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Broadcasting Borders: Why Forensic Extraterritorial Electronic Border Searches for Contraband Do Not Require Reasonable Suspicion Under the Fourth Amendment

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Broadcasting Borders: Why Forensic Extraterritorial Electronic Border Searches for Contraband
Do Not Require Reasonable Suspicion under the Fourth Amendment

Rory McClain

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“[A]ll the vexatious and annoying machinery of the custom-house, and the vigilance of its officers, are imposed by law to prevent even the smallest evasion of [the customs laws of the United States].”

-Justice Samuel Freeman Miller (1882)¹

“The challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected.”

-The 9/11 Commission Report (2004)²

Introduction

In 2016, U.S. Customs and Border Protection (CBP) personnel stationed abroad precleared eighteen million travelers, over fifteen percent of all commercial air travelers to the United States.³ Generally, at Preclearance locations, CBP officers inspect travelers for compliance with U.S. law before they board an aircraft bound for the United States, which eliminates the need for customs processing upon arrival.⁴ CBP currently has fifteen air Preclearance locations in six countries recently concluded two agreements to cover locations in Sweden and the Dominican Republic, and is negotiating with several more countries interested in establishing Preclearance locations.⁵

¹ Von Cotzhausen v. Nazro, 107 U.S. 215, 218 (1882).

² The 9/11 Commission Report 383 (2004), available at [http:// www.9-11commission.gov/report/911Report.pdf](http://www.9-11commission.gov/report/911Report.pdf).

³ U.S. Customs and Border Protection, Preclearance Locations, <https://www.cbp.gov/border-security/ports-entry/operations/preclearance> (last visited Jan. 2, 2020).

⁴ Id.

⁵ Id. The countries in which CBP already has Preclearance locations are Ireland, Aruba, The Bahamas, Bermuda, United Arab Emirates, and Canada.

Meanwhile, on November 12, 2019, the U.S. District Court for the District of Massachusetts became the latest court to express its opinion on the constitutionality of suspicionless forensic electronic border searches in Alasaad v. Nielsen.⁶ Judge Denise Casper held that all electronic border searches require reasonable suspicion, taking the more popular position on the electronic border search debate.⁷ This debate over what level of suspicion forensic electronic border searches require has raged with particular ferocity since May 2018, when the Eleventh Circuit created a split among the lower courts.⁸ The conviction with which both sides of the debate have argued is understandable. On one side are privacy advocates pointing to the 2014 Supreme Court decision Riley v. California, in which the Court found that the search-incident-to-arrest exception did not apply to cell phones because of the heightened privacy interests that such technology implicates.⁹ Law enforcement advocates citing customs

⁶ No.17-cv-11730-DJC, 2019 WL 5899371, at *1 (D. Mass. Nov. 12, 2019), *appeal docketed*, No. 20-1081 (1st Cir. Jan. 29, 2020); see also Sophia Cope et al., Federal Judge Issues Historic Opinion for Digital Privacy at the Border, Electronic Frontier Foundation (Nov. 15, 2019), <https://www.eff.org/deeplinks/2019/11/federal-judge-issues-historic-opinion-digital-privacy-border>.

⁷ Alasaad, No.17-cv-11730-DJC, 2019 WL 5899371, at *14.

⁸ *United States v. Touset*, 890 F.3d 1227, 1234 (11th Cir. 2018).

