82 The court reasons that because a forensic electronic device search does not involve an agent touching or exposing the suspect’s body parts, the search is not intrusive.83 The Eleventh Circuit’s application of the legal standard violates the Fourth Amendment because it allows officers to subjectively determine when to conduct a forensic search without ever having reasonable suspicion.84 Instead, the court relies solely on the notion that the border search exception emerged to protect government interests only.85 The court’s reasoning disregards an individual’s privacy rights under the Fourth Amendment.86

Furthermore, the Eleventh Circuit’s suspicionless border search standard is not inclusive nor practical to apply.87 The court fails to realize the intimate relationship between a traveler and his electronic device.88

81. See Kolsuz, 890 F.3d at 145-46 (citing Riley v. California, 573 U.S. 373, 400 (2014)) (highlighting the differences between cell phones and other kinds of property); see also U.S. CONST. amend. IV (stating, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause”).

82. See Touset, 890 F.3d at 1233-34 (using the court’s precedent to conclude that a search of a person’s body is the only kind of search that requires individual suspicion).

83. See id. at 1234; Riley v. California, 573 U.S. 373, 393 (2014) (explaining that under the search incident-to-arrest doctrine, an additional search of one’s pocket bears no additional privacy intrusion but searching one’s digital devices has a substantially greater privacy interest and thus a higher level of intrusion).

84. See Touset, 890 F.3d at 1237 (noting that while reasonable suspicion is based on an objective inquiry, reasonable suspicion is not required for searches of electronics at the border).

85. See id. at 1235 (stating that the court is unpersuaded that an individual’s right to privacy is not given more weight than the paramount interest of the sovereign).

86. See id. at 1233 (re-asserting that not even the Supreme Court has required reasonable suspicion to search a traveler’s property at the border). But cf. Riley, 573 U.S. at 396-97, 2491 (noting that searches of cell phones implicate different privacy concerns than searches of property like luggage because electronic devices may contain more information than would even be found in a typical search of a home).

87. See Touset, 890 F.3d at 1228 (reasoning that although many people own electronic devices, forensic searches of devices are not intrusive because the device is property, not a traveler’s person or body).

88. See id. at 1233 (comparing the information contained on cell phones to that contained in “a tractor-trailer loaded with boxes of documents”).
devices store vast amounts of information and a cell phone search exposes
the government to far more information than the most intrusive search of a
house.89 The attachment between a traveler and his electronic device is
significant for Fourth Amendment purposes because the traveler may store
information that could potentially expose his family and profession.90 A
suspicionless forensic search of this information can result in harmful
consequences.91 For example, Justice Sotomayor emphasized in her Riley
concurrence that cell phones store large amount of applications, that when
forensically searched, can reveal information about an individual’s religion,
GPS location, and other personal information that officers can use against
the person to stereotype.92

1. The Eleventh Circuit Disregarded its own Definition of
“Intrusiveness” by Failing to Apply it to Electronic Device Border
Searches and thus, Violated the Fourth Amendment.

The Eleventh Circuit broadly construes precedent to conclude that both
manual and forensic border searches are reasonable without suspicion simply
because the search occurs at the border.93 For example, the Eleventh Circuit
uses the holding in United States v. Alfaro-Moncada to justify manual and
forensic border searches by concluding that national security interests
outweigh a traveler’s right to privacy.94 The Eleventh Circuit reasons that
such searches can prevent issues of national security.95

Moreover, the Eleventh Circuit justifies the minimization of individual

89. See Riley, 573 U.S. at 395-97 (citing Ontario v. Quon, 560 U.S. 746, 760 (2010))
(noting that today, more than 90% of American adults own cell phones that host mundane
and intimate details and records that, until recently, were much more difficult for law
enforcement to access).

90. See id. at 395 (comparing a personal diary a decade ago with a cell phone today);
United States v. Kolsuz, 890 F.3d 133, 145 (4th Cir. 2018) (explaining that electronic
devices contain information such as business documents and medical records).

91. See Kolsuz, 890 F.3d at 145 (noting that electronic devices store uniquely
sensitive information that contain intimate details about one’s life).

92. See Riley, 573 U.S. at 395-96 (explaining that apps provide a comprehensive
record of a person’s public movements and affiliations that reveal information about a
person’s life).

93. See Touset, 890 F.3d at 1228, 1232 (asserting that the border exception has
complications because of routine and nonroutine searches and the consequences of each).

94. See United States v. Alfaro-Moncada, 607 F.3d 720, 728 (11th Cir. 2010)
(concluding that there is a qualitative balance that exists when the Fourth Amendment is
used to balance the international border and the interior of the United States).

95. See id. at 728 (stating that the United States’ paramount responsibility is to
protect the sovereign, its territory, and integrity).
privacy rights at the border by emphasizing that a traveler’s desire to enter the United States is a privilege. Therefore, travelers should understand that their personal effects, which includes electronic devices, are subject to a forensic search at the border without an officer needing any form of suspicion. The Eleventh Circuit unnecessarily overextends the government’s power to conduct forensic searches of an electronic device at the border by asserting that entering the United States is a privilege, but fails to provide any legally sound explanation for not requiring any level of suspicion for searches protected under the Fourth Amendment.

The Fourth Circuit’s approach creates a norm for officers to conduct manual and forensic searches based on a subjective standard, rather than an objective standard without implicit biases. Conducting searches of persons on a subjective basis removes the ability of officers to conduct searches with the objective interest of protecting national security. Without a reasonable suspicion standard, permitting an officer to search individuals on a subjective basis creates the risk of the officer using implicit bias to decide which individuals get searched, giving wide discretion to agents at the border. For example, an officer can conduct a forensic electronic device search on any traveler at the border, despite being employed in a professional field, not posing a national security risk, and without being in the process of transmitting a crime. Thus, the Eleventh Circuit’s legal standard is overly

96. See id. (emphasizing that Fourth Amendment protections are “relaxed” at the border so much so that government officials have the utmost power to reject travelers from entering the U.S.to protect the sovereign (citing United States v. Chemaly, 741 F.2d 1346, 1350 (11th Cir. 1984)).

97. See id. (reiterating that at the border, a person’s personal effects lack protection under the Fourth Amendment).

98. See U.S. CONST. amend. IV (stating, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause”).

99. See Whren v. United States, 517 U.S. 806, 807 (1996) (acknowledging that a law enforcement’s subjective intentions and perspective plays no role in ordinary probable cause search and seizures).

100. See United States v. Kolsuz 890 F.3d 133, 147 (4th Cir. 2018) (noting that forensic searches of electronic devices do not fit within the border search exception and therefore need more than reasonable suspicion. The Riley court acknowledges that forensic border searches need a warrant based on probable cause (citing Riley v. California, 573 U.S. 373, 392 (2014))).

101. See id. at 146 (arguing that Cotterman’s reasoning requires officers to make “commonsense differentiation” between a manual and forensic search, it gives too much discretion to an officer (citing United States v. Cotterman, 709 F.3d 952, 967 (2013))).

broad and goes beyond the border search exception. The court asserts that officers can lawfully “pat-down” and “frisk” travelers solely because they request to cross the national border. The Eleventh Circuit should expand its rhetoric to include the reasoning in Riley related to electronic device border searches because electronic devices store personal information. In Riley, the Supreme Court concluded that searching a cell phone requires probable cause secured by a warrant. Instead, however, the Eleventh Circuit relies heavily on Ramsey, noting that CBP agents have reasonable suspicion to search a package when it crosses the border from known sources of illegal activity. For example, the Ramsey Court noted that because Thailand was known for heroin distribution in the United States, mail entering the country from Thailand was subject to search without requiring reasonable suspicion. However, the Ramsey Court attaches a slightly favorable standard to persons traveling within the United States border. It concluded that travelers already in the United States have a right to travel without interruption or search unless there is

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103. See United States v. Touset, 890 F.3d 1227, 1232 (11th Cir. 2018) (stating the court’s holding that forensic border searches never require suspicion (quoting United States v. Ramsey, 431 U.S. 606, 619 (1977))).

104. See United States v. Alfaro-Moncada, 607 F.3d 720, 728 (11th Cir. 2010) (quoting United States v. Ramos, 645 F.2d 318, 322 (5th Cir. 1981)) (stating that merely crossing the border is enough justification for a traveler to be patted down and frisked, no additional suspicion or cause is needed).

