

# CONSTITUTIONAL LIMITS ON ELECTRONIC BORDER SEARCHES

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## OF CUSTOMS, IMMIGRATION, AND RIGHTS

The warrantless border search of electronic devices is rapidly increasing. In 2015, U.S. Customs and Border Protection (CBP) examined 8,503 devices. The number more than doubled the following year before soaring in 2017 to more than 30,000 searches.<sup>1</sup> In 2015, U.S. Immigration and Customs Enforcement (ICE), in turn, reported the search of 4,444 cellphone and 320 other electronic devices. In 2016, ICE eclipsed these numbers, searching 23,000 devices.<sup>2</sup>

The Supreme Court, of course, has long recognized a border search exception to the Fourth Amendment. In *United States v. Flores-Montano*, it looked to the nation's sovereign "interest in protecting its territorial integrity" to justify such searches.<sup>3</sup> In *United States v. Montoya de Hernandez*, the Court widened the aperture, acknowledging Congress as the source of the executive's power, having, "[s]ince the founding of our Republic...granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant."<sup>4</sup> The commerce clause provides the nexus for seizure of goods.<sup>5</sup>

But the exception is now being applied by the Executive Branch in a manner that raises significant constitutional concerns. It belies the narrow limits traditionally placed on the executive that have justified the departure from Fourth Amendment norms. And it implicates individual rights well beyond ordinary searches.

Historically, Congress and the Courts have acknowledged only two purposes behind broad border search authorities: first, "to regulate the collection of duties and to prevent

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<sup>1</sup> U.S. Customs & Border Prot., *CBP Releases Statistics on Electronic Device Searches*, CBP (April 11, 2017), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-statistics-electronic-device-searches-0>; *CBP Releases Updated Border Search of Electronic Device Directive and FY17 Statistics*, CBP (Jan. 5, 2018), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and>; U.S. CUSTOMS & BORDER PROT., BORDER SEARCH OF ELECTRONIC DEVICES, CBP Directive No. 3340-049A (Jan. 4, 2018), <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf> [hereinafter CBP DIRECTIVE].

<sup>2</sup> Daniel Victor, *What Are Your Rights if Border Agents Want to Search Your Phone?*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/business/border-enforcement-airport-phones.html>

<sup>3</sup> *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004). See also *Torres v. Puerto Rico*, 442 U.S. 465, 472-73 (1979) ("The authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity. By reason of that authority, it is entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry.")

<sup>4</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

<sup>5</sup> See, e.g., *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 125 (1973) (observing, "searches of persons and packages at the national borders rest on different considerations...from domestic regulations. The Constitution gives Congress broad, comprehensive powers' [t]o regulate commerce with foreign Nations.' Art. I, Sec. 8, cl. 3. Historically, such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.")

the introduction of contraband into this country;<sup>6</sup> and, second, to ascertain which persons should be admitted to the United States. For the latter, ensuring proper legal process (and status) proved paramount.<sup>7</sup> Looking to these two areas, Congress empowered the executive to exercise the power of the United States to monitor “who and what may enter the country.”<sup>8</sup> In so doing, Congress did not provide an exception for ordinary law enforcement to use the movement of people to look for evidence of criminal activity. *Only* customs agents and immigration officials could exercise search authorities, which were narrowly tailored to intercepting contraband and controlling immigration.

The manner in which electronic searches are now being conducted, however, violates these restrictions. It is not just to intercept contraband or to prevent illegal entry that the government is accessing electronic devices. CBP and ICE can now search devices for *any* criminal (or political) activity, with no reservation on the use of the material so obtained. In an increasingly globalized world, the executive branch could target individuals and use their movement across frontiers to obtain information that otherwise would clearly require a warrant. Thus far, the courts have provided something of a backstop, rejecting some of the more egregious cases to come forward. But the lack of legislation and Supreme Court attention to the matter is of significant concern. It leaves citizens’ rights at the mercy of each agency’s regulatory regime. As the Court recognized in *Riley*, “the Founders did not fight a revolution to gain the right to government agency protocols.”

The rights concerns at issue, moreover, are substantial. CBP’s January 2018 guidelines allow for basic searches without suspicion.<sup>9</sup> This means that the agency considers itself entitled to seize the mobile phones, iPads, and laptops of every U.S. citizen—including those of judges and members of Congress, and their colleagues, families and friends—*without any suspicion of any wrongdoing*. There are no statutory (or, according to the agencies, constitutional) limits on who can see this information, how long it can be kept, or how it can be used. And there is no special protection provided for sensitive political material, client-attorney privilege, trade secrets, medical information, or materials otherwise privileged at law. For advanced, forensic searches (which involve connecting external equipment “to an electronic device not merely to gain access...but to review, copy, and/or analyze its contents”<sup>10</sup>), customs officers must merely meet a standard of “reasonable suspicion of activities violating laws enforced or administered by CBP or in which there is a national security concern.”<sup>11</sup>

The equivalent 2009 ICE directive has not been updated since the last review in 2012.<sup>12</sup> Like its CBP counterpart, the directive applies to *any* item containing electronic

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<sup>6</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

<sup>7</sup> A third area, disease prevention, also carried search powers. Such considerations are not immediately relevant to the electronic device discussion, although they could arise in terms of the type of information examined on such devices. For further discussion of the evolution of quarantine authorities, see generally Laura K. Donohue, *Pandemic Disease, Biological Weapons, and War*, in *LAW AND WAR* 84 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds. 2014), <http://scholarship.law.georgetown.edu/facpub/1296/>; Laura K. Donohue, *Biodefense and Constitutional Constraints*, 4 NAT’L SEC. & ARMED CONFLICT. L. REV. 82 (2014), <http://scholarship.law.georgetown.edu/facpub/677/>.

<sup>8</sup> *United States v. Ramsey*, 431 U.S. 606, 620, 616. (1977).

<sup>9</sup> U.S. CUSTOMS & BORDER PROT., BORDER SEARCH OF ELECTRONIC DEVICES, CBP Directive No. 3340-049A (Jan. 4, 2018), <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf> [hereinafter CBP DIRECTIVE].

<sup>10</sup> *Id.* at para 5.1.4.

<sup>11</sup> *Id.*

<sup>12</sup> U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE DIRECTIVE No. 7-6.1: BORDER SEARCHES OF ELECTRONIC DEVICES (Aug. 18, 2009), [https://www.dhs.gov/xlibrary/assets/ice\\_border\\_search\\_electronic\\_devices.pdf](https://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf) [hereinafter 2009 ICE DIRECTIVE].

or digital information.<sup>13</sup> But unlike its counterpart, it authorizes ICE Special Agents to “search, detain, seize, retain, and share electronic devices, or information contained therein, with or without individualized suspicion.”<sup>14</sup> Agents are not required to perform the search in the presence of the owner.<sup>15</sup> In addition, “At any point during a border search, electronic devices, or copies of information therefrom, may be detained for further review either on-site at the place of detention or at an off-site location.”<sup>16</sup> Searches can take place up to 30 days after the information is seized, with continuations subject to supervisory approval every 15 days thereafter.<sup>17</sup> Unlike CBP, which performs basic searches in the equivalent of “airplane mode,” ICE can use the opportunity to access information held on the cloud.<sup>18</sup>

The disjunction we are seeing between CBP and ICE to some extent reflects the two streams of authorities: customs and immigration. The latter focuses on the character of individuals entering the country, perhaps explaining for the broader search powers into travelers’ cloud data. Regardless, both agencies actions are merging into the law enforcement realm and raise troubling constitutional concerns, not least of which stem from the Fourth Amendment.

As the Supreme Court recognized in *Riley v. California*, electronic devices “implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.”<sup>19</sup> Even the term “cell phone” is misleading, as “many of these devices are in fact minicomputers that also happen...to be used as a telephone.”<sup>20</sup> A key distinguishing feature is their “immense storage capacity.”<sup>21</sup> As the Court adroitly put it, “Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read.”<sup>22</sup>

Mobile devices differ from ordinary luggage searches not just in volume, but also in terms of the *type* of information that can be obtained, such as medical records, location data, political beliefs, religious convictions, and intimate relationships—for decades. The search, moreover, does not end with the device in question, which may provide a gateway to the cloud.<sup>23</sup> Such searches implicate far more detailed, personal information than can

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<sup>13</sup> Compare *id.* at para. 5.2 (“Any item that may contain information, such as computers, disks, drives, tapes, mobile phones and other communication devices, cameras, music players, and any other electronic or digital devices.”), with CBP DIRECTIVE, *supra* note 1, at para 3.2 (“Any device that may contain information in an electronic or digital form, such as computers, tablets, disks, drives, tapes, mobile phones and other communication devices, cameras, music and other media players.”)

<sup>14</sup> 2009 ICE DIRECTIVE, *supra* note 17, at para. 6.1 (emphasis added).

<sup>15</sup> *Id.* at para 8.1.2.

<sup>16</sup> *Id.* at para 8.1.4.

<sup>17</sup> *Id.* at para 8.3.1.

<sup>18</sup> See CBP Directive at para 5.1.2.

<sup>19</sup> *Riley*, 134 S. Ct. at 2488-89

<sup>20</sup> *Id.* at 2489.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> This occurs in two principal ways: first, by using the devices themselves to access information stored on the cloud, and, second, by requiring travelers to provide identifiers or handles, or account login credentials (such as usernames and passwords) to access social media. The latter issue appears to have first presented in December 2016 when CBP started asking non-U.S. persons entering the country under the Visa Waiver Program (VWP) to disclose their social media identifiers. Under the VWP, foreign citizens can visit the U.S. for up to 90 days without a visa, if they have been cleared by the Electronic System for Travel Authorization. Initially, the program was to be entirely voluntary. With only the provider/platform and social media identifier provided, the government stated that it would only consider publicly-available information. In January 2017, however, the Council on American-Islamic Relations (CAIR) filed complaints with the U.S. Department of Homeland Security, alleging that *U.S. citizens* were being directed to disclose not just their passwords to their phones, but also their social media login information. *CAIR-FL files 10 complaints with CBP after the Agency Targeted and Questioned American-Muslims about Religious and Political Views*, CAIR Florida (Jan. 18, 2017), <https://www.cairflorida.org/newsroom/press-releases/720-cair-fl-files-10->

be ascertained even from the search of an individual's home, which traditionally receives the highest protections under the Fourth Amendment. And it is not just the Fourth Amendment at stake. The executive's actions raise important First Amendment rights of speech, association, and religion; Fifth Amendment due process rights and privilege against self-incrimination; and a Sixth Amendment right to counsel.