⁹ See e.g., Thomas Mann Miller, Comment, Digital Border Searches after Riley v. California, 90 **Wash. L. Rev.** 1943, 1946 (2015) (arguing that Riley supports “requiring at least reasonable suspicion, if not probable cause, for digital border searches”).

authorities' centuries-old authority to conduct suspicionless border searches represent the other side.¹⁰

One aspect of the electronic border search debate that has not received much attention is the regular execution of such searches at extraterritorial locations, namely foreign airports in countries which have Preclearance Agreements with the United States. Thus far, only one court has litigated the validity of extraterritorial border searches.¹¹ However, although the Ninth Circuit thoroughly examined the extent to which the U.S.-Canada Preclearance Agreement authorized the search, it only briefly examined the reasonableness of the search in question under the Fourth Amendment.¹²

This Comment will argue that forensic extraterritorial electronic border searches for contraband do not require individualized suspicion. Although forensic electronic border searches for contraband at the U.S. border and ports of entry (e.g., interior airports) may require, at most, reasonable suspicion according to some courts, the further reduced privacy expectations and further magnified governments interests involved in extraterritorial border searches dictate that

¹⁰ See e.g., Michael Creta, Comment, A Step in the Wrong Direction: The Ninth Circuit Requires Reasonable Suspicion for Forensic Examinations of Electronic Storage Devices During Border Searches in *United States v. Cotterman*, 55 **B.C. L. Rev. E-Supplement** 31 (2014) (contending that a reasonable suspicion requirement is impractical and harmful to national security).

¹¹ *United States v. Walczak*, 783 F.2d 852 (9th Cir. 1986). In *Alasaad v. Nielsen*, one plaintiff was searched at a Toronto Preclearance Station, but the court did not address the extraterritorial element. No.17-cv-11730-DJC, 2019 WL 5899371, at *4.

¹² *Walczak*, 783 F.2d at 856.

forward-operating border officers merely adhere to the Fourth Amendment requirement of reasonableness with respect to U.S. persons. To support this argument, this Comment will proceed in five parts, first summarizing jurisprudence regarding the border search exception and routine versus non-routine border searches.¹³

Second, it will examine recent case law examining the validity of electronic border searches.¹⁴ Third, this Comment will review the relatively sparse jurisprudence regarding the extraterritorial application of the Fourth Amendment.¹⁵ Fourth, it will argue that electronic border searches within or at traditional U.S. borders require, at most, reasonable suspicion, although the necessary level of suspicion in this sphere is far from resolved.¹⁶ Fifth, this Comment will analyze the necessary level of suspicion for electronic border searches at Preclearance locations in light of jurisprudence regarding the extraterritorial application of the Fourth Amendment.¹⁷ It should be noted that this Comment only focuses on those Fourth Amendment protections to which U.S. persons are entitled and, further, does not address electronic border searches for the purpose of finding general evidence of wrongdoing.¹⁸ Further,

¹³ See infra part I, I.A, and I.A.1-2.

¹⁴ See infra part I.A.3.

¹⁵ See infra part I.A.4.

¹⁶ See infra part II.A.

¹⁷ See infra part II.B.

¹⁸ To read comments that do address electronic border searches for the purpose of finding general evidence of wrongdoing, see generally Kelly A. Gilmore, Note, Preserving the Border Search Doctrine in a Digital World: Reproducing Electronic Evidence at the Border, 72 **Brook.**

this Comment examines the required level of suspicion for searches of electronic devices in general because, in addition to ensuring that this Comment is more concise and cogent, if no Supreme Court precedent supports distinguishing between electronic devices and other types of property at the border, it is equally baseless—and imposes unnecessary constraints on CBP officers and introduces complexity that is anathema to the border search doctrine—to distinguish between different types of electronic devices.¹⁹

I. Background

The Fourth Amendment states, in relevant part, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . .”²⁰ Two years before the Fourth Amendment was ratified, the First U.S. Congress promulgated the Act of July 31, 1789.²¹

L. Rev. 759 (2007) (contending that neither the initial inspection nor the replication of digital evidence at the border is subject to a standard of reasonable suspicion) and Ashley H. Verdon, Comment, International Travel with a “Digital Briefcase”: If Customs Officials Can Search a Laptop, Will the Right Against Self-Incrimination Contravene This Authority? 37 **Pepp. L. Rev.** 105 (2009) (arguing for the creation of a border search exception to the Fifth Amendment protection against self-incrimination for laptops).