105. See Riley v. California, 573 U.S 373, 395 (2014) (stating that prior to the growth of digital technology, people did not carry sensitive personal information with them on a daily basis).

106. See Touset, 890 F.3d at 1234 (explaining that the Supreme Court has declined to identify the level of suspicion needed to perform a nonroutine search); see also Riley v. California, 573 U.S. at 386 (asserting that a cell phone search requires a level of suspicion because it does not present any sort of Chimel risk).

107. See United States v. Ramsey, 431 U.S. 606, 609-10 (1977) (explaining that the defendant was transporting heroin from Thailand, a country known for mass-producing and transporting heroin into the United States).

108. See id. at 614-15 (explaining that in addition to mail entering from Thailand, there was a statute to confirm the validity of the search; therefore, even if the border search exception did not apply, the search was valid under the statute).

109. See id. at 618 (stating that travelers and their effects outside of the United States border need to prove that they can legally be in the United States and not be a threat to the national security of the country).
probable cause that the traveler is transporting contraband.110

The Eleventh Circuit concludes that its own three-factor test for determining the intrusiveness of a border search, established in Touset, is irrelevant to electronic manual and forensic border searches because both are dissimilar to an x-ray search of a person’s body.111 In conducting a search of an electronic device, officers do not touch the traveler’s body or use physical force to expose the traveler’s body.112 The court incorrectly applied the three-factor intrusiveness test because there was physical contact between Touset and the border officer through his personal effects—the officer touched and searched his luggage and electronic devices.113 Secondly, the test created by Touset is overly vague in that it does not specify what it means to physically expose a traveler’s intimate body parts.114 The vague language of the test, therefore, leads one to argue that an officer is lawfully allowed to expose intimate photographs of a traveler simply by conducting a manual search.115 Specifically, the test allows an officer to scroll through a traveler’s cell phone to view intimate photographs since under the test’s language, the officer is not physically touching the traveler.116

Lastly, the court indicates the use of force as a prerequisite for intrusiveness.117 However, the court fails to acknowledge that the action of force is subjective, difficult to measure, and based on individual factors such as an officer’s physical strength.118 For these reasons, the Eleventh Circuit followed a vague intrusiveness test created by Touset and disregarded that

110. See id. at 620 (noting that what CBP agents really must evaluate is incoming persons and property, not the mode of transportation).
111. See Touset, 890 F.3d at 1234 (listing the three-factors of the court’s intrusiveness test and analyzing how the test does not implicate any violation to the Fourth Amendment).
112. See id. (emphasizing that because the officers in Touset did not physically touch the defendant nor use body strip search methods to search the traveler, no intrusion of privacy occurred).
113. See id. at 1230 (stating that a lookout was issued for Touset’s return to the United States, and when he entered the airport, a CBP agent seized his luggage and searched it).
114. See id. at 1234 (explaining that the court uses only a body search to define “intrusive” but neglects to consider modern technology).
115. See id. at 1235 (explaining that manual searches have revealed photos of child pornography).
116. See id. (noticing that the court fails to flush through the definition of “physical” and uses it too loosely).
117. See id. 1234 (noting that the court affiliates force with physical strength that can cause harm).
118. See id. (failing to provide a measure of “force”).
both manual and forensic searches of electronics at the border infringe upon an individual’s privacy interests protected under the Fourth Amendment.\textsuperscript{119}

Moreover, even if the Eleventh Circuit’s reliance on the intrusiveness test is valid, the court misapplies the factors of the test for searches conducted at the border.\textsuperscript{120} Specifically, the court fails to acknowledge what the Supreme Court has already considered in \textit{Riley}: with the growth of technological advances, travelers no longer keep their personal effects at home.\textsuperscript{121} Rather, individuals’ private documents are stored and easily accessed on their electronic devices.\textsuperscript{122} Thus, contrary to the court’s reasoning in \textit{Touset}, a search of an individual’s electronic device is intrusive under the three-factor test because intrusiveness, force, and touching are subjective to a traveler and a border officer.\textsuperscript{123}

The Eleventh Circuit also uses its precedent to analogize and conclude that an x-ray scan of the body and a forensic search of an electronic device at the border should not be treated the same.\textsuperscript{124} The court correctly acknowledges that an officer should perform an x-ray scan of a person’s body when reasonable suspicion exists.\textsuperscript{125} However, using the courts’ intrusiveness test, an x-ray exam does encompass: (1) physical contact between a traveler and an officer; (2) exposure of a traveler’s intimate body parts; and (3) the use of force.\textsuperscript{126}

\textsuperscript{119} \textit{See} U.S. CONST. amend. IV (restating the fundamental basis for the Fourth Amendment resides with individual privacy interests to ones’ person and personal effects).

\textsuperscript{120} \textit{See Touset}, 890 F.3d at 1234 (stating that the factors of the intrusiveness test are irrelevant to searches of electronic devices because the electronic device is not a physical part of a person).

\textsuperscript{121} \textit{See} Riley v. California, 573 U.S. 373, 396-97 (2014) (noting that today, a phone can contain more personal information than a physical house).

\textsuperscript{122} \textit{See} United States v. Vergara, 884 F.3d 1309, 1315-16 (11th Cir. 2018) (using the Supreme Court’s rationale that cell phones provide information never found in the home, yet that information has a broad array of private information).

\textsuperscript{123} \textit{See} Whren v. United States, 517 U.S. 806, 812-13 (1996) (stating that an officer’s subjective reasoning and intent is irrelevant when determining whether an individual is partaking in criminal behavior).

\textsuperscript{124} \textit{See} United States v. Alfaro-Moncada, 607 F.3d 720, 729 (11th Cir. 2010) (describing that an x-ray search of persons’ body requires reasonable suspicion that a crime is being committed or the person and their effects pose a government interest risk).

\textsuperscript{125} \textit{See Touset}, 890 F.3d at 1234 (concluding that an x-ray search differs from a forensic search of an electronic device and constitutes a nonroutine search, whereby reasonable suspicion is required).

\textsuperscript{126} \textit{See id.} (stating that even at the border, reasonable suspicion is required for highly intrusive searches which include x-rays and strip searches).
Additionally, the Eleventh Circuit incorrectly uses the analogy of an x-ray scan and forensic search of a cell phone.\(^\text{127}\) Riley’s rationale concludes that cell phones contain intimate details of one’s life, therefore using sophisticated scanning equipment and software to conduct a forensic electronic device search has the same effect as searching a person’s body with an x-ray machine: both are overly intrusive privacy matters that are inherently protected by the Fourth Amendment.\(^\text{128}\) Because the Eleventh Circuit incorrectly categorizes electronic devices as “property” or “effects,” as stated in the Fourth Amendment, the court’s legal standard fails to preserve a traveler’s fundamental right to privacy at the border.\(^\text{129}\)

**B. The Ninth Circuit’s Interpretation and Application of the Reasonable Suspicion Standard Partially Aligns with the Fourth Amendment’s Protection of Privacy Rights, but should be Expanded to Include an Individualized Suspicion Standard for Electronic Border Searches.**

The Ninth Circuit’s legal standard for forensic searches of electronic devices at the border better balances an individual’s privacy rights protected by the Fourth Amendment with the government’s interest in promoting national security.\(^\text{130}\) More importantly, the Ninth Circuit acknowledges that there must be limits on the government’s power.\(^\text{131}\) However, the Ninth Circuit’s approach to forensic electronic device searches occurring at the border has limitations.\(^\text{132}\) Specifically, the court expects travelers to

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127. See id. (citing United States v. Montoya de Hernandez, 473 U.S. 532, 541 (1985)) (noting the Court did not decide what level of suspicion is required for a nonroutine border strip search).

128. See Riley v. California, 573 U.S. 373, 397 (2014) (explaining that the privacy interest of searching a cell phone not only exposes the data a user regularly accesses but data that might not be stored on the device itself. For example, the traveler can have their cell phone synced to a Cloud storage in a different location and still access more information that is not stored on the cell phone itself).

129. See id. at 384 (referencing precedent that shows a person’s personal property includes things immediately near him during a search).

130. See United States v. Cotterman, 709 F.3d 952, 960 (9th Cir. 2013) (explaining that it is fundamental for the court to draw a clear distinction between government interests and individual privacy interests. The Government cannot be allowed to unjustly seize property for extended times without justification to be used as criminal evidence against an individual crossing the border).