This essay lays out the history of customs border search authorities up to the present day, noting in the process the strong protections traditionally provided to the home—even where contraband may be at issue. It then turns to the evolution of immigration law, again pointing out the Fourth Amendment protections extended to the home, before looking at how the circuits have come down on the question of electronic border searches in particular, before and after *Riley* and *Jones*, and the issues now presented by *Carpenter*. It concludes with a brief discussion of numerous other constitutional questions that arise in the context of electronic border search.

## I. CUSTOMS BORDER SEARCHES

Historically, the Executive Branch has had a wide latitude to conduct searches at the border without first establishing probable cause and obtaining a warrant. That breadth derives in part from the evolution of customs law. During the early colonial period, England considered customs in the context of commercial regulation—an opportunity to ensure dominance in shipping and trade. Over time, the approach shifted to using customs as a way of generating revenue. Officials obtained broad powers to interdict “uncustomed” materials. Following the American Revolution, the latter emphasis survived, laying the groundwork for today's CBP authorities. This history matters, as it demonstrates the purposes of customs searches (i.e., to interdict contraband and so generate revenue), and the special protections afforded the home, even where customs issues arise. Both aspects serve as a limit on the border search exception as applied to electronic devices

### A. Commercial Regulation versus Revenue Generation

The American colonies provided England with an opportunity to strengthen its global mercantile dominance. As early as 1621, the Privy Council recognized the gains at stake, arguing that “the Commodities brought from” the colony of Virginia ought to be

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complaints-with-cbp-after-the-agency-targeted-and-questioned-american-muslims-about-religious-and-political-views.html. See also Sophia Cope, *Fear Materialized: Border Agents Demand Social Media Data from Americans*, ELECTRONIC FRONTIER FOUND. (Jan. 25, 2017), <https://www EFF.ORG/deeplinks/2017/01/fear-materialized-border-agents-demand-social-media-data-americans>. Media reported that officials were considering new policies to expand CBP scrutiny of cloud content. In February 2017, newly-appointed DHS Secretary John Kelly told a Congressional Committee that the agency might adopt a provision requiring login information from all foreign visa applicants, with the failure to comply resulting in denial of entry. Starting in May 2017, login information became required in cases tied to national security. Less than a year later, in March 2018, the U.S. Department of State submitted a formal proposal to the Office of Management and Budget, requiring that almost all visa applicants list all social media identities used over the previous five years, all telephone numbers, all email addresses, all international travel, all prior immigration violations, and whether specified family members have been involved in terrorist activity. U.S. Dep't of State, 83 Fed. Reg. 13807, 13807-13808 (proposed Mar. 30, 2018). The rule change would allow the government to vet and identify about 14.7 million people per year, searching any social media platforms associated with the individual. Brendan O'Brien, *U.S. Visa Applicants to be Asked for Social Media History: State Department*, REUTERS (Mar. 29, 2018), <https://www.reuters.com/article/us-usa-immigration-visa/u-s-visa-applicants-to-be-asked-for-social-media-history-state-department-idUSKBN1H611P>; Matthew Lee, *U.S. to Seek Social Media Details from All Visa Applicants*, BLOOMBERG (Mar. 29, 2018), <https://www.bloomberg.com/news/articles/2018-03-29/us-to-seek-social-media-details-from-all-visa-applicants>.

“appropriated unto his Majesties subjects” instead of being “communicated to forraine countries.”<sup>24</sup> Accordingly, the council adopted an ordinance requiring that “all Tobacco and other commodities” from Virginia “not be carried into any forraine partes until the same have beene first landed here and his Majesties Customes paid therefore.”<sup>25</sup> In the first Navigation Act of 1651, Parliament went on to require that any materials to or from the Americas be carried on English ships.<sup>26</sup> The aim was to prevent European powers from trading with the colonies.

Following the Stuart Restoration, in 1660 Parliament passed the second Navigation Act, re-entrenching the rule that colonial trade only be carried out on English vessels: they had to be English-owned, operated by an English master, and carry a crew of which three quarters must be English.<sup>27</sup> The statute did not prevent foreign imports to the colonies—it required that they be shipped under English flag. Three years later, Parliament further tightened its grip with the third Navigation Act, requiring that any European commodities bound for the colonies first be taken to England, unloaded, and duties paid, prior to their return to North America.<sup>28</sup> The goal was to establish a monopoly over colonial trade.

The early navigation statutes erroneously assumed that most or all colonial trade involved overseas commerce.<sup>29</sup> In the absence of regulation, intra-colonial trade (not subject to duties) began to flourish, with commodities eventually making their way to Europe “to the great Hurt and Diminution of” H.M. Customs and trade.<sup>30</sup> Parliament closed this gap in the Navigation Act of 1673, requiring that a bond be paid on enumerated items where the ship travelled between plantations.<sup>31</sup> But the enforcement devices were weak. They also differed from those in place in England. In the late 17th century, customs agents could search “any ship, house, or place soever” in London to search for prohibited goods.<sup>32</sup> The Treasurer could provide a warrant to the customs commissions to examine trunks and boxes held at the Custom House in Southampton.<sup>33</sup> There was no equivalent in the new world.

In the 18<sup>th</sup> Century, Britain tried to tighten its hold, assuming greater powers to

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<sup>24</sup> THOMAS C. BARROW, *TRADE & EMPIRE: THE BRITISH CUSTOMS SERVICE IN COLONIAL AMERICA 1660-1775*, at 4 (1999).

<sup>25</sup> *Id.*

<sup>26</sup> An Act for Increase of Shipping, and Encouragement of the Navigation of this Nation, (1651) 2 ACTS & ORDS. INTERREGNUM 559-62 (Eng.).

<sup>27</sup> An Act for the Encouraging and Increasing of Shipping and Navigation of 1660, 12 Car. II c. 18 (Eng.).

<sup>28</sup> An Act for the Encouragement of Trade 1663, 15 Car. II c. 7 (Eng.).

<sup>29</sup> BARROW, *supra* note 26, at 6.

<sup>30</sup> 9 CALENDAR TREASURY BOOKS 1965 (William A. Shaw eds. 1904), <http://www.british-history.ac.uk/search/series/cal-treasury-books> [hereinafter C.T.B.] (noting that “[t]he act of 1673 did more to systemize the commercial activities of the colonists than did any other regulation of the navigation acts except the enumeration, of which it was an integral part. It affected not only the commercial relations between England and her colonies but also the relations of the colonies among themselves...The new requirement made necessary the installation in colonial ports of a large number of customs officials, whom there had been no need before, appointed after 1696 on the English establishment by the customs commissioners under authority from the Treasury. The business of these officials was to receive, retain, and if necessary prosecute, the bonds in the common law courts and collect the duties, which were supposed to be those of the English book of rates, payable in silver or its equivalent at sterling values. The object of the act was not revenue but the regulation of trade.”)

<sup>31</sup> Navigation Act of 1673, 25 Car. II c. 7 (Eng.).

<sup>32</sup> *Compare Entry Book: October 1663*, in 1 C.T.B. 547, 550 with *Entry Book: December 1661*, in 1 C.T.B. 311, 315 (directing John Seymour and Charles Smith “to search for all wares and merchandize mentioned in the royal proclamation of November 20 last for prohibiting the importation of divers foreign wares and merchandizes into this realm of England and Wales.”)

<sup>33</sup> *Entry Book: April 1661*, in 1 C.T.B. 232, 236.

search for, and to seize, colonial contraband.<sup>34</sup> Lord Grenville, the First Lord of the Treasury, and Chancellor of the Exchequer, famously considered the colonies to be best source of revenues, charging the colonies with a failure to offset the costs of their own defense.<sup>35</sup> Towards this end, he repeatedly argued in Westminster for more stringent customs enforcement in North America. Many agreed, so when the Molasses Act expired, Parliament passed a measure that emphasized both mercantilism and revenue generation. The preamble to the American Revenue Act of 1764 (a.k.a. the Sugar Act) explained, “[I]t is expedient that new provisions and regulations should be established for improving the revenue of this kingdom, and for extending and securing the navigation and commerce between Great Britain and your Majesty’s dominions in America.”<sup>36</sup> This statute, along with the Currency Act of 1764 (in which Britain assumed control of the colonial system of currency), laid the groundwork for the revolt that followed the introduction of the Stamp Act of 1765.<sup>37</sup>

### B. Contraband in the Early American Republic

Following independence, English mercantile ambitions ceased to matter, of course; however, like England following the Seven Years’ War, the United States needed to raise revenue to pay for the recent war. This required efficient enforcement mechanisms. Thus, from the earliest days of the Republic, customs inspectors could board vessels to search for contraband without first obtaining a warrant. To find the same items within a dwelling house, building, or other place, customs officers first had to obtain a warrant based upon “cause to suspect.”<sup>38</sup>

In 1789, the same year that Congress forwarded the Bill of Rights to the states for ratification, it enacted statutes setting duties, establishing international ports of entry, requiring vessels to report their contents, and providing for inspectors to board vessels to examine whether the stated goods comported with the items on board.<sup>39</sup> Under the Act of

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<sup>34</sup> GAUTHAM RAO, NATIONAL DUTIES: CUSTOMS HOUSES AND THE MAKING OF THE AMERICAN STATE (2016).

<sup>35</sup> Philip Lawson, *George Grenville and America: The Years of Opposition, 1765-1770*, 37 WM. & MARY Q. 561 (1980).

<sup>36</sup> An act for granting certain duties in the British colonies and plantations in America,; for continuing, amending, and making perpetual, an act passed in the sixth year of the reign of his late majesty King George the Second for applying the produce of such duties, and of the duties to arise by virtue of the said act, towards defraying the expenses of defending, protecting, and securing the said colonies and plantations; for explaining an act made in the twenty fifth year of the reign of King Charles the Second, (intituled, An act for the encouragement of the Greenland and Eastland trades, and for the better securing the plantation trade;) and for altering and disallowing several drawbacks on exports from this kingdom, and more effectually preventing the clandestine conveyance of goods to and from the said colonies and plantation, and improving and securing the trade between the same and Great Britain.

*See also* FRED ANDERSON, *The American Duties Act (The Sugar Act)*, in CRUCIBLE OF WAR: THE SEVEN YEARS’ WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766, at 572 (2000).

