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Border Searches of Laptops and Other Electronic Storage Devices

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Summary

The Fourth Amendment generally requires a warrant to support most searches and seizures conducted by the government. Federal courts have long recognized that there are many exceptions to this general presumption, one of which is the border search exception. The border search exception permits government officials, in most "routine" circumstances, to conduct searches with no suspicion of wrongdoing whatsoever. On the other hand, in some "non-routine" and particularly invasive situations, customs officials are required to have "reasonable suspicion" in order to conduct a search.

Several federal courts have recently applied the border search exception to situations in which customs officials conducted searches of laptops and other electronic storage devices at the border. Though the federal courts have universally held that the border search exception applies to laptop searches conducted at the border, the degree of cause required to support the search has not been established. Though some federal appellate courts do not appear to require any degree of suspicion to justify a search, one federal district court stated categorically that all laptop searches conducted at the border require at least reasonable suspicion of wrongdoing.

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Introduction

A recently developing area in the law of search and seizure is whether, at the border, the Fourth Amendment permits warrantless searches of the content of laptop computers and other electronic storage devices. The federal courts that have addressed this issue have universally held that the border search exception to the Fourth Amendment applies to these searches, making warrantless searches permissible. These courts, however, have declined to clarify the degree of suspicion needed to initiate a search and satisfy the Fourth Amendment.

The Fourth Amendment mandates that a search or seizure conducted by a government agent must be reasonable, and that probable cause[1] must support any judicially granted warrant.[2] Generally, the requirement that searches and seizures be "reasonable" has been construed to mean that there is a presumptive warrant requirement for searches conducted by the government.[3] Nonetheless, the Supreme Court has recognized several exceptions to this presumptive warrant requirement, one of which is the border search exception.[4]

Border Search Exception

The border search exception to the Fourth Amendment allows government officials to conduct searches at the border without warrant or probable cause.[5] Though Congress and the federal courts long appeared to have implicitly assumed the

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

[2] U.S. Const., Amend. IV.

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

[4] For a more expansive treatment of the border search exception to the Fourth Amendment, *see* CRS Report RL31826, *Protecting the U.S. Perimeter: "Border Searches" Under the Fourth Amendment*, by Yule Kim.

[5] United States v. Ramsey, 431 U.S. 606, 619 (1977).

existence of a border search exception,[6] it was not formally recognized until the Supreme Court decided *Ramsey v. United States*.[7] In that case, the Supreme Court approved the search of several suspicious envelopes, later found to contain heroin, conducted by a customs official pursuant to search powers authorized by statute.[8] The Court determined that the customs official had "reasonable cause to suspect"[9] when searching the envelopes.[10] This standard, while less stringent than probable cause, was sufficient to justify a border search.[11] The border search exception has subsequently been expanded to not only persons, objects, and mail entering the United States by crossing past a physical border, but also to individuals and objects departing from the United States[12] and to places deemed the "functional equivalent" of a border, such as an international airport.[13]

As the border search exception was further developed in case law, the lower federal courts have recognized two different categories of border searches: routine and non-routine. This distinction is based on language in *United States v. Montoya de Hernandez*, where the Supreme Court applied the border search exception to the overnight detention of a woman suspected of smuggling drugs in her alimentary canal

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[6] *See* Act of July 31, 1789, ch. 5 §§23-24, 1 Stat. 29, 43 (authorizing custom officials "full power and authority" to enter and search "any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed..."); Carroll v. United States, 267 U.S. 132, 153-154 (1925) ("Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."). *Accord* Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973); United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971); Boyd v. United States, 116 U.S. 616 (1886).

[7] 431 U.S. at 619.

[8] *Id.* at 622.

[9] "Reasonable cause to suspect" appears to be equivalent to "reasonable suspicion," which is simply a particularized and objective basis for suspecting the particular person of wrongdoing. *See* Terry v. Ohio, 392 U.S. 1 (1978).

[10] 431 U.S. at 614.

[11] *Id.* at 619 ("This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment itself.").