131. See id. at 957 (stating that even though the government cannot be required to have equipment readily available at the border to conduct forensic searches of electronic devices, the government cannot simply practice an “anything goes” process).

132. See id. at 961 (explaining that an “extended” border search, commonly known as a forensic search, is only permissible when it is apparent with reasonable certainty that
understand that forensic searches of electronic devices can occur hundreds of miles away from the border. This expectation unrealistically forces travelers to inform themselves that their electronic devices are subject to a forensic search even at a distance that is far from the border. Even though the Ninth Circuit makes an effort in considering a traveler’s privacy rights, it falls short by failing to establish a legal standard that objectively considers who should be subjected to a forensic search.

The Ninth Circuit’s legal standard for lawfully conducting forensic searches of electronic devices at the border is based on reasonable suspicion and is a two-pronged test. First, for a forensic electronic device search to be lawful, the traveler must have recently crossed the border, and second, the officer must have reasonable suspicion that criminal activity has occurred or will occur. Similarly to the Eleventh Circuit, the legal question raised by the Ninth Circuit’s legal standard is that it still favors a subjective approach to conducting forensic electronic device searches. The Ninth Circuit moves closer to a balanced standard for conducting forensic searches of electronic devices at the border. In particular, the Ninth Circuit reasons there was a recent border crossing and reasonable suspicion that a criminal activity is in progress or has been committed (citing United States v. Guzman-Padilla, 573 F.3d 865, 878-79 (9th Cir. 2009)).

133. See id. at 960 (clarifying that the court’s expectation exists because according to the traditional interpretation of the border search exception, an individual loses their privacy protection at the border).

134. See id. at 974-75 (asserting that the border search exception is not rigid and there should not be an expectation for the United States to have forensic search equipment readily available at each port-of-entry or border).

135. See Riley v. California, 573 U.S. 373, 403 (2014) (noting that cell phones are not immune from search, but a warrant is generally required even when the search occurs incident to arrest. The Court also emphasizes that cell phones are not just technological conveniences, they hold “the privacies of life”).

136. See Cotterman, 709 F.3d 961 (citing United States v. Guzman-Padilla, 573 F.3d 865, 878-79 (9th Cir. 2009)) (explaining the dual requirements and their establishment to protect government interests).

137. See id. (explaining their legal standard and the overarching objective: conforming to government needs, concluding that the sovereign does not need to make any special justifications to search at the border).

138. See United States v. Touset, 890 F.3d 1227, 1234 (11th Cir. 2018) (noting that the Fourth Circuit and Ninth Circuit both agree that reasonable suspicion is required for “extended” forensic searches of electronic devices at the border).

139. See Cotterman, 709 F.3d at 960 (citing United States v. Montoya de Hernandez, 473 U.S. 531, 539 (1985)) (concluding that the government does not have carte blanche at the border; therefore, the Fourth Amendment protections do not disappear at the border).
that when a traveler’s electronic device is destroyed during or before a forensic search, CBP agents must have reasonable suspicion before initiating the search.140

While the Ninth and Eleventh Circuits have similar interpretations of the border search exception, the Ninth Circuit properly holds that border searches of forensic electronic devices, without reasonable suspicion, are an intrusion on an individual’s protected privacy rights.141 Moreover, although only relevant until after the subject or items have entered the U.S., the Ninth Circuit’s legal standard addresses not only the type of search but the distance where the search is conducted.142 The Ninth Circuit’s legal standard asserts that a person’s expectation of privacy does not cease at the border or its functional equivalent.143 Therefore, when the government conducts an extended search, inherently delayed in nature and extending beyond the actual border, it must justify the search with reasonable suspicion.144

The Ninth Circuit erred by disagreeing with the district court’s conclusion that a traveler cannot be subject to a forensic electronic device search, if while at the border, the government had no evidence of criminal acts in transit.145 Rather, to forensically search and seize a traveler’s electronic device, the government should have evidence, such as through a lookout

140. See id. at 962-63 (explaining that proximity to the border is just one factor the court considers when enforcing the border search exception); see also United States v. Villasenor 608 F.3d 467, 471-72 (declining to enforce the border search exception within a few miles of the border).

141. See Cotterman, 952 F.3d at 957 (noting the intrusive nature of forensic examinations and its Fourth Amendment implications. Moreover, the Fourth Amendment asserts its privacy protection against intrusion when a search is conducted beyond the border, where a traveler’s normal expectation of privacy is attached).

142. See id. at 962-63 (emphasizing that a heightened level of suspicion should arise when forensic searches of an electronic device occur away from the border or at the border’s “functional equivalent,” which can extend hundreds and even thousands of miles away from the physical border).

143. See id. at 962 (citing United States v. Cotterman, 637 F.3d 1068, 1086-87 (9th Cir. 2011) (Fletcher, J. dissenting))) (explaining that seizure of a person or their belongings does not become unreasonable because the seizure is extended in time. However, what really matters is the scope of their detention. The court must find that the detention remains related to the initial search and seizure).

144. See United States v. Abbouchi, 502 F.3d 850, 855 (9th Cir. 2007) (explaining that extended searches go beyond the regular expected border search, thus requiring a particularized level of suspicion to uncover contraband or evidence of criminal activity).

145. See Cotterman, 637 F.3d at 1074 (explaining that the United States argued that if the border officer’s initial search was based on reasonable suspicion, the officer no longer has to justify an extended forensic border search because the original finding of suspicion is transferred).
alert, that proves that a traveler has committed a crime. 146

According to the Ninth Circuit, it is not necessary to dwell on the government’s border search power because the First Congress’s rationale for the Fourth Amendment has historically taken precedent: customs border agents could conduct warrantless searches of vessels crossing the border for contraband. 147 However, the Ninth Circuit incorrectly holds in Cotterman that a traveler’s presence at the border automatically foregoes his Fourth Amendment protections. 148 The court’s holding is incorrect because a traveler’s right to privacy is not diminished the instant he presents himself at the border. 149 Rather, being at the border should alert a traveler that his right to privacy is less applicable, but never completely removed, because as the court asserts, the government cannot seize property for weeks to conduct a forensic search without first having reasonable suspicion. 150 Interestingly, the Ninth Circuit’s reasoning seems to contradict itself: first it asserts that a traveler’s Fourth Amendment protection is waived at the border, but later asserts that forensic searches require reasonable suspicion based on the totality of the circumstances in each case. 151 Its reasoning must be more

146. See id. (restating the District Court’s ruling: The United States does not dispute that there was insufficient evidence to conduct a forensic search of the electronic devices 170 miles away from the border).

147. See United States v. Ramsey, 431 U.S. 606, 616-18 (1977) (providing an explanation of the First Congress’s interpretation of the Fourth Amendment: Section 24 authorizes custom and border officers to lawfully enter and search dwellings of crewmembers on vessels); see also Cotterman, 637 F.3d at 1074 (stating that because ICE agents relayed information that seemed to incriminate the defendant, the government was allowed to conduct a forensic search of an electronic device without considering whether they actually had evidence that established reasonable suspicion).

148. See Cotterman, 637 F.3d at 1078 (concluding that the border search exception still applies to searches initiated at the border with devices that have not been cleared to enter the United States. The court contends that the border search exception allows a search to continue beyond the border to determine whether the device causes a risk to the sovereign).

149. See United States v. Kolsuz, 890 F.3d 133, 145 (4th Cir. 2018) (citing Riley v. California, 573 U.S. 373, 403 (2014)) (stating that Riley presented the notion that a cell phone should not be treated as just another form of a container, rather, cell phones are different: they impose a risk to expose sensitive information without probable cause).

150. See Cotterman, 637 F.3d at 1070, 1077 (claiming that if a traveler’s initial search occurs at the border, that traveler no longer has a “normal” expectation of privacy. However, a line must be drawn: the Government cannot seize property at the border and hold it for weeks, months, or years on a whim).

151. See id. at 1079 (quoting the court: “We continue to analyze the Government’s conduct on a case-by-cases basis” to determine when a search is unreasonable; the reasoning should be based on the duration and scope of the search).
uniform. Through this rationale, the Ninth Circuit, similar to the Eleventh Circuit, entirely disregards the Fourth Amendment’s inherent protection against unreasonable intrusion.