<sup>37</sup> Duties in American Colonies Act 1765, 5 Geo. III c. 12 (Eng.).

<sup>38</sup> *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

<sup>39</sup> An Act for laying a Duty on Goods, Wares, and Merchandizes imported into the United States, Act of July 4, 1789, §§ 1, 3, 4, ch. 2, 1 Stat. 24, 24-27 (1789) (setting duties); An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States, Act of July 31, 1789, § 1, ch. 5, 1 Stat. 29, 29 (1789) (establishing districts, ports, and officers); §2 (establishing ports for non-U.S. vessels); *id.* §4 (requiring master or commander of every ship or vessel to provide “a true manifest of the cargo on board such ship or vessel”); *id.* §5 (empowering inspection of the vessels “to examine whether the goods imported are conformable to the entries thereof.”); *id.* §10 (requiring that the master or commander of the vessel provide the manifest to the inspector with “a true account of the loading which such ship or vessel had on board at the port from which she last sailed, and at the time of her sailing, or at any time since, the packages, marks and numbers, and noting thereon to what port in the United States such ship or vessel is bound, and the name or names of the person or persons to whom the goods are consigned, or in cases where the goods are shipped to order, the names of the shippers.”); *id.* §12 (prohibiting any goods, wares, or merchandise from being unladen or delivered from any

July 31, 1789, officials could board any vessel, “in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise.”<sup>40</sup> Where suspecting that such materials be concealed in a “dwelling house, store, building, or other place,” they could apply to a justice of the peace for a warrant to conduct a search for the goods, “and if any shall be found, to seize and secure the same for trial.”<sup>41</sup>

These statutes were followed by statutes in 1790, 1793, and 1799, which underscored the importance of the enforcement of duties.<sup>42</sup> So we find, contemporaneous with the drafting and adoption of the Fourth Amendment, the First, Second, and Fourth Congresses signaling that there was no need to obtain a warrant for goods subject to forfeiture when held in a ship or vessel; however, when held in a warehouse, building, or dwelling, a warrant was required.

Congress continued to follow this line in the Act of July 18, 1866.<sup>43</sup> That statute made it lawful for any customs officer “to go on board of any vessel, as well without as within his district, and to inspect, search, and examine the same, and any person, trunk, or envelope on board, and to this end, to hail and stop such vessel if under way, and to use all necessary force to compel compliance.”<sup>44</sup> Where it appeared “that any breach or violation of the laws of the United States [had] been committed” whereby “such vessel, or the goods, wares, and merchandise, or any part thereof, on board of or imported by such vessel, is or are liable to forfeiture,” then the customs officer had the authority to seize the items.<sup>45</sup> The statute also empowered officers to “arrest any person engaged in such breach or violation” and to pursue and arrest anyone who tried to escape.<sup>46</sup> The officers could stop, search, and examine “any vehicle, beast, or person on which or whom he or they shall suspect there are goods, wares, or merchandise which are subject to duty or shall have been introduced into the United States in any matter contrary to law.”<sup>47</sup> The statute reflected the importance of securing *things* to demonstrate the illegal movement of uncustomed goods—namely, the vehicle, beast, “goods, wares, merchandize, and all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, or other appurtenances of such beast.”<sup>48</sup>

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ship or vessel at night or without a permit from the collector); An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes, Sept. 1, 1789, § 3, ch. 11, 1 Stat. 55, 55-56 (1789) (empowering the surveyor to measure every vessel to ascertain its tonnage); An Act to suspend part of an Act, intitled ‘An Act to regulate the collection of the Duties imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares, and Merchandises, imported into the United States,’ Sept. 16, 1789, § 3, ch. 15, 1 Stat. 69, 69-70 (1789) (setting duties on certain foreign goods).

<sup>40</sup> Act of July 31, 1789, ch. 5, §§ 24, 36, 1 Stat. 29, 43, 47. (1789) (current version codified at 19 U.S.C §§ 482, 1582).

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

<sup>42</sup> Act of Aug. 4, 1790, ch. 35, §§ 48–51, 1 Stat. 145, 170 (1790); Act of February 18, 1793, ch. 8, §27, 1 Stat. 305, 315 (1793); Act of March 2, 1799, ch. 22, §§ 68–71, 1 Stat. 627, 677, 678 (1799). *See also* Montoya de Hernandez, 473 U.S. at 537 (noting that Congress has always provided the Executive with plenary power to search and seize at the border, absent probable cause or a warrant to regulate duties/prevent introduction of contraband). *See also* An Act further to regulate the entry of merchandise imported into the United States from any adjacent territory, Mar. 2, 1821, ch. 14, 3 Stat. 616.

<sup>43</sup> An Act further to prevent Smuggling and for other Purposes, Act of July 18, 1866, ch. 201, 14 Stat. 178.

<sup>44</sup> *Id.* § 2.

<sup>45</sup> *Id.*

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

<sup>47</sup> *Id.* § 3.

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

### C. Contemporary Border Search Authorities

In 1930, the (ill-fated) Smoot-Hawley Tariff Act significantly increased tariffs on agricultural and industrial goods.<sup>49</sup> Eight years later, an amendment to the act provided for special inspection, examination, and search authorities.<sup>50</sup> As subsequently amended, the law now reads:

Whenever a vessel from a foreign port or place or from a port or place in any Territory or possession of the United States arrives at a port or place in the United States or the Virgin Islands, whether directly or via another port or place in the United States or the Virgin Islands, the appropriate customs officer for such port or place of arrival may, under such regulations as the Secretary of the Treasury may prescribe and for the purpose of assuring compliance with any law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce, cause inspection, examination, and search to be made of the persons, baggage, and merchandise discharged or unladen from such vessel, whether or not any or all such persons, baggage, or merchandise has previously been inspected, examined, or searched by officers of the customs.<sup>51</sup>

The law empowers customs officers, at any time, to board any vessel or vehicle,

within a customs-enforcement area established under the Anti-Smuggling Act [19 U.S.C. 1701 et seq.], or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.<sup>52</sup>

The Secretary of the Treasury may issue regulations for searching persons and baggage.<sup>53</sup> Further, “all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.”<sup>54</sup>

The level of suspicion required to search travelers for illegal goods as they cross the border increases as the search becomes more intrusive. Courts, for instance, do not require particularized suspicion for the contents of a traveler’s briefcase, luggage, purse, or pockets.<sup>55</sup> Nor is it required for documents contained within containers in such items.<sup>56</sup>

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<sup>49</sup> Tariff Act of 1930, ch. 497, 46 Stat. 590 (codified at 19 U.S.C. ch. 4). See also Robert Whaples, *Where Is There Consensus Among American Economic Historians? The Results of a Survey on Forty Propositions*, 55 J. ECON. HIST. 139, 151 (1995) (finding consensus among economic historians that the Act “exacerbated the Great Depression.”)

<sup>50</sup> Customs Administrative Act of 1938, ch. 679, 52 Stat. 1077, 1083 (codified as amended at 19 U.S.C.A. § 1467).

<sup>51</sup> 19 U.S.C. § 1467. See also 19 U.S.C. § 1496 (“The appropriate customs officer may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefor has been made.”); 19 U.S.C. § 1499 (providing for entry examination of imported merchandise).

<sup>52</sup> 19 U.S.C. § 1581(a).

<sup>53</sup> 19 U.S.C. § 1582. Implementing regulations can be found at 19 C.F.R. §§ 23.1, 23.5, 23.11.

<sup>54</sup> *Id.* See Tariff Act of 1930, ch. 497, § 582, 46 Stat. 590, 748.

<sup>55</sup> See, e.g., *United States v. Tsai*, 282 F.3d 690, 696 (9th Cir. 2002); *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967). But note that suspicion cannot be based merely on ancestry as a basis for detention and questioning. See *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

<sup>56</sup> See *United States v. Grayson*, 597 F.2d 1225, 1228–29 (9th Cir. 1979).

Pictures, films and other graphic materials do not earn any higher level of protection.<sup>57</sup> A pat-down warrants “minimal suspicion.”<sup>58</sup>

In contrast, the search of a travelers’ undergarments and strip searches require “real suspicion.”<sup>59</sup> The only context thus far recognized by the Supreme Court as requiring individualized suspicion is related to the intimate physical search of a woman believed to be smuggling drugs in her alimentary canal.<sup>60</sup> In the 1985 case *United States v. Montoya de Hernandez*, customs officials suspected that a woman had swallowed balloons containing drugs.<sup>61</sup> The Supreme Court determined that reasonable suspicion was required to detain the individual until the drugs had passed.<sup>62</sup> This decision followed on a series of lower court cases rejecting mere suspicion for intrusive body searches, requiring a “clear indication” or “plain suggestion” of criminal activity.<sup>63</sup>

Vehicles are subject to a much less rigorous standard than searches of the person. In *United States v. Flores-Montano*, reasonable suspicion was considered sufficient for removing a gas tank to search for contraband.<sup>64</sup> The Supreme Court, however, has held open the possibility “that some searches of *property* are so destructive as to require” particularized suspicion.<sup>65</sup>

#### D. Mail Search

Customs officers, by statute, have the authority to stop and to search domestic mail headed outside the United States, as well as foreign mail transiting the United States.<sup>66</sup> The law is specifically tied to six areas: exportation or importation of monetary instruments;<sup>67</sup> material related to obscenity or child pornography;<sup>68</sup> controlled

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<sup>57</sup> *United States v. Thirty–Seven Photographs*, 402 U.S. 363, 376 (1971).

<sup>58</sup> *See, e.g.*, *People of the Territory of Guam v. Sugiyama*, 846 F.2d 570, 572 (9th Cir. 1988) (pat-down appropriate when suspect known to be connected to packages of marijuana previously sent to airport); *United States v. Des Jardins*, 747 F.2d 499, 504-05 (9th Cir.1984), *vacated in part*, 772 F.2d 578 (9th Cir. 1985) (pat-down justified when objects frequently used in narcotics smuggling found in the traveler’s suitcase); *United States v. Quintero-Castro*, 705 F.2d 1099, 110-01 (9th Cir. 1983) (pat-down appropriate where traveler paid cash for the ticket, appeared nervous, and story conflicted with co-traveler); *United States v. Carter*, 563 F.2d 1360, 1361 (9th Cir. 1977) (pat-down appropriate when traveler appeared nervous and did not directly answer questions about trip); *United States v. Rivera-Marquez*, 519 F.2d 1227, 1228 (9th Cir. 1975) (pat-down appropriate when informer told agents that individual with traveler’s name would be smuggling drugs on that day). *See also* *United States v. Romero*, 71 F. Supp.2d 1021 (N.D. Cal. 1999) (pat-down of traveler did not meet the minimal suspicion standard).