¹⁹ Infra part II.A.1.

²⁰ **U.S. Const.** amend. IV

²¹ 1 St. 29, 43, § 24 (“[E]very collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise

This legislation authorized customs officers “to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise.”²² However, with respect to dwelling-houses, stores, and other buildings, such as warehouses, the act required customs officers to obtain a warrant prior to conducting a search.²³ Thus, the border search exception was born, before there was even a Fourth Amendment to which one could take exception.²⁴

subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial . . .”).

²² Id. Interestingly, some courts have compared border searches of electronic media to searches of ship cabins at the border. See e.g., *United States v. Touset*, 890 F.3d 1227, 1233 (11th Cir. 2018) (“[W]e have upheld ‘a search without reasonable suspicion of a crew member’s living quarters on a foreign cargo vessel that [wa]s entering this country,’ even though ‘[a] cabin is a crew member’s home—and a home ‘receives the greatest Fourth Amendment protection (citations omitted).’”).

²³ Id.

²⁴ *Boyd v. United States*, 116 U.S. 616, 623 (1886) (“As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear

Subsequent case law would later interpret “reason to suspect” and determine the required level of suspicion for border searches under a variety of circumstances.²⁵ Nonetheless, this act elucidates that, “from the earliest days of the Republic, customs inspectors could board vessels to search for contraband without first obtaining a warrant.”²⁶ A short time later, the Act of March 2, 1799 granted customs officials plenary authority to search the baggage of persons entering the country “whenever the collector . . . shall think proper to do so.”²⁷

Almost seventy years later, Congress passed another significant piece of legislation that clarified customs officers’ authority regarding vehicles and goods crossing the border. The Act of July 18, 1866 permitted a customs officer to stop and search “any vehicle, beast, or person on which or whom he . . . shall suspect there are goods, wares, or merchandise which are subject to

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.”); see also *United States v. Ramsey*, 431 U.S. 606, 617 (1977) (citing *Boyd*, 116 U.S. at 623) (explaining that border searches are not subject to the warrant provisions of the Fourth Amendment)

²⁵ See infra part I.A.

²⁶ Laura K. Donohue, Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches, 128 *Yale L.J. Forum* 961, 974-75 (2019) (“[F]rom the earliest days of the Republic, customs inspectors could board vessels to search for contraband without first obtaining a warrant.”).

²⁷ Ch. 22, § 46, 1 Stat. 662.

duty or shall have been introduced into the United States in any matter contrary to law.”²⁸ In 1925, the Court decided Carroll v. United States.²⁹ It noted in dicta that “[t]ravellers 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.”³⁰ In its last significant piece of legislation before CBP’s border search authority was challenged for one of the first times in United States v. Ramsey more than four decades later, Congress enacted the Smoot-Hawley Tariff Act of 1930.³¹ One notable section provided that “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.”³² The next section will examine the development of the modern border search

²⁸ See also Act of July 18, 1866, An Act further to prevent Smuggling and for other Purposes, ch. 201, 14 Stat. 178 (1866). See generally Laura K. Donohue, supra note 26 (discussing the early history of the border search exception).

²⁹ 267 U.S. 132 (1925).

³⁰ Id. at 154.

³¹ Ch. 679, 52 Stat. 1077, 1083 (codified as amended at 19 U.S.C. § 1467 (2018)); see also Donahue, supra note 26, at 977 (“[T]he law empowers customs officers, acting pursuant to regulations issued by the Secretary of the Treasury or the Customs Service, to ‘enforce, cause inspection, examination, and search to be made of the persons, baggage, and merchandise discharged or unladen from’ vessels arriving at U.S. ports, regardless of whether the goods have previously undergone inspection.”)

³² Section 582, 52 Stat. 1077, 1083.

exception, including the Court’s three most important border search decisions in the last forty-five years and lower courts’ application of such decisions to electronic media.