Cotterman, like many other travelers crossing the border, did not expect the government to conduct a forensic electronic search of his device away from the border without having individualized suspicion. This expectation is reasonable because the traveler has no direct knowledge of when the search will cease or what the government is actually looking for. Cotterman’s argument is persuasive because it exemplifies a common concern for travelers: travelers should not be expected to leave their personal effects and electronic devices at home to prevent being subject to such an intrusive search.


The individualized suspicion standard that the Fourth Circuit applies to forensic electronic device searches at the border is the correct standard

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152. See id. (providing examples of the court’s reasoning being unclear).

153. See United States v. Vergara, 884 F.3d 1309, 1310 (11th Cir. 2018) (concluding that the two requirements under the Fourth Amendment to search and seize, probable cause and a warrant, are never required at the border unless it is an x-ray examination or strip search); see also United States v. Touset, 890 F.3d 1227, 1229 (11th Cir. 2018) (reiterating that reasonable suspicion is not required for initial search of an electronic device at the border; therefore, no suspicion is needed to search electronic devices at the border regardless if the search is manual or forensic); Cotterman, 709 F.3d at 967 (concluding that travelers should expect to have their privacy intruded upon during a border search).

154. See Cotterman, 637 F.3d at 1076 (reiterating that under the border search exception, the government can conduct searches of property away from the border not yet cleared for entry).

155. See id. at 1074 (referencing Cotterman’s argument that the border search exception is ambiguous and allows the government to conduct forensic searches of electronic devices without sufficient evidence and can lead to extended border searches without reasonable particularized suspicion).

156. See United States v. Kolsuz, 890 F.3d 133, 145 (4th Cir. 2018) (emphasizing that electronic devices are found everywhere and used by everyone regardless of being a criminal or law-abiding citizen. In addition, electronic devices are the most efficient tools used for communication when a traveler is abroad, and it is unreasonable and unrealistic to ask a traveler to leave his electronic devices at home because of the border search exception); Contra United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971) (concluding that a person should not have the same expectation of privacy at a port as they do at their home).
because it aligns and complies with the inherent privacy protections guaranteed in the Fourth Amendment. In *Kolsuz*, the Fourth Circuit did not address or resolve the level of suspicion needed in the course of a manual electronic device search at the border. Instead, the court uses *Kolsuz* to address whether more than reasonable suspicion is needed to conduct forensic electronic device searches at the border. However, since the Fourth Circuit is the only circuit that suggests that a higher level of reasonable suspicion is needed to conduct a forensic search at the border, the Fourth Circuit should consider addressing manual searches in future cases. The Fourth Circuit’s determination that individualized suspicion is needed to conduct forensic searches of electronic devices at the border serves the Congressional intent of prioritizing government interests and protecting an individual’s right to privacy that the Fourth Amendment guarantees. For example, on two separate occasions prior to the forensic search of Kolsuz’s electronic devices, CBP agents found illegal firearm parts in his luggage and reminded him that he needed a license to transport the parts; he did not comply. In 2016, CBP agents received a registered alert listing prior border searches revealing Kolsuz’s same illegal transport of firearm parts, establishing individualized suspicion, and leading to two suitcases full of contraband. The Fourth Circuit’s legal standard is compliant with the

157. *See Kolsuz*, 890 F.3d at 135 (concluding that a traveler’s right to privacy does not stop at the border. Rather, the government is required to have specific reasons to conduct a forensic search of an electronic device based on individualized suspicion).

158. *See id.* at 141 (using the fact that Kolsuz did not dispute the manual search of his electronic device at the border to justify their reasoning for not addressing manual searches of electronic devices at the border).

159. *See id.* at 142 (suggesting that Kolsuz does not dispute the manual search because he was arrested during the forensic search, which uncovered more private information on his cell phone; whereas the manual search at the airport did not reveal information used against him at trial).

160. *See id.* at 140 (stating that *Riley* helps to acknowledge that electronic devices serve as property, and therefore are protected by the Fourth Amendment).

161. *See United States v. Touset*, 890 F.3d 1227, 1236 (11th Cir. 2018) (acknowledging the Congressional intent of the border search exception: officers are required to have reason to suspect contraband is being imported); *See Kolsuz*, 890 F.3d at 137 (agreeing with *Riley*: forensically searching an electronic device requires more than reasonable suspicion).

162. *See Kolsuz*, 890 F.3d at 141 (explaining that Kolsuz did not contest or reject the fact that his electronic devices were seized, he also had prior knowledge of the licensing requirements to transport such fire arm parts and never complied).

163. *See id.* at 143 (explaining that CBP agents rightfully forensically searched Kolsuz’s phone because they had good reason (his history) to believe that he would continue transporting illegal fire arm parts).
Fourth Amendment because a forensic search of electronic devices requires the government to produce a greater justification for conducting the search.\textsuperscript{164} In \textit{Kolsuz}, the court applied an individualized suspicion standard and thereby correctly rejected the defendant’s argument against the forensic search.\textsuperscript{165} Kolsuz argued that because he was exiting the United States, the border search exception did not apply, but he is incorrect.\textsuperscript{166} Moreover, Kolsuz’s continuous efforts to transport illegal weapon-parts speaks directly to the basis of the border search exception which aims to prevent dangerous contraband from entering the United States.\textsuperscript{167} In hindsight, the Fourth Circuit recognizes that even at the border, the government’s authority is limited because electronic device searches must be subject to reasonableness.\textsuperscript{168} The Fourth Circuit’s legal standard is an example of an objective legal standard that correctly balances both government and personal interests because it acknowledges that a forensic search at the border reveals sensitive and private information.\textsuperscript{169} In addition, the Fourth Circuit relies on precedent that acknowledges cell phone searches go beyond the normal expected standard of intrusion.\textsuperscript{170} In 2012, CBP agents discovered 163 illegal firearms in Kolsuz’s luggage; the firearms were added to the United States Munitions List (hereinafter “USML”).\textsuperscript{171} To add a

\begin{enumerate}
\item[164.] See id. (agreeing with the District Court’s holding but adding that perhaps there must be a higher warrant-based rule for nonroutine searches of electronic devices at the border, suggesting that maybe a warrant-based standard should be developed).
\item[165.] See id. at 138 (describing the long history of the defendant’s criminal activity. When the defendant attempted to exit the United States, he was already “well known” to government authorities for exporting firearm parts without an export license).
\item[166.] See id. (asserting the basis of the border search exception is to protect against national security risks, which give way to regulating imports and exports).
\item[167.] See id. (explaining that the purpose of the border search exception is to monitor the transport of dangerous weapons).
\item[168.] See id. (emphasizing that the touchstone of the Fourth Amendment is reasonableness to search and seize).
\item[169.] See id. at 140 (explaining that a manual search of an electronic device requires no level of suspicion because such a search is implied for travelers entering and existing the border. However, a forensic search, whereby a cell phone is seized from its owner, connected to a sophisticated piece of equipment which is developed to analyze and extract data beyond a manual search, can no longer be compared to an ordinary search of ones’ luggage).
\item[170.] See id. (stating that Supreme Court precedent has acknowledged the difficulties in categorizing a forensic search of a cell phone as just a manual search; instead, the Court concluded that such a search is easily comparable to a “body cavity search” of a phone).
\item[171.] See id. at 138 (explaining that under the Arms Export Control Act, firearm parts are considered defense articles subject to licensing requirements).
\end{enumerate}
weapon to the USML, the government must have a justified reason that the weapon itself is a national security risk.\footnote{172} The Fourth Circuit’s legal standard for forensic searches complies with the Fourth Amendment because it requires border officials to have specific reasons to conduct such a search, like the defendant’s long history of transporting illegal contraband.\footnote{173} Additionally, following Kolsuz’s arrest, the forensic search of his cell phone revealed information showing that he intended to continue transporting illegal firearms.\footnote{174} Moreover, without a legal standard based on individualized suspicion, CBP agents are searching travelers based on a subjective standard.\footnote{175} Having a legal standard based on individualized suspicion prevents the government from having free rein to unequivocally forensically search without reason.\footnote{176} In turn, this will produce an interest-balanced standard that reduces Fourth Amendment violation claims of “unreasonable search or seizure.”\footnote{177}