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

[13] *See* Almeida-Sanchez v. United States, 413 U.S. 266, 272-273 (1973); United States v. Hill, 939 F.2d 934, 936 (11th Cir. 1991); United States v. Gaviria, 805 F.2d 1108, 1112 (2d Cir. 1986). In the context of international airports, the border search exception only applies to searches of persons and effects on international flights while the administrative search exception is used to justify searches of persons and effects on domestic flights. *See* United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

and held that the custom officials' "reasonable suspicion" that the suspect was smuggling drugs sufficiently supported the detention.[14] Although this case focused on a "non-routine" detention of a traveler at the border, lower federal courts, seizing upon this language distinguishing between the search at issue and "routine" searches,[15] have expanded the border search exception by concluding that a customs official may conduct "routine" searches of persons or effects without any reason for suspicion at all.[16] The Supreme Court further developed this doctrine in *United States v. Flores-Montano* where the disassembly and examination of an automobile gasoline tank was determined to be a routine vehicle search and therefore did not require reasonable suspicion.[17] The Court concluded that the gasoline tank search was no more intrusive than a routine vehicle search because there was no heightened expectation of privacy surrounding the contents of a gasoline tank even when the search involved a time-consuming disassembly of the vehicle.[18] *Flores-Montano* illustrates that extensive, time-consuming, and potentially destructive searches of objects and effects can be considered "routine" and can be conducted without any necessary ground for suspicion.

On the other hand, non-routine searches, which involve a high degree of intrusion, such as strip searches, require "reasonable suspicion," which is some particularized and objective basis for suspecting wrongdoing.[19] However, the precise degree of intrusion a search must subject on a person or his effects in order to rise to the level of the non-routine has still been left undefined in the case law.[20] Typically, courts have designated the requisite amount of cause needed to justify the search, on a case-by-case basis.[21] Nonetheless, the holding in *Flores-Montano* indicates that,

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[14] 473 U.S. 531, 541 (1985) ("We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.").

[15] *Id.* at 538 ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant, and first-class mail may be opened without a warrant on less than probable cause.").

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

[17] 541 U.S. 149, 154 (2004).

[18] *Id.* ("It is difficult to imagine how the search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile's passenger compartment").

[19] *See Montoya de Hernandez*, 473 U.S. at 541 citing *Terry*, 392 U.S. at 21 ("And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

[20] *See id.* at 541 n. 4.

[21] *Id.* (requiring "reasonable suspicions" for the detention of a traveler at the border, beyond the scope of a routine customs search and inspection). *See also* Henderson v. United States, (continued...)

unlike a search of a person's body, intrusiveness may not be a dispositive factor when determining whether the search of a vehicle or personal effects is non-routine.[22]

Judicial Developments On Laptop Searches

With the advent of portable computing, it is now common practice for travelers to store their data on laptop computers, compact discs, and other electronic storage devices and to travel with them across the American border. Commensurate with this, customs officials have been searching and seizing such devices with greater frequency. The issue that federal courts have been confronting recently is whether the border search exception applies to electronic storage devices and, if it does, whether a laptop border search is routine or non-routine, and if found to be non-routine, what degree of suspicion or cause is needed to justify the search to satisfy the Fourth Amendment.

The Supreme Court has yet to address this issue. Most lower federal courts, however, have concluded that searches of laptops, computer disks, and other electronic storage devices fall under the border search exception, which means neither a warrant nor probable cause is necessary to support the search.[23] Nonetheless, these courts have been reticent about determining what degree of cause or suspicion justifies laptop border searches; rather, these courts typically leave the question unanswered and merely find the search before them supported by reasonable suspicion.[24] Even when the courts conclude that the laptop searches were routine, they have found reasonable suspicion supporting the search.[25] The one exception to

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[21] (...continued)
390 F.2d 805 (9th Cir. 1967) (holding that strip searches may be conducted only upon a real suspicion); United States v. Adekunle, 980 F.2d 985 (5th Cir. 1992), on reh'g, 2 F.3d 559 (5th Cir. 1993) (requiring reasonable suspicion to justify a strip search); United States v. Asbury, 586 F.2d 973, 975-976 (2d Cir. 1978) (requiring reasonable suspicion for strip searches); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966) (requiring a clear indication of the possession of narcotics to justify an alimentary canal search).

[22] *Flores-Montano*, 541 U.S. at 152.

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

[24] *See, e.g., Irving*, 452 F.3d at 124 ("Because these searches were supported by reasonable suspicion, we need not determine whether they were routine or non-routine."); *Furukawa*, *supra* at *1-2 ("[T]he court need not determine whether a border search of a laptop is 'routine' for purposes of the Fourth Amendment because, regardless, the magistrate judge correctly found the customs official had a reasonable suspicion in this case.").