<sup>59</sup> *Des Jardins*, 747 F.2d at 505; *United States v. Couch*, 688 F.2d 599, 604 (9th Cir. 1982); *United States v. Guadalupe-Garza*, 421 F.2d 876 (9th Cir. 1970).

<sup>60</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See, e.g.*, *United States v. Vance*, 62 F.3d 1152 (9th Cir. 1995) (holding “real suspicion” was present when Mr. Vance, traveling from Hawaii to Guam, underwent a pat-down search). In that case, a customs officer observed that the traveler was glassy-eyed, disoriented, and had trouble answering questions. A pat-down revealed two pairs of underwear and a bulge at the traveler’s crotch. When directed to drop his underwear, two packs of methamphetamine fell out.

<sup>64</sup> *United States v. Flores-Montano*, 541 U.S. 149 (2004). In this case, the Ninth Circuit had taken the term “routine” from *United States v. Montoya de Hernandez*, created a balancing test, and applied it to vehicle searches. The Supreme Court objected, determining that searches of vehicles were subject to a much less rigorous standard than searches of the person. The 9th circuit went on in *United States v. Chaudhry*, 424 F.3d 1051, 1054 (9th Cir. 2005) to find the distinction between “routine” and “non-routine” inapplicable to searches of property.

<sup>65</sup> *Flores-Montano* at 155–56, 124 S. Ct. 1582 (holding that complete disassembly and reassembly of a car gas tank did not require particularized suspicion.)

<sup>66</sup> 19 U.S.C. § 1583.

<sup>67</sup> 31 U.S.C. § 5316.

<sup>68</sup> 18 U.S.C. §§ 1461, 1463, 1465, and 1466.

substances;<sup>69</sup> nuclear materials covered by the Export Administration Act;<sup>70</sup> defense articles and services;<sup>71</sup> and emergency matters that fall within the International Emergency Economic Powers Act, such as foreign exchange, transfers of credit or payments, or the import or export of currency or securities.<sup>72</sup> Mail that has not been sealed against inspection, and to which the sender or addressee has consented a search, can be examined.<sup>73</sup> Mail weighing more than 16 ounces that has been sealed against inspection can only be opened and searched by a customs officer where there is reasonable grounds to suspect that it contains monetary instruments, a weapon of mass destruction, or material related to one of the six categories listed above.<sup>74</sup> The law explicitly forbids reading any correspondence contained in mail sealed against inspection absent consent by the sender or addressee, or a search warrant obtained consistent with rule 41 of the Federal Rules of Criminal Procedure.<sup>75</sup> Customs officers do not have the authority to open and inspect mail weighing 16 ounces or less.<sup>76</sup>

A different provision in the code, whose origins stem from 19<sup>th</sup> century statutes, deals specifically with opening trunks or envelopes.<sup>77</sup> The standard it sets is “reasonable cause.” The statutory language reads:

Any of the officers or persons authorized to board or search vessels may search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law.<sup>78</sup>

The Supreme Court has noted that the “reasonable cause to suspect” test presents “a less stringent requirement than that of ‘probable cause’ imposed by the Fourth Amendment as a requirement for the issuance of warrants.”<sup>79</sup> The Court has upheld this test as applied to border searches as constitutional.<sup>80</sup>

#### E. Special Protections Afforded the Home

As the Supreme Court noted in 1977, “[A] port of entry is not a traveler’s home.”<sup>81</sup> For the latter, as a matter of law, for centuries special protections have applied. From the time of Coke’s *Institutes* (and, arguably, Magna Carta) forward, outside of a fleeing felon or the hue and cry, common law forbade access to the home absent a particularized warrant.<sup>82</sup> The need for such a document pushed on what, precisely would satisfy the requirement. As the Crown made increasing use of general warrants, treatise writers and jurists roundly condemned the practice as unreasonable—i.e., against the Reason of the common law.<sup>83</sup> Only specific warrants, issued by a magistrate, naming the individual, establishing probable cause for a specific crime, and supported by oath or affirmation,

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<sup>69</sup> 21 U.S.C. § 953.

<sup>70</sup> 50 U.S.C. §§ App. 2401 et seq.

<sup>71</sup> 22 U.S.C. § 2778.

<sup>72</sup> 50 U.S.C. §§ 1701, 1702 et seq.

<sup>73</sup> 19 U.S.C. § 1583(b).

<sup>74</sup> *Id.* § 1583(c)(1).

<sup>75</sup> *Id.* § 1583(c)(2).

<sup>76</sup> *Id.* § 1583(d).

<sup>77</sup> *Id.* § 482 (re-codified Rev. Stat. § 3061, which derived from the Act of July 18, 1866, ch. § 3, 14 Stat. 178, 178.)

<sup>78</sup> *Id.* § 482.

<sup>79</sup> *United States v. Ramsey*, 431 U.S. 606, 612 (1977).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 618 (1980 (quoting *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971)).

<sup>82</sup> Laura K. Donohue, *The Original Fourth Amendment*, 83 CHL. L. REV. 1181 (2016).

<sup>83</sup> *Id.*

met the standard.<sup>84</sup> The U.S. founders incorporated this common law rule into the Fourth Amendment.<sup>85</sup>

It is important here to remember the mere evidence rule, which similarly continued the common law tradition and did not fall out of favor in the United States until 1967, just a few months prior to *Katz v. United States*.<sup>86</sup> This rule made it clear that even with a particularized warrant, there were certain things that the government could not obtain because it interfered with the privacies of life. The court thus drew a distinction between the fruits and instrumentalities of crime, on the one hand, and other types of materials. In *Boyd v. United States*, Justice Bradley explained for the Court,

The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not.<sup>87</sup>

This distinction reflects in the customs law tradition:

The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the Act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment....So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. Many other things of this character might be enumerated.<sup>88</sup>

In other words, Congress (and the Courts) drew a distinction between a store or dwelling house, or other structure for which a proper warrant was required, and the search of a ship, motorboat, wagon, or automobile, where it was not practicable to obtain a warrant because the vehicle could be quickly moved. Thus, under the Act of March 3, 1815, it was not only lawful to board and search vessels within the customs' officers' districts and those adjoining, but also to stop and search any vehicle, beast, or person for whom there was probable cause to believe unlawful goods had unlawfully been brought into the United States.<sup>89</sup> The Court, and the government, considered it a valid exercise of

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<sup>84</sup> *Id.*

<sup>85</sup> U.S. CONST. amend IV.

<sup>86</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>87</sup> *Boyd v. United States*, 116 U.S. 616, 623 (1886).

<sup>88</sup> *Id.* at 623-24 (internal citations omitted).

<sup>89</sup> Act of Mar. 3, 1815, ch. 94, 3 Stat. 231, 232. For total or partial renewals of the statute, see Act of Apr. 27, 1816, ch. 110, 3 Stat. 315; Act of Feb. 28, 1865, ch. 67, 13 Stat. 441; Act of July 18, 1866, c. 201, 14 Stat. 178; section 3061 of the Revised Statutes.

constitutional power.<sup>90</sup> To the extent that a question of distance from the border arose, in the 19<sup>th</sup> century, the Attorney general drew the line at three miles.<sup>91</sup>

In this way, the border exception bore a striking resemblance to the fleeing felon exception: it was only in the process of hot pursuit of goods illegally brought into the country that broader powers applied. But limits applied:

It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.<sup>92</sup>

In *Carroll v. United States*, the Court noted the necessity of establishing probable cause of a felony for a search that occurred away from the border. The border was only relevant insofar as it helped to establish probable cause.<sup>93</sup>

Reflecting these traditions, the current state of play, as both a statutory and a doctrinal matter, is that customs searches of homes require a warrant, issued by a third party federal judge or magistrate, and supported by probable cause that merchandise has been illegally brought into the United States, or that the goods in question are subject to forfeiture.<sup>94</sup> The search of vehicles or vessels, however, is not limited to the time and place of actual international crossings.<sup>95</sup>

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<sup>90</sup> *Cotzhausen v. Nazro*, 107 U.S. 215 (1883). See also *United States v. One Black Horse*, 129 F. 167 (D. Me. 1904). Similar provisions applied to Indian agents who, suspecting the introduction of alcohol, could cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched and seized. Rev. Stat. § 2140 (1875). This power arose from an 1822 statute, which allowed for traders' goods to be searched/seized on basis of suspicion of alcohol (Act of May 6, 1822, ch. 58, 3 Stat. 682), as well as the Act of June 30, 1834, § 20, ch. 161, 4 Stat. 729, 732. The Supreme Court recognized the Statute of 1822 as sufficient for search and seizure in *American Fur Co. v. United States*, 27 U.S. (2 Pet.) 358. All statutes cited and discussed in *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>91</sup> Section 174 of Act of Mar. 3, 1899, ch. 429, 30 Stat. 1254, 1280. The Attorney General, construing the Act, wrote, "If your agents reasonably suspect that a violation of law has occurred, in my opinion they have power to search any vessel within the three-mile limit according to the practice of customs officers when acting under section 3059 of the Revised Statutes [Comp. St. § 5761], and to seize such vessels." 26 Op. Attys. Gen. 243. Cited and quoted in *Carroll*, 267 U.S. at 153.

<sup>92</sup> *Carroll*, 267 U.S. at 153-54.

<sup>93</sup> *Id.*, at 160.

<sup>94</sup> 19 U.S.C. § 1595.

<sup>95</sup> *Id.* § 482: "(a) Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. (b) Any officer or employee of the United States conducting a search of a person pursuant to subsection (a) of this section shall not be held liable for any civil damages as a result of such search if the officer or employee

## F. Extended Border Search and the Functional Equivalent

For searches away from ports of entry, courts look at whether such actions can be upheld as “extended border searches” as well as whether they take place at the “functional equivalent” of the border.<sup>96</sup> Airports, for instance, are considered the functional equivalent of the border.<sup>97</sup> The validity of such searches depends upon a variety of factors, suggesting a totality of circumstances test. As with searches at the actual border, the Fourth Amendment standard of “reasonableness” still applies; however, mere suspicion is sufficient.<sup>98</sup>

In cases of continuous surveillance of vehicles transiting the border, the lower courts have upheld searches 20 miles from the border that occur 15 hours after entry.<sup>99</sup> On the other hand, for roving searches, the Supreme Court has held that a warrantless search, 25 miles north of the border, on an East-West Highway located at all points at least 20 miles from border, absent probable cause and reasonable suspicion, was invalid.<sup>100</sup> There is no border exception outside the actual border or its functional equivalent.<sup>101</sup>

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performed the search in good faith and used reasonable means while effectuating such search.” This section dates back to Act of March 3, 1815, ch. 94, 3 Stat. 231, 232; Act of July 18, 1866, ch. 201, 14 Stat. 178.