In \textit{Kolsuz}, the Fourth Circuit agreed with the Ninth Circuit’s holding that after an electronic device search is initiated at the border, proximity is no longer an issue.\footnote{178} The Fourth Circuit has also taken an approach that respects governmental interest, an individual’s right to privacy, and its

\begin{itemize}
\item \footnote{172} See \textit{id.} at 139 (explaining that once a weapon is added to the United States Munitions List, it cannot be removed from the United States without a license).
\item \footnote{173} See \textit{id.} at 138 (describing the long list of encounters and warning border officers had with the defendant prior to the forensic search of his electronic devices. The encounters occurred for a number of years).
\item \footnote{174} See \textit{id.} at 143 (providing the explanation that the forensic search showed ongoing efforts to continue transporting illegal firearms to Miami and Turkey from the United States).
\item \footnote{175} See United States v. Touset, 890 F.3d 1227, 1232 (11th Cir. 2018) (asserting that there is no need for an extended legal standard to incorporate specific reasons to conduct a forensic search).
\item \footnote{176} See \textit{Kolsuz}, 890 F.3d at 135 (explaining that there needs to be a balanced objective standard for Fourth Amendment exceptions. Moreover, when an individual’s privacy interests outweigh government interests, a warrant based on probable cause is required).
\item \footnote{177} See \textit{id.} at 141 (citing United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985)) (explaining that courts have justified the most intrusive nonroutine searches with reasonable suspicion, including the case where the Court used an x-ray to ensure that a suspect was smuggling drugs, and detained the criminal until the drugs was excreted from her alimentary canal).
\item \footnote{178} See \textit{id.} at 142 (citing United States v. Cotterman, 709 F.3d 952, 961-62 (2013)) (concluding once an electronic device search started at the border, conducting an off-site forensic search away from the actual border is permissible and does not remove the border exception).
\end{itemize}
extension to property, including electronic devices. The Fourth Circuit’s legal standard is in line with the Fourth Amendment’s privacy protection because it requires the government to demonstrate significant proof that an individual is in transit to commit a crime before being able to conduct a forensic search.

The interesting nuance between the circuit courts is that all suggest that the legislative and executive branches of government further examine the issue and implications of electronic device searches at the border. They recommend that Congress use its law-making power to create an objective standard to determine the level of suspicion required for border searches.

By adopting the Fourth Circuit’s rationale, circuit courts will be able to properly apply Riley’s individualized suspicion standard instead of applying a reasonable suspicion standard, or failing to apply a standard at all when performing nonroutine-forensic electronic device searches at the border. A standard based on individualized suspicion is more effective; it serves as a safeguard for travelers and allows CBP agents to properly investigate actual risks to national security based on individual suspicion, rather than subjective beliefs. An individualized suspicion standard ensures that the individual subjected to the search is guaranteed protection over his private interests, such as his political affiliations, religious views, location, and

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179. See id. at 143 (explaining that when a Fourth Amendment search exception is applicable and there are ancillary governmental interests, the court must enforce the paramount protection described in the Fourth Amendment, the government must obtain a warrant based on probable cause).

180. See id. (explaining that CBP agents found two suitcases of firearm parts and did not just search Kolsuz’s belongings to invoke the border exception to generalized law enforcement interests and combating crime).

181. See id. at 148 (Wilkinson, J., concurring) (emphasizing that different standards of suspicion should be determined by Congress and courts should apply it. In addition, because border searches of electronic devices are becoming more common, all three branches of government need to approach the topic, not just one).

182. See id. at 148 (emphasizing that the legislative and executive branches of government have a critical role in defining the standard for border searches and therefore, are better equipped to create rules that govern individual privacy rights and governmental interests).

183. See Riley v. California, 573 U.S. 373, 374 (2014) (emphasizing that a search of a cell phone does not further the government interests in Chimel but has a greater privacy interest than a brief physical search).

184. See id. at 394 (explaining the justification for expanding the standard of suspicion for cell phone searches: a cell phones’ storage capacity has consequences that raise several privacy concerns. A cell phone collects and stores information such as personal contacts, addresses, financial and medical records, and thousands of photographs that show a person’s private life).
browsing history.\footnote{See id. at 396 (citing Justice Sotomayor’s point of view: cell phones contain particularized information that is meant to be kept private).} Moreover, manual routine searches are already exempted from the standard Fourth Amendment requirements: probable cause and a warrant; therefore, CBP agents are free to assess risks concerning national security and safety without having to forensically search an electronic device.\footnote{See Kolsuz, 890 F.3d at 135 (explaining that the Fourth Amendment is broad enough to prevent contraband without having to forensically search when individualized suspicion is absent).}

Having courts recognize the importance of individualized suspicion is useful but not enough.\footnote{See id. at 133 (referring to circuit cases that disagree on the legal standard of the border search exception).} The inconsistencies between circuit courts regarding forensic electronic device searches directly infringe on the primary purpose of the Fourth Amendment: to protect against government intrusion.\footnote{See generally United States v. Touset, 890 F.3d 1227 (11th Cir. 2018), Kolsuz, 890 F.3d at 133, United States v. Cotterman, 637 F.3d 1068 (9th Cir. 2011) (citing the circuit court cases that differ on the standard of suspicion needed to conduct a forensic electronic device search at the border or its functional equivalent).} As a result, it becomes cumbersome and difficult for travelers and law enforcement officers to understand when to proceed with such a search.\footnote{See Kolsuz, 890 F.3d at 148 (Wilkinson, J., concurring)(noting that if, as the majority declares, individualized suspicion is required to conduct a forensic search of an electronic at the border, then Congress must say so. Moreover, issues like border searches are the reason why the government must be active in the separation of powers; all branches of government must participate in such a policy, “not just one”).} Furthermore, because the Fourth Circuit, like its sister circuits, chose not to address manual searches, the individualized suspicion standard is still vague because no standard objective test exists for border officials to use.\footnote{See id. at 146 (explaining that at this point, even though CBP implemented the \textit{Border Search of Electronic Devices} directive, it does not establish a constitutional mandate).} Therefore, any search can be considered manual or forensic.\footnote{See id. at 148-49 (noting that even though the majority chose not to address manual searches at the border, individualized suspicion can apply to manual searches as well. Moreover, the majority should have found that the forensic search was reasonable, rather than allowing the distinction of intrusive and less intrusive be the deciding factor in whether or not individualized suspicion was present because such distinction allows for slipperiness).} Moreover, the concurring opinion in \textit{Kolsuz} emphasizes the need to resolve empirical questions that will help create an objective legal standard
minimizing tension between privacy and security interest at the border.192

IV. POLICY RECOMMENDATIONS

With the advance of modern technology and the new administration, electronic device searches at the border have increased to almost 15,000 in the first half of 2017, and is estimated to triple at the end 2017.193 The border search exception’s purpose is to protect the sovereign from national security risks, yet it is proven that the exception encroaches upon, and on occasion can violate an individual’s privacy interest.194 Courts drastically vary with their interpretations of the border search exception and need an objective legal standard to evaluate cases based on the border search exception.195 In deciding what an objective legal standard would be, the legislative branch should utilize the Fourth Circuit’s standard for forensic searches and incorporate the Eleventh Circuit’s three-factor intrusiveness analysis.196

Moreover, the legislative branch should strictly review this exception and objectively create a standard for manual and forensic searches.197

192. See id. at 150 (stating specific questions that are critical to answer in order to establish an objective legal standard).


194. See Riley v. California, 573 U.S. 373, 386 (2014) (acknowledging that cell phones differ from other physical objects because they store an immense amount of information that is readily available upon a warrantless search).

195. See generally United States v. Touset, 890 F.3d 1227, 1229 (11th Cir. 2018), Kolsuz, 890 F.3d at 133, United States v. Cotterman, 637 F.3d 1068, 1070 (9th Cir. 2011) (showing how each circuit court applied the border search exception to forensic searches of electronic devices differently).

196. See Riley v. California, 573 U.S. 373, 408 (2014) (Alito, J., concurring) (stating that with the growth of modern day technology, it would be “very unfortunate” if in the twenty-first century, privacy protection of electronic devices was left for the federal courts to analyze using only the “blunt” instrument of the Fourth Amendment. Noting that the legislative branch is in a better place to determine a standard, objective assessment to handle electronic device border searches); see also Kolsuz, 890 F.3d at 150 (agreeing with the suggestion that the legislative and executive branches of government are better equipped to create a standard test because they are elected by the people).