[25] *Ickes*, 393 F.3d at 507 (noting that the computer search did not begin until the customs agents found marijuana paraphernalia and child pornography which raised a reasonable suspicion); *Hampe*, *supra* at *4-5 (holding that even though the laptop search did not implicate any of the serious concerns that would characterize a search as non-routine, the
(continued...)

this trend is *United States v. Arnold*, a federal district court case explicitly holding that reasonable suspicion is required to support a search of laptops and other electronic storage devices.[26] Because laptop border search cases require fact-intensive analysis, a closer look at the facts of *Ickes*, *Romm*, and *Arnold* and the approaches the courts used in those cases is warranted to fully understand this issue.

United States v. Ickes. One of the first federal appellate cases to discuss the border search of laptops is *United States v. Ickes*.[27] In this case, a customs official searched the defendant's van near the Canadian border after discovering during a routine search a videotape that focused excessively on a young ballboy during a tennis match.[28] After a more thorough search, they discovered marijuana paraphernalia, a photo album containing child pornography, a computer, and several computer disks.[29] Customs officials examined the contents of the computer and disks, all of which contained additional child pornography.[30] The defendant would later file a motion, which was denied by the trial court, seeking to suppress the contents of the computer and disks on both First and Fourth Amendment grounds.[31]

The Fourth Circuit held that the search of the defendant's computer and disks did not violate either the First or Fourth Amendment. The court first noted that the border search exception applied in this case.[32] Furthermore, the court rejected the defendant's contention that the First Amendment bars the border search exception from being applied to "expressive" materials, stating that it would "create a sanctuary for all expressive materials — including terrorist plans" and that a First Amendment exception would cause an excessive amount of administrative difficulties for those who would have to enforce it.[33] The court concluded by indicating that, even though searches of computers and disks fall under the border search exception, "[a]s a practical matter, computer searches are most likely to occur where — as here — the traveler's conduct or the presence of other items in his possession suggest the need to search further," indicating that such searches will typically only occur if supported by reasonable suspicion.[34]

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[25] (...continued)
peculiar facts of the case gave rise to reasonable suspicions).

[26] 454 F. Supp. 2d 999, 1000-1001 (C.D. Cal. 2006).

[27] 393 F.3d 501 (4th Cir. 2005).

[28] *Id.* at 502.

[29] *Id.* at 503.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 505.

[33] *Id.* at 506.

[34] *Id.* at 507.

United States v. Romm. The Ninth Circuit has also addressed this issue in *United States v. Romm*.[35] The defendant had arrived at an airport in British Columbia when his laptop was searched after the Canadian customs agent discovered the defendant had a criminal history.[36] After discovering child pornography sites in the laptop's "internet history," the defendant was denied entry into Canada and flown to a Seattle airport.[37] After the Canadian authorities informed Immigration and Customs Enforcement (ICE) of the contents of the defendant's laptop, ICE detained the defendant when he arrived in Seattle, who then agreed to allow ICE agents to examine his laptop.[38] ICE agents used a forensic analysis which recovered deleted child pornography from the laptop. Before trial, the trial court denied defendant's motion to suppress the evidence obtained from his laptop.[39]

The Ninth Circuit held that the forensic analysis used by the ICE agents fell under the border search exception.[40] First, the court noted that airport terminals were "the functional equivalents" of a border, allowing customs agents to conduct routine border searches of deplaning passengers.[41] The court then proceeded to classify the search of the defendant's laptop as "routine."[42] However, the court did so only after declining on procedural grounds to consider the defendant's contention that the search's intrusion upon his First Amendment interests qualified it as non-routine.[43]

United States v. Arnold. *United States v. Arnold*, a district court case arising from the Ninth Circuit, differs from both *Ickes* and *Romm* by explicitly holding that reasonable suspicion must support a laptop border search. Here, the defendant was returning from the Philippines when a custom agent chose him for secondary questioning after he had gone through the customs checkpoint.[44] The customs agent ordered the defendant to "turn on the computer so she could see if it was functioning."[45] While the defendant's luggage was being inspected, another customs agent searched the laptop's contents and found pictures of nude adult women.[46] The defendant was then detained for several hours while special agents from ICE

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[35] 455 F.3d 990 (9th Cir. 2006).

[36] *Id.* at 994.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 997.

[41] *Id.* at 996.

[42] *Id.* at 997.

[43] *Id.* (declining to consider the issue because arguments not raised by a party in its opening briefs are deemed waived).

[44] 454 F. Supp. 2d at 1001.