<sup>96</sup> *United States v. Carter*, 760 F.2d 1568 (11th Cir. 1985); *Torres v. Puerto Rico*, 442 U.S. 465 (1979) (Search of individual arriving in Commonwealth of Puerto Rico from the United States not satisfied because no functional equivalent to international border of the United States)

<sup>97</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (“For ... example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a non-stop flight from Mexico City would clearly be the functional equivalent of a border search.”).

<sup>98</sup> *Alexander v. United States*, 362 F.2d 379 (9th Cir. 1966) (citing *Cervantes v. United States*, 263 F.2d 800, 803, n. 5 (9th Cir. 1959); *Carroll v. United States*, 267 U.S. 132, 154, (1925); *Boyd v. United States*, 116 U.S. 616, 623, (1886); *Hammond v. United States*, 356 F.2d 931 (9th Cir. 1966); *King v. United States*, 348 F.2d 814, 817 (9th Cir. 1965); *Jones v. United States*, 326 F.2d 124, 130 (9th Cir. 1964, Duniway, J., concurring); *Denton v. United States*, 310 F.2d 129 (9th Cir. 1962); *Mansfield v. United States*, 308 F.2d 221 (5th Cir. 1962); *Plazola v. United States*, 291 F.2d 56 (9th Cir. 1961); *Witt v. United States*, 287 F.2d 389 (9th Cir. 1961); *Murgia v. United States*, 285 F.2d 14 (9th Cir. 1960); *Landau v. United States Attorney*, 82 F.2d 285 (2d Cir. 1936); *United States v. Wischerth*, 68 F.2d 161 (2d Cir. 1933); *United States v. Yee Ngee How*, 105 F. Supp. 517 (N.D. Cal. 1952).

<sup>99</sup> *See, e.g., King v. United States* 348 F.2d 814 (9th Cir. 1965), *cert. denied*, 382 US 926 (customs agent, based on a tip, followed car at Tijuana crossing); *Leeks v. United States*, 356 F.2d 470 (9th Cir. 1966) (upholding search 15 miles north of San Ysidro border entry, continuous tailing); *Alexander v. United States* 362 F.2d 379 (9th Cir. 1966), *cert. denied*, 385 U.S. 977 (heroin discovered after placing vehicle crossing into Arizona after surveillance, with only a one or two minute break, reasoning that by statute customs officers had long had the express authority to stop, search, examine vehicles suspected of carrying merchandise subject to duty, making it possible for them to do what would be “unreasonable” for police, supported by courts, use a totality of the circumstances—e.g., time, distance, manner and extent of surveillance, etc.); *Lee v. United States* 376 F.2d 98 (9th Cir. 1967), *cert. denied*, 389 U.S. 837 (customs agent acting on tip placed car from Mexico under surveillance, arrested and found narcotics—upheld because continuously under surveillance); *Rodriguez-Gonzalez v. United States* 378 F.2d 256 (9th Cir. 1967) (mere suspicion acceptable for search that took place 15 hours and 20 miles from the border found marijuana hidden in rear door; met totality of the circumstances test—time and distance, extent and manner; constant surveillance until car stopped a few miles north of San Diego); *Gonzalez-Alonso v. United States* 379 F.2d 347 (9th Cir. 1967) (marijuana; followed from border, stopped and searched 11 miles inland, found valid, applying totality of the circumstances test); *Bloomer v. United States* 409 F.2d 869 (9th Cir. 1969) (Oldsmobile with marijuana under constant surveillance from time it crossed the border).

<sup>100</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). In *Almeida-Sanchez*, a Mexican citizen with a valid U.S. work permit was convicted for possession and transfer of marijuana following a warrantless search of his automobile. 413 U.S. at 267. The government argued that the Immigration and Nationality Act, which provided for warrantless searches “within a reasonable distance [defined by regulations as 100 air miles] from any external boundary” authorized the search. Immigration and Nationality Act, § 287(a)(3), codified at 8 U.S.C.A. § 1357(a). *See also* 8 C.F.R. § 287.1 (cited in *Almeida-Sanchez*, 413 U.S. at 268. In a 5-4 opinion, the Supreme Court ruled that the statute and regulation were inconsistent with the Fourth Amendment. While border searches could take place at functional equivalent of the border, searches within 100 miles of the border violated the reasonableness clause. The Court also held that the search could not be justified on the

### G. Restrictions on Customs Searches: Who and Why

The Courts have held that an “officer of the customs” includes customs officers, inspectors, investigators, and mail entry aids, certain Immigration and Naturalization Service officials (e.g., border patrol agents), and Coast guard officers.<sup>102</sup> It has also included a doctor aiding a customs search. The right to undertake border searches *does not extend to the FBI or to law enforcement when acting for general law enforcement purposes*. Thus, In the 1979 case of *United States v. Vidal Soto-Soto*, the 9th Circuit considered the FBI’s warrantless search of a Chevrolet pickup truck at the border to determine whether it had been stolen.<sup>103</sup> The agent’s sole basis for stopping the truck was due to the make and model of the vehicle.<sup>104</sup> The Court looked to the Supreme Court’s recent decision in *Delaware v. Prouse*, in which it had required articulable and reasonable suspicion that a motorist was unlicensed or an automobile not registered, to detain a vehicle and request the registration papers.<sup>105</sup>

The reason for the broader authority granted to customs officers than to ordinary law enforcement is because the basic purpose behind a border search is *to obtain things illegally brought into the country*. As the 9<sup>th</sup> circuit noted, “Validity for this distinction is found in the fact that the primordial purpose of a search by customs officers is not to apprehend persons, but to seize contraband property unlawfully imported or brought into the United States.”<sup>106</sup> The Court observed, “The authorization of section 581 (19 USC §1581) is to ascertain whether there are any dutiable articles concealed in the vessel; it is not to discover acts of criminality. If by chance contraband merchandise or dutiable articles are discovered, then the Coast Guard officer must arrest any person connected with the smuggling of such merchandise.”<sup>107</sup> The purpose is “to effectuate the provisions of the navigation and tariff laws and to protect the revenue of the United States, Congress, by section 581 of the Tariff Act 1930.”<sup>108</sup> The purpose of customs law is not to deter criminal activity writ large.<sup>109</sup>

## II. IMMIGRATION BORDER SEARCH AUTHORITIES

Immigration law has a considerably different history and appears in a different area of the code. This history sheds light on the differences between CBP and ICE in terms of their regulations. It is a doctrine increasingly fraught with contradictions that increasingly suggest that rights concerns must be weighed against immigration authorities.

On the one hand, more than a century ago the plenary power doctrine emerged,

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basis of the rules applied to search of automobiles. In *Carroll v. United States*, the Court had upheld the clause in the Volstead Act that allowed for warrantless search of automobiles where probable cause existed that the vehicle in question contained illegal alcoholic beverages. 267 U.S. 132 (1925). In this case, however, the standard of probable cause had not been met.

<sup>101</sup> *United States v. Ortiz*, 422 U.S. 891 (1975).

<sup>102</sup> *See also* 19 U.S.C.A. § 1401(i).

<sup>103</sup> *United States v. Vidal Soto-Soto*, 598 F.2d 545, 546 (9th Cir. 1979).

<sup>104</sup> *Id.*

<sup>105</sup> *Delaware v. Prouse*, 440 U.S. 648 (1979).

<sup>106</sup> *Alexander v. United States*, 362 F.2d 379, 382 (1966). *See also* *The Atlantic. Olson v. United States*, 68 F.2d 8 (2d Cir. 1933).

<sup>107</sup> *Atlantic. Olson*, 68 at 9.

<sup>108</sup> *Id.* at 10.

<sup>109</sup> But note that seizure may rest on a violation of criminal law. *See Maul v. United States*, 274 U.S. 501 (1927); *Wood v. United States*, 41 U.S. 342 (1842); *Awalt v. United States*, 47 F.2d 477 (3d Cir. 1931).

rejecting any constitutional challenge to Congress's initial immigration laws.<sup>110</sup> In *Chae Chan Ping v. United States*, the Court stated that although the Constitution did not explicitly address immigration, Congress had the general power to pass a statute amending prior Treaties and excluding Chinese citizens.<sup>111</sup> Justice Field, writing for the Court, said, "The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of courts."<sup>112</sup> The decision fell to the political branches, rendering any judicial "reflection upon [Congress's] motives, or the motives of any of its members," immaterial.<sup>113</sup>

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.<sup>114</sup>

Such authority was part of the foreign affairs power of any country, found in the interstices of Article I(8) and Article II.<sup>115</sup>

Over time, however, the rule that the executive branch and Congress have absolute authority over immigration decisions has eroded.<sup>116</sup> Thus, while entry without the appropriate status may be unlawful, the Supreme Court has held that a child's immigration status cannot impact their access to public elementary and secondary education.<sup>117</sup> Professor Hiroshi Motomura has argued that the gap between the Court and the dissent in that case stems from disparate views of immigration outside legal constraints: namely, a contribution to the economy and society, versus "egregious lawbreaking."<sup>118</sup> Further complicating the debate is the role of states and cities, as well as how (and whether) to integrate unlawful immigrants—including and up to providing a path to formal citizenship.<sup>119</sup>

Questions of individual rights have gained ground. U.S. citizens, and individuals with a substantial connection to the United States, benefit from the protections of the Fourth

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<sup>110</sup> *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). See also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990).

<sup>111</sup> *Id.*; An act to Execute Certain Treaty Stipulations Relating to Chinese, May 6, 1882, ch. 1, 22 Stat. 58.

<sup>112</sup> *Id.* at 602.

<sup>113</sup> *Id.* (citing *Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855), *aff'd*, 67 U.S. 481 (1862)).

<sup>114</sup> *Id.* at 603-604.

<sup>115</sup> *Id.* at 604. ("The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations").