A. The Modern Border Search Exception

In 1977, after almost two centuries without direct challenge, the Court first addressed CBP’s border search authority in United States v. Ramsey.³³ The defendant and others had conducted an international “heroin-by-mail enterprise,” smuggling such contraband into the Washington, D.C. area from Thailand using letter-sized envelopes.³⁴ A customs officer, inspecting international air mail from Thailand, spotted eight envelopes that were bulky.³⁵ Given that Thailand was a known source for narcotics, that one of the letters felt as though it contained something other than correspondence, and that one of the letters weighed three to six times the weight of a normal airmail letter, the customs officer suspected that the envelopes might contain merchandise or contraband rather than correspondence and opened the heavy letter.³⁶ Inside was a plastic bag containing a white powdered substance that he tested and determined to be heroin.³⁷

The Court found that the Act of July 18, 1866 authorized the search and that it was otherwise permissible under the Fourth Amendment.³⁸ With respect to the latter, Justice Rehnquist reasoned, “[t]hat searches made at the border, pursuant to the long-standing right of

³³ 431 U.S. 606 (1977)

³⁴ Id. at 608.

³⁵ Id. at 609.

³⁶ Id.

³⁷ Id. at 610.

³⁸ Id. at 615, 624-25.

the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.”³⁹ Thus, because the officer conducted the search at the

³⁹ Id. at 616 (emphasis added); see also Nat. Treasury Empl. Union v. Von Raab, 489 U.S. 656, 670 (1989) (quoting Carroll v. United States, 267 U.S. 132, 154 (1925)) (“We have long held that travelers seeking to enter the country may be stopped and required to submit to a routine search without probable cause, or even founded suspicion, ‘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.’”). Note that Justice Rehnquist found that there was no legally significant difference between envelopes mailed and envelopes carried across the border. Ramsey, 431 U.S. at 620 (“The critical fact is that the envelopes cross the border and enter this country, not that that are brought in by one mode of transportation rather than another. It is their entry into this country from without it that makes a resulting search ‘reasonable.’”).

functional equivalent of the border,⁴⁰ it was reasonable.⁴¹ Justice Rehnquist declined to determine “whether, and under what circumstances, a border search might be deemed ‘unreasonable’ because of the particularly offensive manner in which it is carried out.”⁴² The sole dissenting opinion merely disagreed that the Act of July 18, 1866 authorized the search, not finding any fault with Justice Rehnquist’s Fourth Amendment analysis.⁴³

1. “Routine” Versus “Nonroutine” Border Searches

In United States v. Montoya de Hernandez,⁴⁴ the Court began to define the contours of reasonable border searches, finding that routine searches do not require individualized suspicion, but that nonroutine searches do.⁴⁵ In this case, customs inspector Talamantes detained the

⁴⁰ Compare Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (noting that domestic airports receiving nonstop flights from other countries and established stations near the border are examples of a “functional equivalent” of the border (FEB)) and Ramsey, 431 U.S. at 616 (assuming that a New York City post office that receives international mail is a FEB) with Almeida-Sanchez, 413 U.S. at 274 (holding that a search by a roving patrol of the U.S. Border Patrol on a highway that is at all points at least twenty miles north of the Mexican border) and Torres v. Com. of Puerto Rico, 442 U.S. 465, 472 (1979) (finding that luggage searches of persons arriving in Puerto Rico from the United States do not constitute border searches)

⁴¹ Ramsey, 431 U.S. at 620.

⁴² Id. at 618 n. 13.

⁴³ Id. at 625 (Stevens, J., dissenting).

⁴⁴ 473 U.S. 531 (1985).