197. See Kolsuz, 890 F.3d at 149 (Wilkinson, J., concurring) (emphasizing that the only responsibility of the judicial branch is to apply the law to the facts of the case; to do so, the legislative and executive branches must use their power to create an objective standard).
Reasonable suspicion is the appropriate standard for manual border searches because, while CBP agents are entrusted to protect government interests, they should only initiate a manual search when they are notified that a traveler is a suspect to a crime or is in the process of committing a crime. Additionally, for a forensic electronic device search, the standard of suspicion should be individualized suspicion, based on specific facts.

The overly broad language of DHS’s electronic device border search policy allows the government to overextend their power, hence the difficulty for circuit courts to agree on when, where, how, and why a traveler’s electronic devices are subject to a manual or forensic border search. This kind of inconsistent policy creates an environment where travelers and law enforcement officers argue against one another and their prospective privacy interests.

Factors such as: whether a traveler has a history of criminal behavior, the kind of criminal charges, the type of electronic device, and the ways in which officers conduct the search, are fundamental questions that help to create an objective standard. Moreover, the correct legal standard for manual searches of electronic devices is reasonable suspicion and individualized suspicion for forensic searches of electronic devices at the border.

198. See id. at 139 (noting that even a manual search of an electronic device can be intrusive: a manual search involves using the iPhone’s touch screen feature to scroll through recent calls and text messages).

199. See id. at 133 (stating that extended border searches are nonroutine searches, thus requiring the individual to be subjected to more personal intrusion of their private effect; such a search requires individualized suspicion); see also Cotterman, 637 F.3d at 1079 (referencing Supreme Court precedent to establish that the manner in which an initial border search is conducted may require a heightened degree of suspicion, whereby even an initial search can be unreasonable).

200. See Touset, 890 F.3d at 1229 (concluding that searches of electronic devices at the border never require probable cause or a warrant. Moreover, no suspicion is required to search electronic devices at the border, regardless of the search being manual or forensic); Kolsuz, 890 F.3d at 133 (concluding that individualized suspicion is required to forensically search an electronic device at the border); Cotterman, 709 F.3d at 968 (concluding that reasonable suspicion is needed to conduct a forensic search of an electronic device at the border).

201. See Kolsuz, 890 F.3d at 148 (Wilkinson, J., concurring) (acknowledging the importance of having a third governmental branch, the Legislature, create a rule that is objective for the courts to apply).

202. See Touset, 890 F.3d at 1234 (using Touset to inspire a standardized, objective test).

203. See Kolsuz, 890 F.3d at 135 (asserting that nonroutine searches deeply intrude on a person’s privacy, thus requiring individualized suspicion); see also Riley v. California, 573 U.S. 373, 403 (2014) (emphasizing that today, technology allows an
CONCLUSION

A Fourth Amendment exception that does not have an objective legal standard to assess whether a constitutional violation has occurred is useless to the judiciary branch and gambles with government and individual privacy interests. An objective legal standard should not give the government an individual preference, rather it should limit power discretion between both parties and formulate a test whereby any court can effectively apply factors that result in an unbiased showing of the facts and the law. The Fourth Circuit attempts to create an objective standard test for forensic searches of electronic devices by concluding that individualized suspicion is needed for such a search; however, this standard must be established through the legislative body.

individual to carry personal information by hand and does not allow for a lesser protection of privacy; a warrant is still generally required and obtaining a warrant is also easier for law enforcement because they can receive warrants electronically).

204. See Kolsuz, 890 F.3d at 137 (explaining the importance of having a different level of suspicion when conducting an electronic device search at the border); see United States v. Cotterman, 637 F.3d 1068, 1079-80 (9th Cir. 2011) (explaining three different types of border searches and the level of suspicion needed to search).

205. See Riley, 573 U.S. at 407-088 (Alito, J., concurring) and Kolsuz, 890 F.3d at 148 (Wilkinson, J., concurring) (emphasizing the need for the legislative and executive branch to step-in and produce a law that evaluates the border search exception).

206. See Kolsuz, 890 F.3d at 149 (noting that if an objective standardized test is created by federal courts, there will be a slippery slope ahead).
Impressions on Quality of Lawyering: A Student’s Perspective

By Kayla Harrington

I recently observed a jury trial in a District Judge's courtroom that taught me a great deal about different lawyering styles and about the many roles a judge has to play during court proceedings. The plaintiff’s attorney seemed overwhelmed and was at times ineffective, while defendants' counsel consisted of a two-lawyer team of very aggressive, almost rude attorneys. The two sides’ styles were in direct opposition, and each had apparent strengths and weaknesses. The Judge did an exemplary job of using her power to try to balance these lawyering styles somewhat, while being fair to both sides and trying to maintain integrity in the courtroom for the jury’s sake. When counsel on both sides kept getting bogged down in their tactics, it seemed like the judge’s job to remind them that a jury was sitting, and that the jury would ultimately decide the outcome of the case. Watching the reactions of the jury to these various strategies was eye-opening for me. Having never served on a jury or seen one operate, I assumed that like me, they would be engaged and excited to be there, with a critical eye toward the proceedings. However in reality, I saw that the jury was fairly tired after several days of trial, and that counsel on both sides failed to keep the jury in mind at critical points, leaving it to the judge to remind them of the jury and try to keep the proceedings on track. I hope not to repeat these lawyers’ mistakes if I ever argue a case before a jury.

The trial concerned a female teacher who was suing the male principal of the school where she had worked for sexual harassment, and for retaliating against her after she filed a claim against him. She also brought a Monell claim against the school, saying administrators violated her civil rights and did not step in to help her even though they knew the teacher was being sexually harassed. Defendants argued that no sexual harassment took place at the school, and that the plaintiff teacher was fired for poor performance.

Plaintiff’s lawyer appeared generally competent and seemed to really care about the case, but he also appeared to be in over his head when he cross-examined witnesses. Everything about him, from his sloppy appearance, to his hot pink shirt and tie (I think he was trying to look sympathetic to women?), to his poorly worded questions, conveyed a sense of not being great at presenting himself or performing for the jury the way an effective lawyer must. Defendants' counsel, seeing an opportunity to throw plaintiff’s counsel off his game, objected to every single question he asked, often baselessly, to interrupt his flow and try to make him flustered. Sometimes this worked, and plaintiff’s counsel would end up having to repeat a question and would do so in a less effective way. Other times it backfired, as defendants' counsel seemed rude and made everything take longer and feel more adversarial, which the judge and the jury did not seem to appreciate.
Finding a balance, the Judge heard every objection from defendants’ counsel, asked for a basis for the objection each time, and only granted the objection if it was valid. If defendants' counsel persisted, she would ask for a sidebar, and try to resolve the issue that way. She frequently reminded counsel on both sides that a jury was sitting, and that their behavior should be becoming of the court. Plaintiff’s lawyer did not issue many objections, but the Judge sometimes appeared to help him in small ways by rephrasing certain issues or giving him the benefit of the doubt to proceed with a line of questioning. However, she did not do any special favors for plaintiff’s counsel. When plaintiff tried to introduce a crucial piece of evidence in the form of a recording of a conversation and defendants' counsel strenuously objected, the Judge stuck to the rules of evidence. She asked for the rules of evidence each side was using to support its view, she held frequent side bars to prevent the jury from overhearing any heated discussions, and she left room for one side or the other to do additional research if they had to. The tape was ultimately not admitted, but the Judge kept open the possibility to introduce it if the witness impeached herself. The witness did not, and so the tape was never heard. The lawyers’ reactions to this major conflict were revealing. Plaintiff’s counsel seemed frustrated and kept giving “come on” gestures to the judge as the witness on the stand artfully dodged his questions about a transcript of that recording by saying she did not recall, or admitting to what she said but saying that she meant the exact opposite of that. The lawyer’s visible frustrations made him a less effective questioner, but his point that the witness on the stand said things in the recording that appeared to directly contradict her current testimony mostly came through. The drama of the questioning appeared to jolt the jury, as they woke up from their near-naps and followed this exchange like a sporting event. Meanwhile, defendants' counsel objected to every single question, often without any basis for doing so, and the witness appeared so coached that the jury seemed suspicious of her testimony. The jury looked like they did not appreciate defendants' counsel’s more obvious efforts to sway them, or possibly deceive them, through such selective testimony.