<sup>116</sup> See *id.* at 549 ("Immigration law, as it has developed over the past one hundred years under the domination of the plenary power doctrine, represents an aberrational form of the typical relationship between statutory interpretation and constitutional law. The aberrant quality is attributable to the prolonged nature of the contradiction between these two sets of "constitutional" norms in immigration law. The constitutional norms that courts use when they directly decide constitutional issues in immigration cases are not the same constitutional norms that inform interpretation of immigration statutes. To serve the latter function, many courts have relied on what I call "phantom constitutional norms," which are not indigenous to immigration law but come from mainstream public law instead. The result has been to undermine the plenary power doctrine through statutory interpretation.) (internal citations omitted)

<sup>117</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>118</sup> Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037 (2008).

<sup>119</sup> *Id.*

Amendment.<sup>120</sup> Non-U.S. persons, however, have no such rights. Immigration officials thus have much broader authorities as to aliens: they can be interrogated, arrested, and subjected to search.<sup>121</sup> Nevertheless, as with customs measures, the law recognizes the protected status of the home, requiring either consent or a properly-executed warrant to enter onto farm land or any agricultural operation to interrogate individuals as to their right to be in the United States.<sup>122</sup> As for “reasonable distance,” lower courts have held that this provision, which allows the Attorney General to ascertain how far from the border probable cause and a warrant is not required, is not unconstitutional because it does not insert a neutral magistrate into the review process.<sup>123</sup>

In terms of searches at the border itself,

Any officer or employee of the [immigration] [s]ervice authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this chapter which would be disclosed by such search.<sup>124</sup>

The standard is thus one of “reasonable cause.” Congress, to date, has not made any special exceptions for the personal effects that may be searched, with the result that, as noted in the introduction, guidance on electronic devices has been left to the agencies themselves.

### III. BORDER SEARCH OF ELECTRONIC DEVICES

As CBP and ICE have been making increasing use of their border search authorities, there have been calls to exempt electronic devices from the exception. The argument put forward is that these devices contain a tremendous amount of private information. Prior to the Supreme Court’s decisions in *Riley v. California*, *United States v. Jones*, and *Carpenter v. United States*, courts generally rejected the argument based either on the grounds that the search was routine and did not require reasonable suspicion (pursuant to the border search exception), or that it was conducted with reasonable suspicion. However, three courts determined that *forensic* examination requires a higher standard than exists in the ordinary border search exception. Following *Riley* and *Carpenter*, moreover, there is every reason to believe that the Fourth Amendment places a limit on the search of electronic devices, at least as to U.S. persons and individuals who have a substantial connection to the United States.

#### A. Cases Prior to *Riley* and *Carpenter*

Although the Supreme Court in *Flores-Montano* left open the possibility, under certain circumstances, that reasonable suspicion could be required for particular property searches at the border, a number of courts, prior to *Riley* and *Carpenter*, considered the search of electronic devices to fall within the ordinary border search exception.<sup>125</sup> Others

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<sup>120</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

<sup>121</sup> 8 U.S.C.A. § 1357(a).

<sup>122</sup> 8 U.S.C.A. § 1357(e).

<sup>123</sup> *United States v. King*, 485 F.2d 353 (10th Cir. 1973), *rev’d on other grounds*, *Bowen v. United States*, 422 U.S. 916 (1975).

<sup>124</sup> 8 U.S.C.A. § 1357(c).

<sup>125</sup> *See United States v. Flores-Montano*, 541 U.S. 149, 155-56 (2004).

determined that in the particular case before them, reasonable suspicion had been met. Yet others extended special protections to forensic (not basic) searches.

*1. Cases holding electronic border searches not subject to reasonable suspicion*

In *United States v. Arnold*, a traveler arrived at LAX after a nearly twenty-hour flight from the Philippines.<sup>126</sup> When he went to clear customs, CBP pulled him aside for secondary questioning, inspected his luggage, and found a laptop, a separate hard drive, a USB stick, and six disks. Agents directed Mr. Arnold to turn on his computer. On the desktop, there were folders labeled “Kodak Pictures” and “Kodak Memories.” When agents opened the folders, they found naked women. CBP called in DHS and ICE, who, believing the pictures to include children, detained and questioned him. They seized his computer and the storage devices and, a fortnight later, obtained a warrant. DOJ charged Michael Arnold with transporting child pornography. Despite the considerable amount of information that could be held on the computer, the court did not see any Fourth Amendment concerns. Neither of the two narrow grounds laid out by the Supreme Court in *Flores-Montano* that would require reasonable suspicion (“exceptional damage to property” or “particularly offensive manner”) applied.<sup>127</sup> “[W]e are satisfied that reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border.”<sup>128</sup> When a similar case arose in regard to fraudulent alien cards, which were found on a traveler’s hard drive while crossing the border, the Ninth Circuit considered the requirement of reasonable suspicion to be foreclosed by *Arnold*.<sup>129</sup>

The Fourth Circuit reached a similar conclusion in *United States v. Ickes*.<sup>130</sup> In that case, the defendant, driving a van that appeared to be packed with everything he owned, crossed the U.S./Canadian border. A search of the van uncovered a video camera with a tape of a tennis match in which the camera was focused on a young ball boy. Border agents found marijuana seeds and pipes and several photo albums of child pornography. They also found a computer and 75 diskettes with additional child pornography on them. The court found the search permissible:

Both Congress and the Supreme Court have made clear that extensive searches at the border are permitted, even if the same search elsewhere would not be. We refuse to undermine this well-settled law by restrictively reading the statutory language in 19 U.S.C. 1581(a) or by carving out a First Amendment exception to the border search doctrine.<sup>131</sup>

At least one other published lower court published opinion has reached a similar conclusion.<sup>132</sup>

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<sup>126</sup> *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

<sup>127</sup> *Id.* at 1008-09.

<sup>128</sup> *Id.* at 1009.

<sup>129</sup> *United States v. Singh*, 295 Fed. App’x. 190 (9th Cir. 2008).

<sup>130</sup> *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005).

<sup>131</sup> *Id.* at 502.

<sup>132</sup> *See, e.g., United States v. McAuley*, 563 F. Supp. 672 (W.D. Tex. 2008) (A name check on a driver crossing at Del Rio, Texas Port of entry from Mexico showed that the individual was the subject of an investigation in New York involving child pornography. The defendant was referred to secondary inspection where, two hours later, ICE began to question him about his computer equipment, including a zip drive and two external hard drives as well as a laptop that had been observed in vehicle. He consented to the search and provided them with the password, whereupon they found child pornography on the device. The court rules the search constitutional). *See also United States v. Hampe*, Crim. No. 07-3-B-W, 2007 WL 1192365 (D. Me. Apr. 18, 2007). The court in this case held that the search of a laptop was a routine search and no reasonable

## 2. Cases finding that the search was supported by reasonable suspicion

Two categories of cases prior to *Riley* and *Carpenter* considered the search of electronic devices to be supported by reasonable suspicion in the matter before the court. The first were searches premised on existing criminal investigations and records that agents became aware of during the border encounter; the second stemmed from agents uncovering illegal substances.

In *United States v. Hassanshahi*, for example, a 2014 case from Washington, D.C., a traveler's laptop was seized during an international border stop at a U.S. airport.<sup>133</sup> An inquiry into the traveler's identity revealed a federal investigation into the defendant's participation in a conspiracy to build a computer production facility in Iran in violation of U.S. trade embargoes. The court in that case considered agents to have established reasonable suspicion sufficient to support a forensic examination of the laptop.

Similarly, in *United States v. Saboonchi*, the traveler's name came up in connection with two different export violation investigations.<sup>134</sup> The government had information that the defendant had purchased two cyclone separators which had then been shipped overseas to an entity linked to a company in Iran. The court determined that the forensic search of the defendant's smart phone and flash drive had been supported by reasonable suspicion.

*Pari passu*, in *Cotterman*, border agents had reasonable suspicion for their initial search based on the fact that the defendant had a prior conviction for child molestation, frequently traveled to a country associated with sex tourism, and carried password-protected files. A handful of lower courts have found the presence of illegal substances during the search to be sufficient for the examination of electronic devices.<sup>135</sup>

## 3. Cases extending special protections to forensic investigations

A third category of cases prior to *Riley* and *Carpenter* extended Fourth Amendment protections to the more intrusive forensic investigations. The most prominent case came out of the Ninth Circuit.

In *United States v. Cotterman*, agents entered a traveler's name into the Treasury Enforcement Communication System (TECS) which revealed a 15-year old child sexual molestation charge. Agents referred the defendant and his wife for secondary questioning, ordering them to leave their car and belongings behind. A search of the vehicle yielded two laptop computers with password-protected files. The defendant offered to assist agents in accessing the information, but the agent declined because of concern that the defendant would use the opportunity to sabotage the files. Agents seized the computers and transported them to Tucson, 150 miles away, for forensic evaluation.

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suspicion was required, but it then concluded that the particular facts of the case gave rise to reasonable suspicion that child pornography was involved.

<sup>133</sup> *United States v. Hassanshahi*, 75 F. Supp. 3d 101 (D.D.C. 2014).

<sup>134</sup> *United States v. Saboonchi*, 990 F. Supp. 2d 536 (D. Md. 2014).

<sup>135</sup> *See, e.g.*, *United States v. Molina-Isidoro*, 267, F. Supp. 3d 911 (W.D. Tex. 2016) (mobile phone searched with reasonable suspicion at Mexican border after agents found methamphetamine in the traveler's suitcase); *United States v. Mendez*, 240 F. Supp. 3d 1005 (D. Ariz. 2017) (mobile phone search at border after finding drugs in the car considered to have been conducted with reasonable suspicion); *United States v. Cano*, 222 F. Supp. 3d 876 (S.D. Cal. 2016) (agents, finding 16 kg of cocaine in the spare tire of the defendant's truck had reasonable suspicion to download mobile phone data on grounds that it had been used as an instrumentality of the crime); *United States v. Ramos*, 190 F. Supp. 3d 992 (S.D. Cal. 2016) (agents found methamphetamine in the car and questioned defendant who said he been in cell phone communication with person to whom he was reporting; court determined that DHS manual search of phone and examination of incoming calls, text messages, and the call log was reasonable); *United States v. Caballero*, 178 F. Supp. 3d 1008 (S.D. Cal. 2016) (CBP found illegal drugs in defendant's car and searched the defendant's mobile phone which had photos of large sums of money; the court said reasonable, particularized suspicion present).