⁴⁵ Id. at 541.

defendant after arriving in Los Angeles on a direct flight from Bogota, Colombia—a source city for controlled substances—when he noticed from her passport that she had made eight recent trips to either Miami or Los Angeles.⁴⁶ The defendant also possessed \$5,000 in cash, mostly in \$50 bills, and her stated purpose for travelling to the United States was unconvincing, as even Justice Rehnquist’s rendition of the facts implied.⁴⁷

At this point, Talamantes, who had apprehended dozens of alimentary smugglers arriving on the same flight as the defendant, suspected that she was smuggling narcotics in her alimentary canal and requested a female customs inspector to take the defendant to a private area and conduct a patdown and strip search.⁴⁸ During the search, the female inspector felt what she thought was a girdle and noticed that the defendant was wearing two pairs of elastic underpants with a paper towel lining the crotch area.⁴⁹ Later, after about twenty hours in detention, a

⁴⁶ Id. at 533.

⁴⁷ Id. at 533-34; see also id. (“Talamantes and another inspector asked respondent general questions concerning herself and the purpose of her trip. Respondent revealed that she spoke no English and had no family or friends in the United States. She explained in Spanish that she had come to the United States to purchase goods for her husband's store in Bogota She indicated to the inspectors that she had no appointments with merchandise vendors, but planned to ride around Los Angeles in taxicabs visiting retail stores such as J.C. Penney and K-Mart in order to buy goods for her husband's store with the \$5,000.”)

⁴⁸ Id. at 534.

⁴⁹ Id.

physician conducted a rectal examination of the defendant pursuant to a court order, removing a balloon with cocaine in it.⁵⁰

The Court, represented again by Justice Rehnquist, found that the search of the defendant's alimentary canal was reasonable under the Fourth Amendment.⁵¹ Justice Rehnquist began, "[s]ince the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."⁵² Citing Ramsey, he further noted that routine searches of the persons and effects of entrants do not require individualized suspicion.⁵³ However, Justice Rehnquist ultimately, and narrowly, held that alimentary canal searches require reasonable suspicion after balancing the defendant's heightened privacy interests—due to the invasion of her person—with the Government's heightened interest in preventing smuggling, travelers' reduced expectation of privacy at the border, and the great difficulty of detecting alimentary smuggling.⁵⁴ Further, although he declined to rule on the required level of suspicion for "nonroutine border searches such as strip, body cavity, or involuntary x-ray searches," Justice Rehnquist's primary holding implied that alimentary canal searches are nonroutine and that nonroutine searches require at

⁵⁰ Id. at 535; id. at 546 (Brennan, J., dissenting).

⁵¹ Id. at 544.

⁵² Id. at 537 (emphasis added).

⁵³ Id. at 538.

⁵⁴ Id. at 538-41.

least reasonable suspicion.⁵⁵ Regardless, Justice Rehnquist found that the above facts “clearly supported a reasonable suspicion that [the defendant] was an alimentary smuggler.”⁵⁶

In the Court’s most recent decision on CBP’s border search authority, United States v. Flores-Montano,⁵⁷ it held that a gas tank search does not require individualized suspicion.⁵⁸ The defendant attempted to enter the United States at a southern California port of entry.⁵⁹ During a second inspection of the defendant’s vehicle, a customs inspector inspected the gas tank by tapping it and noted that it sounded solid.⁶⁰ The inspector then requested a mechanic to remove the tank, after which the inspector dissembled it and discovered thirty-seven kilograms of marijuana bricks inside.⁶¹ Now-Chief Justice Rehnquist found that the gas tank search was reasonable under the Fourth Amendment.⁶² Before reversing the decision of the Court of Appeals for the Ninth Circuit yet again, he admonished the lower court, “the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person . . .

⁵⁵ Id. at 541, n. 4. Note that all the searches listed are of one’s person. See also id. at 551 (Brennan, J., dissenting) (describing body-cavity searches, x-ray searches, and stomach-pumping as highly intrusive).

⁵⁶ Id. at 542.

⁵⁷ 541 U.S. 149 (2004).

⁵⁸ Id. at 150.

⁵⁹ Id.

⁶⁰ Id. at 151.

⁶¹ Id.