This encounter taught me a lot about the subtleties of courtroom lawyering. Plaintiff’s counsel’s flustered reaction to the evidence not being admitted showed me how important it is to have a contingency plan, and to prepare for alternative lines of questioning if something you were counting on falls through. What should have been a slam dunk ended up looking more like a hail Mary because of a lack of preparation. And defendants' counsel’s overly aggressive tactics reminded me that juries are made up of people and that people, in general, do not like being lied to or misled, so going too far in coaching a witness so that only a small part of the truth can come though might backfire. If the witness’s selective memory or her explanations that she meant something entirely different than what she said had not sounded so rehearsed, the jury might have been more sympathetic to her. The jury also rolled their eyes at the constant objections by defendants' counsel because many of the jurors looked like they just wanted to go home, and the objections were drawing out the proceedings. I have never been selected for a jury, and I had
naively speculated that it would be purely exciting. I see now that I was wrong about that. If I ever argue in front of a jury, I will remember to be respectful of their time and their position.

In the trial I watched, the judge played a big role in maintaining integrity for the jury and reminding the lawyers in the room that the jury was their audience. The Judge was effective and fair. She helped explain things to the jury when absolutely necessary, but mostly took a backseat and focused on enforcing the trial rules and keeping order in the court. The entire experience was an amazing learning opportunity for me. I had never observed a trial before, and I learned so much about what to do once I am a lawyer, and even more about what not to do when arguing in front of a jury.
**Buen Camino!**

*By Hon. Elizabeth S. Stong*

We are on our way home from an amazing week on the Camino de Santiago - one hundred miles, more or less, on foot on the Camino Frances from the Galician town of Sarria in Spain to the medieval city of Santiago de Compostela.

I think I will be reflecting on this experience for a long time, but I thought it might be interesting (at least to me) to try to capture some preliminary thoughts in writing, and to share them, before they become indelibly intermixed with the experiences of every day.

I’m not sure what I expected. But whatever my expectations were, they were exceeded in just about every way that I can contemplate.

To begin, the Camino is a lot of walking. And there are a lot of hills. Somehow the uphills seem longer and more steep than the downhills. Much of the way is very rural and the path is shaded by large trees that you begin to view as your friends.

A good bit of the way is also very, very old. More than a thousand years old. These parts are typically constructed of large, flat stones fitted together (more or less) and smoothed by thousands of footsteps, horse hooves, dog paws, and nowadays, bike wheels, stroller wheels, and even wheelchairs.

Other parts are covered with the soft, loamy surface of leaves, red soil, pine needles, and plants, typically accompanied by the kind, overarchsing branches of oak, eucalyptus, and other trees, and typically far from any kind of civilization. Often these made a green and brown tunnel, and the sunlight that managed to penetrate the canopy made a mosaic pattern on the ground. The air smelled deep green. These were my favorites.

So the Camino is a lot of walking, but that’s one of the best parts about it. It’s always engaging, it’s never dull. Every single step brings you closer to your destination. No two kilometers are the same. And after the first day - heck, after the first couple of hours and big hills - you just know you can do this.

It is said that it’s not a real Camino unless you have rain. And on our first day, we achieved real Camino status with several hours of light rain. Starting out is exciting, invigorating,
energizing, everything is new - so what’s a little rain? It kept us fresh, it made us a little silly, and it showed us that a little (or more than a little) rain would not get between us and our Camino. It was only when I looked at some photos a few days later that I realized that we were soaked - smiling and happy but soaked!

The Camino is also about milestones - literally and figuratively. Literally, because every few hundred meters there is a marker indicating the direction to Santiago de Compostela. These friendly and distinct markers with blue and yellow symbols become your allies and your friends. You seek them out at junctions to be sure you are going the right way. And they quietly cheer you on as you watch the numbers descend. 100 kilometers to go! That was worth a photo. 90 kilometers, 80 kilometers, 70 kilometers! Halfway at 56.5 kilometers or something like that - one of our group was quite precise. I took a picture each time we got below another ten.

And figuratively because, well, it’s the Camino! For many people, this is something they think about for some time. In one way it’s just like going for a walk. A really really long walk. But it’s also following in the footsteps of people who were moved by something deep to set off for the unknown, for the city that was considered nearly the end of the earth, without maps or guides or means of communication, to achieve forgiveness of their sins. And maybe adventure? Who knows.

Next, the Camino is both a very individual and a profoundly collective experience. It’s individual because you decide to do this, on your own feet, in your own head, with your own thoughts and goals. You may converse constantly within yourself. You’re immersed in the woods, the meadows, up and down (and up and up) the rolling hills. You negotiate with yourself about when it’s time to pause at a small refugio for water, a coffee or bocadilla (sandwich), or a bathroom (or all of the above). You find yourself thinking about everything, something, someone, or nothing. Sometimes all at once. Songs may get stuck in your head for kilometers at a time, and you may sing them out loud, sometimes on purpose but usually not. I thought a lot about events and especially about people in my life, including from years or decades ago, again sometimes on purpose but usually not.

But this may also be the most collective thing I have ever done. In the last 100 miles of the Camino Frances or Jacobean Way, pretty much all the Caminos join together - as they have for centuries. You can’t help but think about the pilgrims from centuries ago, traversing this path without any comfort or certainty, motivated solely by their faith. I can’t say that I somehow “felt their presence” in some sort of mystical way, but I can say for sure that for me, it added immeasurably to the experience to know that I was one among hundreds of thousands or more who have literally followed this path. On our last evening, we toasted the hundreds of thousands of pilgrims that have come before us - and the hundreds of thousands that will come after as well.
It’s hard to imagine how different our experience is from that of a medieval “peregrino,” and similarly, how different the experience will be hundreds of years from now.

And of course you are never alone. Not in any way. Many walk with family (❤Margaret❤) and friends. Some are with groups - groups from school, groups from church, groups for a cause. There were groups from Germany, France, Italy, Australia, Spain of course, and groups from all over the US.

A group of about 200 whom we often encountered were walking to call attention to childhood cancer, and they included people with cancer, families, and caregivers.

Another group of about 90 that we regularly saw on the route were high school students from Sevilla who have prepared for the Camino for the past two years. One of their projects was to interview several pilgrims each day to learn where they were from, what motivated them to walk, and what advice they would give. When I was interviewed, I answered without pausing - “open your eyes, open your ears, open your mind, open your heart.” Later I added, “listen with your eyes, look with your ears, feel with your mind, think with your heart”. That’s the Camino. You think about the same things but in different ways, you make connections that never occurred to you before (and that may seem silly afterwards).

As you walk along, there are times where you don’t see anyone ahead of you - but you know they are there, in a good way. And unlike any other hike or walk anywhere, absolutely everyone is going in the same direction. Imagine a great flow of humanity walking, striding, rolling, and riding along - all in the same direction, like water running downhill. That’s the Camino.

Sometimes you are passed, usually to the left, and you are greeted with a cheery “buen Camino!,” to which you respond in kind. Sometimes you pass a group and you initiate the greeting.

You always remember your first “buen Camino.” It makes you realize that you are embarked on something different and special. It connects you and means you have been recognized. It creates a tiny but real bond. For us, it was actually in Sarria, on the day before we began. We explored all over the town, the modern part and the old part too. We followed a steep road out of the town past a church and to a monastery, and walked silently (as instructed by the caretaker) around the Romanesque cloister. Just us, no one else. And as we continued around the hillside to loop back into town, a pilgrim with a backpack, a wide-brimmed hat, a walking stick and a shell passed us - “buen Camino” he said, and we responded the same. And somehow at that moment it came together that we really were about to embark on something different. Not just a seven-day hiking trip - though definitely that. Not just a visit deep into Galicia - though definitely that too. And not just a chance to work on my fledgling Spanish - claro que si. But there is
something unifying about the experience that is both more complex and more simple, that pulls all of these threads into one splendid ribbon that is something much more than its individual parts.

So the Camino is this amazing, continuous, flowing experience. The steps blend, the paths blend, the days blend. But here is another aspect of the Camino. Like a huge mosaic, or a pointillist masterpiece painting, it is composed of individual moments, encounters, vistas, and realizations.