After three days, seventy-five images of child pornography had been found. The court determined that border searches were limited in time and distance: agents needed to have reasonable suspicion that the subject was involved in criminal activity. Mere suspicion was not enough.<sup>136</sup> The court recognized the unique nature of the type of information contained in electronic devices:

The amount of private information carried by international travelers was traditionally circumscribed by the size of the traveler's luggage or automobile. This is no longer the case. Electronic devices are capable of storing warehouses full of information. \* \* \* Laptop computers, iPads and the like are simultaneously offices and personal diaries. They contain the most intimate details of our lives: financial records, confidential business documents, medical records and private emails. \* \* \* Electronic devices often retain sensitive and confidential information far beyond the point of erasure, notably in the form of browsing histories and records of deleted files. This quality makes it impractical, if not impossible, for individuals to make meaningful decisions regarding what digital content to expose to the scrutiny that accompanies international travel.<sup>137</sup>

A second case from the District Court in Maryland held that the border search of any computer or electronic device should be considered non-routine and require reasonable suspicion.<sup>138</sup> The court's argument was that, while the government has legitimate concerns about child pornography, it does not justify unfettered crime-fighting searches or an unregulated assault on citizens' private information—which is what is involved in forensic examination of a hard drive. The court took a different approach than the Ninth Circuit in *Cotterman*: in the former, the court determined that the forensic search of a computer that had been imaged was as invasive of the defendant's privacy as a strip search. In *Saboonchi*, the Maryland court took issue with the Ninth Circuit's failure to provide guidelines for what constituted a "forensic" search. The court distinguished between routine and non-routine border searches and tried to construct a test for determining when a conventional computer search becomes a forensic investigation:

A conventional search at the border of a computer or device may include a Customs officer booting it up and operating it to review its contents, and seemingly, also would allow (but is not necessarily limited to) reviewing a computer's directory tree or using its search functions to seek out and view the contents of specific files or file types. . . . And, just as a luggage lock does not render the contents of a suitcase immune from search, a password protected file is not unsearchable on that basis alone.<sup>139</sup>

In contrast, "[i]n a forensic search of electronic storage, a bitstream copy is created and then is searched by an expert using highly specialized analytical software—often over the course of several days, weeks, or months—to locate specific files or file types, recover hidden, deleted, or encrypted data, and analyze the structure of files and of a drive."<sup>140</sup> The court provided three explanations for why forensic searches should be considered *sui generis*: first, it creates a copy and uses specialized software to analyze the computer's

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<sup>136</sup> *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc) (requiring reasonable suspicion for forensic examination of the laptop).

<sup>137</sup> 709 F.3d at 964-65.

<sup>138</sup> *U.S. v. Saboonchi*, 990 F. Supp. 2d 536 (D. Md. 2014).

<sup>139</sup> *Id.* at 560-61.

<sup>140</sup> *Id.* at 561.

contents; second, it provides access to deleted material; third, it provides insight into an individual's actions away from the border which would not otherwise be discoverable.<sup>141</sup>

The First Circuit, in evaluating other kinds of searches, offered the following non-exhaustive list of factors may be relevant when determining whether a search can be characterized as routine:

(i) whether the search results in the exposure of intimate body parts or requires the suspect to disrobe; (ii) whether physical contact between Customs officials and the suspect occurs during the search; (iii) whether force is used to effect the search; (iv) whether the type of search exposes the suspect to pain or danger; (v) the overall manner in which the search is conducted; and (vi) whether the suspect's reasonable expectations of privacy, if any, are abrogated by the search.<sup>142</sup>

#### B. *Riley v. California*: Stronger Constitutional Protections for Mobile Devices

The above cases pre-dated *Riley v. California*, in which the Supreme Court explicitly recognized the unique incursions into privacy occasioned by the search of a mobile phone.<sup>143</sup> In holding that search of a cell phone incident to arrest required a warrant supported by probable cause, the Court underscored the distinction between electronic devices and physical items. The sheer capacity of mobile devices had numerous implications for privacy:

First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.<sup>144</sup>

More than 90% of American adults own and carry cell phones, keeping “on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.”<sup>145</sup> The type of information that could be gleaned, moreover, is different in important respects from what could be uncovered from the search of a physical item. Medical records, location information, relationship details, political beliefs, religious convictions—in fact, *more* than could be ascertained even from the search of an individual's home, can be gleaned.<sup>146</sup>

Beyond this, mobile phones provide a gateway to the cloud. The court in *Riley* was unsatisfied with the solution that CBP has adopted, which the government proposed as an alternative—namely, “to disconnect a phone from the network before searching the

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<sup>141</sup> *Id.* at 563. See also Gretchen C.F. Shappert, The Border Search Doctrine: Warrantless Searches of Electronic Devices After *Riley v. California*, U.S. ATTY'S BULL., Nov. 2014, at 10.

<sup>142</sup> *United States v. Braks*, 842 F.2d 509, 512 (1st Cir. 1988) (footnotes omitted).

<sup>143</sup> *Riley v. California*, 134 S. Ct. 2473 (2014).

<sup>144</sup> *Id.* at 2489.

<sup>145</sup> *Id.* at 2490.

<sup>146</sup> *Id.* at 2490-91.

device.”<sup>147</sup>

One of the first border search cases to apply *Riley* was *United States v. Kim*, in which the court determined that the question of electronic searches was settled neither by the border exception nor by application of what was meant by “forensic.”<sup>148</sup> Instead, it considered the extent to which the search “intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”<sup>149</sup> The court noted:

while the courts in *Ickes*, *Cotterman*, and *Saboonchi* had little in the way of Supreme Court precedent to guide their way, the Supreme Court has since issued its opinion in *Riley v. California*. And in *Riley*, the Court made it clear that the breadth and volume of data stored on computers and other smart devices make today's technology different in ways that have serious implications for the Fourth Amendment analysis.<sup>150</sup>

Under a totality of circumstances test, that the imaging and search of a laptop, for an unlimited period and without any limits on the scope of the analysis, invaded the traveler's privacy to such an extent that it was unreasonable under the Fourth Amendment.<sup>151</sup> The court noted: “given the vast storage capacity of even the most basic laptops, and the capacity of computers to retain metadata and even deleted material, *one cannot treat an electronic storage device like a handbag simply because you can put things in it and then carry it onto a plane.*”<sup>152</sup>

The *Kim* case is notable not just for its application of *Riley*, but because it involved a conscious decision by investigators to wait until a suspect left the United States before using the border exception to search his laptop and thereby obtain detailed information about his activities.<sup>153</sup> The court ultimately rejected agents' instrumentalist approach—i.e., using the border search exception to obtain information to which they otherwise would not be entitled.<sup>154</sup>

Other courts, in the post-*Riley* world, consider forensic examination of mobile telephones to be non-routine and allowable only upon a showing of individualized suspicion or probable cause. In *United States v. Kolsuz*, the Fourth Circuit held that the forensic border search of a mobile device required individualized suspicion.<sup>155</sup> In that case, Mr. Kolsuz was detained when CBP uncovered firearms parts in his luggage.<sup>156</sup> Agents seized his phone and subjected it to a one-month forensic examination, generating a nearly 900 page report on the contents of the device. The District Court determined that, under *Riley*, the forensic investigation was non-routine but justified by reasonable suspicion.<sup>157</sup> The Fourth Circuit agreed that it was non-routine, and that non-routine searches require some level of individualized suspicion. It did not, however, reach the question of whether reasonable suspicion or probable cause was required.<sup>158</sup> Because probable cause had been present, the good faith exception would apply and so, in any

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<sup>147</sup> *Id.* at 2491.

<sup>148</sup> *United States v. Kim*, 103 F. Supp. 3d 32, 54 (D.D.C. 2015).

<sup>149</sup> *Riley*, 134 S. Ct. at 2484 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

<sup>150</sup> *United States v. Kim*, 103 F. Supp. 3d 32, 54 (D.D.C. 2015).

<sup>151</sup> *Kim*, 103 F. Supp. 3d at 56.

<sup>152</sup> *Id.* at 50 (emphasis added).

<sup>153</sup> *Id.* at 38-39.

<sup>154</sup> *Id.* at 45 (citing *Hassanshahi*, 75 F.Supp.3d at 120-21).

<sup>155</sup> *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018).

<sup>156</sup> 890 F.3d at 136.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

event, the information would not be suppressed.

In *United States v. Molina Isidoro*, the Fifth Circuit declined to announce a rule regarding the application of the border search exception to the modern technologies for which the Supreme Court, in *Riley*, had recognized increased privacy interests.<sup>159</sup> Their rationale is of note: having found several kilos of methamphetamine in the traveler's suitcase, CBP looked at some apps on her phone. According to the court, "the nonforensic search of Molina's cell phone at the border was supported by probable cause. That means at a minimum the agents had a good –faith basis for believing the search did not run afoul of the Fourth Amendment."<sup>160</sup>

A divided Eleventh Circuit panel recently considered the warrantless forensic search of three phones at the border.<sup>161</sup> The majority stated, "Border searches 'never' require probable cause or a warrant. And we require reasonable suspicion at the border only 'for highly intrusive searches of a person's body such as a strip search or an x-ray examination.'"<sup>162</sup> Judge Jill Pryor, dissenting, agreed "that the government's interest in protecting the nation is at its peak at the border," but she faulted the majority for ignoring the implications of *Riley*.<sup>163</sup> In her view, "a forensic search of a cell phone at the border requires a warrant supported by probable cause."<sup>164</sup>

### C. Impact of *Carpenter v. United States*

As with *Riley*, the Court's recent decision in *Carpenter v. United States* has significant implications for how to think about potential Fourth Amendment limits on electronic border searches. In *Carpenter*, the Court decided not to extend third party doctrine from *United States v. Miller* and *Smith v. Maryland* to cell site location information (CSLI).<sup>165</sup> In *United States v. Jones*, five justices (the so-called "shadow majority") had adopted the view that individuals have a reasonable expectation of privacy in the whole of their physical movements.<sup>166</sup> The *Carpenter* court built on *Jones*, underscoring the sensitivity of the information that could be gleaned from location data. It highlighted a number of factors that suggested a higher privacy incursion: accuracy; retroactive application; length of time (implicating the amount of information); the revealing nature of the information; the nature of the information obtained; and the ease with which it could be obtained.<sup>167</sup>

These elements are all present in the border search of electronic devices, suggesting a higher intrusion into travelers' privacy than is present with the simple search of a traveler's baggage or pockets. To the extent that electronic devices contain a record of the traveler's physical movements, warrantless search runs directly contrary to the holding in *Carpenter*.