⁶² Id. at 155-56.

simply do not carry over to vehicles.”⁶³ Chief Justice Rehnquist elaborated, “[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.”⁶⁴ In other words, the Government has a “paramount interest in protecting[] its territorial integrity” that sharply contrasts with a traveler’s reduced expectations of privacy at the border.⁶⁵ Although he conceded that “some searches of property are so destructive as to require a different result,” Chief Justice Rehnquist held that “this [search] was not one of them.”⁶⁶ Notably, in this case, no justice dissented.⁶⁷

2. Privacy Interests Regarding Searches of One’s Person

Searches of one’s person vis-à-vis searches of property implicate disparate magnitudes of privacy interests, as implied in Montoya de Hernandez’s identification of only personal searches as nonroutine and explicitly discussed in Flores-Montano with respect to people and vehicles.⁶⁸

⁶³ Id. at 152 (emphasis added).

⁶⁴ Id. (emphasis added).

⁶⁵ Id. at 153.

⁶⁶ Id. at 155-156.

⁶⁷ Further, Justice Breyer’s three-sentence concurring opinion merely noted that CBP’s recordkeeping with respect to its border searches should minimize concerns that the agency will conduct gas tank searches in an abusive manner.

⁶⁸ Id. at 152; see United States v. Montoya de Hernandez, 473 U.S. 531, 541 n.4 (1985); id. at 542.

Border search jurisprudence contains a distinction between searches of property and searches of persons that parallels the one found in the broader Fourth Amendment case law.⁶⁹

In Terry v. Ohio, regarding police patdowns for weapons, the Court noted that “[e]ven a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security.”⁷⁰ Further, it stated in Missouri v. McNeely, a DWI case involving a warrantless blood test, that “an invasion of bodily integrity implicates an individual’s ‘most personal and deep-rooted expectations of privacy.’”⁷¹ Schmerber v. California came down the opposite way of McNeely, and the Court found the warrantless blood test was reasonable under the Fourth Amendment based on the particular facts of the case.⁷² In other cases, the Court proscribed compelled surgical removal of a bullet from the defendant for evidentiary purposes⁷³

⁶⁹ E.g., Flores-Montano, 541 U.S. at 152.

⁷⁰ See also Cupp v. Murphy, 412 U.S. 291, 295 (1973) (describing the taking of a suspect’s fingernail scrapings as a “severe, though brief, intrusion upon cherished personal security”).

⁷¹ Winston v. Lee, 470 U.S. 753, 760 (1985).

⁷² 384 U.S. 757, 722 (1966); cf. id. (“It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual’s person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual’s body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.”)

⁷³ See Winston, 470 U.S. at 759 (“A compelled surgical intrusion into an individual’s body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be ‘unreasonable’ even if likely to produce evidence of a crime.”).

and forced stomach pumping.⁷⁴ At least three circuits have constructed or positively cited tests for determining whether a border search is routine based primarily on physical factors such as use of force and exposure of intimate body parts.⁷⁵

3. Searches of Electronic Media

Before addressing jurisprudence regarding searches of electronic media at the border, one must examine case law ruling on such searches in the interior since the Court has ruled on the latter and not the former. Further, decisions like Riley v. California⁷⁶ and Carpenter v. United

⁷⁴ See Rochin v. California, 342 U.S. 165, 173 (1952) (“It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.”).

⁷⁵ See United States v. Kelly, 302 F.3d 291, 295 n.3 (5th Cir. 2002) (echoing Montoya de Hernandez’s identification of only physical searches as nonroutine and citing United States v. Vega-Barvo, 729 F.2d 1341, 1346 (11th Cir. 1984) (identifying three factors, including: (1) “physical contact between the searcher and the person searched”; (2) “exposure of intimate body parts”; and (3) “use of force”) and United States v. Braks, 842 F.2d 509, 512 (1st Cir.1988) (describing six factors including: (1) whether the search requires exposure of intimate body parts or removal of clothing; (2) physical contact between the searcher and the suspect; (3) use of force; (4) whether the suspect is subjected to pain or danger; (5) the overall manner in which the search is conducted; and (6) whether reasonable expectations of privacy are abrogated by the search))

⁷⁶ 573 U.S. 373 (2014).