Many moments come with collecting stamps on your pilgrim’s credential, or “passport,” that demonstrates that you have traveled the Camino route. You receive this at the outset of your journey (and you are cautioned not to lose it, as it can’t be replaced). Upon arrival in Santiago de Compostela, you present this credential to the pilgrim’s office to receive your “Compostela,” a beautiful illuminated document that states (in Latin) that you have completed the pilgrimage. Two per day is the minimum, we never collected less than five. Some of these moments are pretty straightforward - at a small refugio cafe, there will be a “silla,” or stamp, and an ink pad. One touch on the pad, one touch on the passport, and off you go with a cheery “buen Camino” exchanged with the family who owns the enterprise (and probably lives behind or upstairs).

Others are more unique. Early in our walk, we passed a tiny town - really, just a place where two gravel roads intersected with a couple of refugios and a very small, very old church. Inside was a blind man, maybe a priest, who placed “temple stamps” (stamps) on the pilgrims’ passports. He spoke with each pilgrim, let their hand guide his with the stamp, said a blessing, and smiled - or even laughed - with great warmth. You could imagine that he had somehow been in that tiny church for decades, drawing on the warmth and goodwill of the pilgrim visitors and sharing his own. Maybe even he has been there for centuries. That’s just how the Camino is.

Later in our walk, toward the end, and deep in a eucalyptus forest, we encountered a makeshift stand with a father and his son. They had two tables laden with Camino souvenir crafts and mementos, including shells, small charms, bracelets, refrigerator magnets, and other similar things. Many of these were familiar from small shops and stands along the way. Somehow, this seemed like the time to make a purchase. So we got in the queue.

Margaret picked out two charms - a silver shell and a round bead with the cross of Saint James. I added a refrigerator magnet in the signature blue and yellow of the Camino, with lines representing all of the routes converging in the shell pattern. We handed them to the father with big smiles and “estos tres, por favor”. To our delight, the father passed them to his son and he made them into necklaces, on fine leather strands with silver clasps.

As the son worked his magic, we spoke about their lives on the Camino. The father explained that he emigrated from Colombia to Spain many years earlier looking for work, stability, and a better life. His son was born in Spain, they saw 2,000 to 3,000 pilgrims a day, things were
good. And things were better in Colombia now as well - with time, things can improve. We agreed on the importance of doing things with your children, and also on the happiness that comes with work that helps others.

When the necklaces - which we did not expect - were finished, the father stamped our Camino passports, and then lit a candle, placed a drop of wax on each of our Camino passports, and affixed a tiny silver charm to each. On mine, it was a tiny pair of feet, on Margaret’s, the classic Camino shell. Of course it’s a business but it’s also a labor of love. We shook hands, I thanked them, we took a photo. I’ve never been more moved by a souvenir purchase - a true Camino experience.

So are there religious moments, moments of great and profound insights? As I looked forward to our Camino, I wondered about how religion, and especially organized religion, would fit into the Camino experience. Would it define it, would it be comfortable or not so much, would it be drowned out by some Camino-commercialism?

Not to worry. Based on what I saw, and heard, and felt, religion and faith can be a quiet but constant part of the Camino experience - but this is utterly up to the individual, and they don’t need to be. I’m sure that it is possible to walk the Camino as a pure expression of organized religion, presumably like the medieval pilgrims that walked to Santiago de Compostela to purge their life’s sins. I saw by example of some in our group that it’s possible to be immersed in the Camino as a confirmed nonbeliever. For me, the Camino was an opportunity to share, immediately and across time, an experience of discovery and connection that is informed, significantly but not exclusively, by faith. And each of these experiences of the Camino seems equally intense, equally profound, equally valid.

Anyone who has read this far might be curious about how all of this works as a practical matter. So here are a few small notes on that.

To receive the Compostela, you have to travel 100 kilometers by foot, 150 on horseback, or 200 on bicycle. Most people walk. We saw many bicycle pilgrims each day, typically in small groups whizzing by with a “buen caminooooo!” We saw lots of evidence of horses, but no pilgrims on horseback - not one.

Towns from small to tiny dot the route. We stayed in charming and varied small inns and hotels each night that cater to the peregrinos. The smallest had maybe a dozen rooms, the largest maybe three dozen. Others carry backpacks and sleep in the pilgrims’ hostels, this is a very thrifty way to travel. According to one of the books I read, some people bring a tent and camp out in a field - hopefully without livestock!
Many people carry a daypack and utilize a transport service to take their bag from place to place. We did this and it was terrific.

We booked our Camino through a small local travel company, and they planned the route, booked our accommodation, and arranged for the transport of our bags each day to our next stop.

We opted for a guide, and she was delightful and knowledgeable on all aspects of the enterprise. This was her sixth Camino, and she provided both a lot of information and lovely local context to our Camino adventure. Our group was nine in total, from Spain, the US, Bristol in the UK (by way of South Africa), and Argentina. We typically walked in groups of two to four.

Everything worked well. As just one example, when we arrived each evening at the property, we were handed our keys and our bags were already in our rooms. You can be pretty tired after six or more hours of walking, and this was quite a luxury indeed.

The properties were quite varied, from country elegant (the first night, a former parador, we had a large room with a deck, an elegant dining room and a gorgeous swimming pool), to quaint (a fifteenth century stone house with foot-thick walls, exposed beam ceilings), to rustic (split log cabin style rooms and dining hall). Always quiet, welcoming, comfortable. A footsore pilgrim needs a long hot shower and a good rest - and a balcony with a beautiful countryside view doesn’t hurt!

Meals are easy. Our arrangements included excellent dinners - always three courses with regional Galician specialties every night. Shellfish fans had lots to enjoy as shellfish is quite a speciality of the region. Many of the fruits and vegetables are sourced locally - we passed farms on both sides of the route nearly all of the way. Hunks of crusty bread, often still warm from the oven, and olive oil accompanied dinner and breakfast. Breakfasts were served buffet style and it was always possible to get an extra piece of fruit for a morning snack. The local apples are superb.

A big surprise was the presence of so many small refugios - cafes, restaurants, fruit stands - along the way. One or more an hour, and never too far from one to the next. These were wonderful for refilling water bottles, using the “servicios” (clean and pleasant), getting a coffee or snack, and of course, adding stamps to the pilgrim passport.

Two moments that every pilgrim experiences come on the last day. The first is at the crest - the last big crest! - of the last band of hills before arriving at Santiago Compostela. It comes soon after a campground and dormitory with many small food stands, laundry and athletic facilities, and a generally festive atmosphere - after all, by this point there are still some miles to go but you are almost there! There’s a large monument on the top of the hill, the path wraps past the shops and stands and around the monument.
And suddenly - there it is! The three large towers of the cathedral of Santiago de Compostela. They reach high above the red clay roofs of the town, dominating the distant skyline. You can’t help but think how moving this must have been for pilgrims a thousand years ago who traveled from all over Europe on foot or maybe horseback just to see and touch this site.

And the second is when you are done. When you reach the Praza do Obradoiro - the workers plaza, so named not so much in their honor as because this is where they lived while the cathedral was under construction. By tradition, you approach this slowly, and in silence. The last half kilometer or so passes through the narrow streets of the old city, and much of your company on the way is, like you, a silent pilgrim. There’s a downhill into a plaza in front of a grand gothic building and from a distance you think - are we there? We are there? But not yet, this is a Benedictine monastery that remains active to this day. Instead you continue to the left, down a narrow stone-paved street, under a deep arch where a bagpiper plays Celtic tunes, and turn left.

And then you are there. Kilometer zero, the end of the Camino de Santiago, the destination of hundreds of thousands of pilgrims over hundreds of years, from popes and the deeply devout, to the questioning, to the committed nonbeliever. It’s powerful.

You smile - heck, you grin from ear to ear. You hug someone, hopefully someone you know. Maybe you tear up a little bit, or maybe you just plain weep. People cheer and sing. Some dance. Many just sit down in the middle of the vast space, and some lay down (collapse?), tired and footsore and happy. I looked at Margaret, thanked her, and said “we did it! Buen Camino!” And there were some group hugs for sure.

So, all in, and from somewhere south of Greenland at 40,000 feet, here’s my Camino summary. This was the experience of a lifetime in many ways, joyful and demanding, fleeting and slow, and maybe just a little bit transformative. That I won’t know for a while. But I recommend it highly and I’m already looking forward to the next. Hopefully this wasn’t just my Camino, it was my first Camino. I’m keeping my shell to bring on my next and I’ll wear it with pride and happiness.

Buen Camino! —ESS