## IV. THE PROBLEM OF DIGITIZATION

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<sup>159</sup> *United States v. Molina-Isidoro* 884 F.3d 287 (5th Cir. 2018).

<sup>160</sup> 884 F.3d at 289.

<sup>161</sup> *United States v. Vergara*, 884 F.3d 1309 (11th Cir. 2018). Petition for Certiorari docketed Apr. 26, 2018.

<sup>162</sup> 884 F.3d at 1312 (quoting and citing *United States v. Ramsey*, 431 U.S. at 619). *See also United States v. Tousef*, No. 17-11561, 2018 WL 2325350 (Judge William Pryor reaching the same conclusion and applying *Vergara* to another border search of a mobile device, stating that no suspicion is necessary to search electronic devices at the border and, in any event, reasonable suspicion was present in this case).

<sup>163</sup> 884 F.3d at 1313 (J. Pryor, J.)

<sup>164</sup> *Id.*

<sup>165</sup> *United States v. Miller*, 425 U.S. 435 (1976); *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>166</sup> *United States v. Jones*, 565 U.S. 400 (2012).

<sup>167</sup> *Carpenter v. United States*, No. 16-402, slip op. at 12-22 (June 22, 2018).

The two streams of authorities, customs and immigration, both deal with the transportation of physical objects: articles and people. Before concluding, it is worth noting that digitization presents two particular challenges for these regimes.

First, for customs, what happens when the illicit materials being sought are digital, and not physical? In the past, if an object was carried into the country, then the inspection regime would uncover it at the border. But what happens if the illicit material can merely be uploaded onto the cloud, to be accessed once someone enters the United States? If a traveler in Thailand, for instance, uploads child pornography onto the cloud, should there be a way to use the traveler's movement to uncover the material? Or what if the material in question consists of documents, such as plans for a nuclear reactor or technology designs which have been forbidden by the export regime. Should a traveler be able to upload this material to the cloud, only to pull it down elsewhere? In the past, the material would have either have been mailed through the post, or carried by hand. Should there be a way to foreclose a digital end-run around the customs regime?

There are at least three possible responses to this argument. Foremost, it is important to note that part of the reason this issue even presents is because of the post-War expansion of the customs mail search regime to include not just uncustomed items, but also child pornography, weapons of mass destruction, emergency matters under the IEEPA, and the like. The historical purpose of the customs regime was *not* to uncover illegal activity generally. The purpose of customs searches was to identify the illegal transportation of contraband or undeclared items.<sup>168</sup> To the extent that a border search exception, derived from sovereignty applies, it is specifically with this end in mind.

In addition, in light of the expansion of the Foreign Intelligence Surveillance Act (FISA) post-9/11 and the infamous demise of the wall, such matters may be relegated more appropriately to the surveillance realm. That is, to the extent that matters, such as drawings of a nuclear reactor being provided to third countries, implicate foreign affairs, surveillance would appropriately fall within FISA. Even where the investigation may be primarily criminal in nature, such surveillance still comes within FISA's ambit.

Further, to the extent that electronic searches reveal information that would otherwise be held in the home, then allowing such searches forces the historic protections afforded to the home, even in customs matters, to drop away. Email has replaced letter correspondence, electronic calendars now take the place of planners, and the contacts list now serves as a telephone book. The border exception, applied to electronic devices, threatens to swallow the protections which, for centuries, have limited customs searches. This is true not just for the *type* of data at stake, but actual views of the home. Consider, for instance, the Blink Home Monitor. An application can be downloaded to smartphones and tablets, providing homeowners with real-time coverage of what is happening inside their houses.<sup>169</sup>

The second challenge presents for immigration. Here, part of the reason behind subjecting non-citizens to searches prior to entering the United States has to do with ascertaining (a) whether they are who they say they are, and (b) what sorts of individuals are being admitted to the country. Surely, the type of information present in travelers' electronic devices is relevant to such a determination. By *not* taking into account social media, or the full range of an individual's background, moreover, U.S. security may be harmed. Notwithstanding PPD-28 and its extension to non-citizens of privacy rights, as Chief Justice Rehnquist noted in *Verdugo-Urquidez*, non-U.S. persons without a substantial connection to the United States lack Fourth Amendment protections. To the

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<sup>168</sup> U.S. v. Seljan, 547 F.3d 993 (9th Cir. 2008).

<sup>169</sup> See [https://blinkforhome.com/pages/blink-home-monitor-app?locale=en&gclid=EA1aIQobChMlpZ-lhMeS3AIVC4GzCh2AQQZnEAAYASAAEgJCM\\_D\\_BwE&gclsrc=aw.ds](https://blinkforhome.com/pages/blink-home-monitor-app?locale=en&gclid=EA1aIQobChMlpZ-lhMeS3AIVC4GzCh2AQQZnEAAYASAAEgJCM_D_BwE&gclsrc=aw.ds).

extent, then, that the executive seeks to build profiles of non-U.S. persons entering or leaving the United States, the question appears primarily to be one of policy, and not of constitutional law.

## V. CONCLUDING REMARKS

This essay has raised two essential constitutional challenges to the government's application of the border search exception: first, the restriction of such powers to the interdiction of contraband and the regulation of non-citizens entering the United States—and not to ordinary law enforcement; second, the significant Fourth Amendment issues at stake—including the extent to which such searches are actually more invasive than search of the home, which is otherwise protected under the areas where the border exception applies. Before concluding, it is worth noting a constellation of further constitutional concerns.

First, even setting the other requirements to the side, as with the search incident to arrest exception at issue in *Riley*, the border search exception is still subject to the reasonableness requirement of the Fourth Amendment. Numerous cases are beginning to move through the courts, challenging whether electronic devices fall outside constitutional norms.<sup>170</sup>

Second, as a matter of First Amendment doctrine, significant matters related to free speech, free association, and freedom of religion present. Here, the doctrine is not as well-developed to take account of new technologies as in the Fourth Amendment realm. The Court in *United States v. Ickes*, for instance, found similar First Amendment arguments to be unpersuasive.<sup>171</sup> In that case, Ickes argued that border search doctrine does not apply when the material being searched is expressive. “[T]his cannot be the case,” the court wrote. That doctrine “is justified by the ‘longstanding right of the sovereign to protect itself.’”<sup>172</sup> National security interests in the contemporary age inescapably implicate expressive material, such as terrorist communications. Recognizing First Amendment interests, moreover, would create difficulties in determining where the line should be drawn.<sup>173</sup> Notwithstanding the court's decision in *Ickes*, the implications of access to electronic devices for religious freedom, free speech, and free association are substantial. The type of information contained in mobile phones, tablet, and computers, goes to the most intimate aspects of individuals' politics, beliefs, and relationships. One of the more recent cases to raise these issues settled.<sup>174</sup>

Third, in addition to the important Fourth and First Amendment issues at stake are those related to the Fifth Amendment right against self-incrimination,<sup>175</sup> as well as due

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<sup>170</sup> See, e.g., *Alasaad v. Nielsen*, No. 17-cv-11730-DJC, 2018 WL 2170323 (D. Mass. filed May 9, 2018); *Abidor v. Napolitano*, 990 F. Supp. 2d 260 (E.D.N.Y. 2013) (dual U.S./French citizen had laptop searched confiscated at Canadian border and returned eleven days later, with evidence that his personal files (including his research, photos, chats with his girlfriend) had been searched); Complaint, *Alasaad v. Duke*, 1:17-cv-11730-DJC (D. Mass. filed Sept. 13, 2017) (challenging search and seizure of smartphones, laptop, and other electronic devices at the U.S. border in violation of the First and Fourth Amendments). See also Daniel Victor, *Forced Searches of Phones and Laptops at U.S. Border are Illegal, Lawsuit Claims*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/technology/aclu-border-patrol-lawsuit.html>; Deb Riechmann, *Are Searches of Laptops and Cellphones by Border Agents Unconstitutional?*, PBS (Sept. 13, 2017) <http://www.pbs.org/newshour/rundown/searches-laptops-cellphones-border-agents-unconstitutional/>.

<sup>171</sup> *United States v. Ickes*, 393 F.3d 501, 506-08 (4th Cir. 2005).

<sup>172</sup> *Id.* at 506 (internal citations omitted).

<sup>173</sup> *Id.*

<sup>174</sup> *House v. Napolitano*, No. 11-cv-10852-DJC, 2012 WL 1038816 (D. Mass. Mar. 28, 2012) (David House, part of the Bradley Manning Support Network, had his laptop seized at the border and imaged).

<sup>175</sup> Requiring, for instance, that individuals provide their password, or demanding access as a condition for entry into, or exit from, the United States. See Senate hearing, April 2017.

process, and the Sixth Amendment right to counsel. The American Bar Association has raised particular concerns about the extent to which the reading, duplication, and seizure of legal documents violates client-attorney privilege.<sup>176</sup> Similar issues have been raised in regard to doctor-patient records, and journalists' privileges, spousal communications, information covered by a U.S. federal court protective order, proprietary information, and intellectual property.

While a short essay such as this does not provide sufficient length to handle these questions in depth, it is at least sufficient to demarcate the points of constitutional tension. What is needed, particularly post-*Carpenter*, is a more careful approach to the border exception, which takes into account the significant constitutional and rights issues at stake in the examination of electronic devices.

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<sup>176</sup> See, e.g., *Looper v. Morgan*, Civ. No. H-92-0294, 1995 U.S. Dist. LEXIS 10241 (S.D. Tex. June 23, 1995); *U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass 1950); *Upjohn Co v. United States*, 449 U.S. 383 (1981). This creates a possible conflict between Rule 1.6 of the ABA Model Rules of Professional Conduct, which deals with Confidentiality of Information, and searches at the border. Under work product doctrine, such materials are not discoverable (Fed. R. Civ. P. 26(b)(3)(A)), although it can be overcome by the demonstration of "substantial need" (Fed. R. Civ. P. 26(b)(3)(A)(ii)). There is a distinction to be drawn between attorney-client material generally versus information and material related to litigation, the confidentiality requirement, and common interest doctrine. See, e.g., *Bank of Am. v. Terra Nova Ins. Co. Ltd.*, 211 F. Supp. 2d 493 (S.D.N.Y. 2002). The ABA Criminal Justice Section currently has a Task Force looking into electronic border searches, considering, inter alia, the impact on client-attorney privilege.