States⁷⁷ have—perhaps inadvertently—signaled to many lower courts that all electronic searches, whether at the border or not, trigger heightened privacy concerns. In Riley, the Court held that searches of cellphones incident to a lawful arrest require a warrant.⁷⁸ Normally, under Chimel v. California, ensuring officer safety and preventing the destruction of evidence justify a warrantless search incident to arrest.⁷⁹ However, Chief Justice Roberts reasoned that neither of these rationales apply to cellphones seized after an arrest of a cellphone’s owner has taken place.⁸⁰

First, Chief Justice Roberts noted that data poses no threat to officer safety.⁸¹ Second, he characterized the Government’s chief concerns with respect to the destruction of evidence—remote wiping and encryption—as insufficient justifications to dispense with the warrant requirement.⁸² More specifically, he wrote that officers could simply turn the phone off or remove its battery to prevent remote wiping or, if they are concerned about encryption, leave the phone powered on and place it in a aluminum foil sandwich bag.⁸³ Chief Justice Roberts next

⁷⁷ 138 S. Ct. 2206 (2018).

⁷⁸ Riley, 573 U.S. at 386.

⁷⁹ Chimel v. California, 395 U.S. 752, 763 (1969).

⁸⁰ Riley, 573 U.S. at 387-91.

⁸¹ Id. at 387.

⁸² Id. at 388-91.

⁸³ Id. at 390. Chief Justice Roberts also noted that, if the police were confronted with a “now or never” situation, such an imminent remote-wipe attempt, they may be able to rely on exigent circumstances to search the phone immediately without a warrant. Id. at 391.

discussed the heightened privacy concerns that cellphone searches implicate due to the volume and variety of information they can hold and what such information can reveal about the cellphone owner.⁸⁴ He also argued that, not only do cell phones contain in digital form many sensitive records previously found in the home, they also contain information never found in a home in any form.⁸⁵

In Carpenter, the Court found that the Government conducts a search when it accesses historical cellphone records that provide a comprehensive chronicle of the user's past movements, otherwise known as cell-site location information (CSLI).⁸⁶ Writing again for the

⁸⁴ Id. at 393-97.

⁸⁵ Id. at 396-97. But cf. Ric Simmons, Why 2007 is Not Like 1984: A Broader Perspective on Technology's Effect on Privacy and Fourth Amendment Jurisprudence, 97 **J. Crim. L. & Criminology** 531, 534 (2007) ("Just as George Orwell misunderstood the implication of new technologies by focusing only on their use by government agents, Fourth Amendment scholars all but ignore the ways in which technology has enabled average citizens and criminals to keep their activities hidden from law enforcement."). Compare id. at 540 ("[O]ne of the primary effects of technology on society over the past two hundred years has been to increase the amount of privacy in our everyday lives. Individuals—including criminals—can now conduct many more activities secretly, particularly activities which involve communicating, storing, or processing information.") with United States v. Jones, 565 U.S. 400, 406 (2012) (quotations marks omitted) (emphasis added) ("At bottom, we must assur[e] preservation of that degree of privacy against government that existed *when the Fourth Amendment was adopted.*").

⁸⁶ 138 S. Ct. 2206, 2217 (2018).

majority, Chief Justice Roberts reasoned that the defendant had a reasonable expectation that law enforcement agents would not and could not secretly monitor and catalogue his every movement over a long period of time and that the Government invaded this expectation of privacy when it obtained court orders to acquire the defendant’s CSLI from his telecommunication providers.⁸⁷ Thus, he maintained, the Government will need a warrant in the future to access CSLI, unless an exception—such as exigent circumstances—applies.⁸⁸

However, Carpenter need not be read as a prohibition on the warrantless access of all data stored on electronic devices. Many lower courts have already held as much.⁸⁹ Further, in a March

⁸⁷ Id.