[45] *Id.*

[46] *Id.*

conducted a more extensive search of the laptop and discovered material they believed to be child pornography.[47]

The court first noted that non-routine searches are intrusions that implicate dignity and privacy interests.[48] The court concluded that since "opening and viewing confidential computer files implicate dignity and privacy interests," the search was non-routine and could be conducted only if justified by reasonable suspicions.[49] After examining the circumstances surrounding the search, the court found that the customs agent had no justification for turning on the laptop, and thus granted the defendant's motion to suppress the evidence procured from the laptop.[50]

Though *Arnold* is the first case to formally characterize a laptop border search as non-routine, it did so only after finding a complete absence of cause to support the search.[51] Therefore, *Arnold* is distinguishable from *Romm* because the challenge to the laptop search in *Romm* was not properly raised.[52] Given the facts in *Arnold*, there was nothing found during the search of the defendant's luggage to raise the requisite amount of reasonable suspicion to justify searching the defendant's laptop.[53]

Possible Future Developments. Currently, *Arnold* is on appeal before the Ninth Circuit. If the Ninth Circuit affirms the lower court's ruling, this could create a circuit split with the Fourth Circuit irrespective of the fact that the Fourth Circuit in *Ickes* did not formally characterize laptop searches as routine and found reasonable suspicion to support the search.[54] Yet, there is an important difference between *Ickes* and *Arnold*: *Ickes* does not affirmatively require reasonable suspicion to support laptop searches, and so the door could be left open for random, suspicionless searches of electronic storage devices. *Arnold* would foreclose that possibility.

Conclusion

It is difficult to forecast whether federal courts will conclude that laptop border searches require reasonable suspicion. At first glance, one can argue that there is a higher expectation of privacy surrounding the contents of laptops than the interior of a vehicle. Even when a vehicle search involves an onerous and time consuming inspection of a gasoline tank, the expectation of privacy surrounding the vehicle and its contents does not appear to be as high as the contents of a laptop, which often contains private or otherwise privileged information. On the other hand, laptop searches are not as intrusive as a strip search or body cavity search, where the

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[47] *Id.*

[48] *Id.* at 1002. *See also* United States v. Flores-Montano, 541 U.S. 149, 152 (2004).

[49] *Id.* at 1003.

[50] *Id.* at 1007.

[51] *Id.*

[52] 455 F.3d at 997.

[53] 454 F. Supp. 2d at 1007.

[54] 393 F.3d at 507.

expectation of privacy is so high, and the search so invasive, that both clearly fall within the realm of non-routine.[55]

Another consideration to take into account is the likelihood of illegal materials being smuggled into the United States through laptops and electronic storage devices. As stated in *Ramsey*, "[t]he border search exception is grounded in the recognized right of the sovereign to control...who and what may enter the country."[56] Laptops can present a problem to the national interest in controlling what enters the country because the vast and compact storage capacity of laptops can be used to smuggle illegal materials. In light of this, routine searches of laptops at the border may be justified because of the strong government interest in preventing the dissemination of child pornography and other forms of "obscene" material that are oftentimes contained in laptops.[57] Another justification may be to facilitate searches of laptops owned by suspected terrorists which may contain information related to a planned terrorist attack.[58] On the other hand, if customs officials can conduct laptop border searches without the need for reasonable suspicion, they may attempt to conduct targeted searches based on unconstitutional justifications. If a customs official could conduct a search without providing cause, it would be difficult to deter ethnic profiling because the official would not need to explain why he conducted the search. These concerns illustrate why resolving the issues surrounding laptop border searches will involve striking a careful balance between national security and individual civil rights.

Ultimately, the issue will turn on whether the federal courts will consider the privacy interest implicated in personal information to be higher than the privacy interest surrounding normal personal effects. Considering the absence of a clear test to distinguish routine searches from non-routine searches, it is difficult to predict how the federal circuits will classify laptop searches. The reluctance of the lower courts to decide this issue arguably can be attributed to the lack of formal guidance available in distinguishing between the two classes of searches. Laptop searches may provide the Supreme Court a suitable vehicle in which to delineate the specific controlling factors that determine whether a search should be classified as either routine or non-routine.

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[55] *Chase*, 503 F.2d 571 (strip searches require reasonable suspicion); *Montoya de Hernandez*, 473 U.S. 531 (alimentary canal search justified by reasonable suspicion).

[56] *Ramsey*, 431 U.S. at 611.

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

[58] *See Ickes*, 393 F.3d at 506.