⁸⁸ Id. at 2222 (“[C]ase-specific exceptions may support a warrantless search of an individual’s cell-site records under certain circumstances.”).

⁸⁹ See United States v. VanDyck, 776 Fed. App’x 495, 496 (9th Cir. 2019) (declining to extend Carpenter to IP addresses); United States v. Hood, 920 F.3d 87 (1st Cir. 2019) (same); United States v. Wellbeloved-Stone, 777 Fed. App’x 605, 607 (4th Cir. 2019) (same, plus subscriber information); United States v. Adkinson, 916 F.3d 605 (7th Cir. 2019) (holding that Carpenter “did not invalidate warrantless tower dumps (which identified phones near one location (the victim stores) at one time (during the robberies))”); cf. United States v. Saemisch, 371 F. Supp. 3d 37, 42 (D. Mass. 2019) (“Carpenter does not provide an answer to the question whether the brief collection of real-time (as distinguished from historical) CSLI for an individual already subject to an arrest warrant implicates the Fourth Amendment.”). But cf. Daniel de Zayas, Comment, Carpenter v. United States and the Emerging Expectation of Privacy in Data

2019 decision situated more squarely within the border search context, the Seventh Circuit noted that “[a]lthough both [Riley and Carpenter] support [the defendant]’s general argument that the Supreme Court has recently granted heightened protection to cell phone data, neither case addresses searches at the border where the government’s interests are at their zenith, and neither case addresses data stored on other electronic devices such as portable hard drives and laptops.”⁹⁰

4. Searches of Electronic Media at the Border

In 2017, CBP officers conducted approximately 30,200 searches of electronic devices at the border, roughly four times more than those conducted in 2015.⁹¹ However, despite the notoriety and litigation surrounding such searches, they only impacted 0.007 percent of the 397 million international travelers processed by CBP officers in 2017.⁹² Although officers usually

Comprehensiveness Applied to Browsing History, 68 **Am. U. L. Rev.** 2209, 2245 (2019)

(arguing that Carpenter applies to browsing history).

⁹⁰ United States v. Wanjiku, 919 F.3d 472, 484 (7th Cir. 2019).

⁹¹ CBP Releases Updated Border Search of Electronic Device Directive and FY17 Statistics, **U.S. CUSTOMS AND BORDER PROTECTION**, <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and> (last visited November 2, 2019).

⁹² Id. Given the massive volume of travelers that CBP processes annually, officers are unlikely to have the time, nor the inclination, to thoroughly examine “the jokes at which [travelers] have laughed” during an electronic search, contrary to what some commentators have suggested.

Donohue, supra note 26, at 966.

have at least reasonable suspicion for more extensive searches,⁹³ they also conduct a certain percentage of random searches of persons who appear entirely innocent for deterrence purposes.⁹⁴

Digital contraband can include child sexual abuse imagery, nuclear weapons designs, counterfeit currencies, classified information, classified information that requires an export license, stolen intellectual property, and more.⁹⁵ Child sexual abuse imagery, in particular, is a

⁹³ United States v. Saboonchi, 990 F. Supp. 2d 536, 570 (D. Md. 2014).

⁹⁴ United States v. Cotterman, 709 F.3d 952, 979 (9th Cir. 2013) (Callahan, J., dissenting in part).

⁹⁵ Donohue, supra note 26, at 1009 (citing 19 U.S.C. § 1583(a)(1), (2) (2018) (warrantless searches of international mail for obscenity and child sexual abuse imagery); 6 U.S.C. § 211(c)(2) (2018) (requiring CBP to ensure “the interdiction of persons and goods illegally entering or existing the United States”); id. § 211(c)(5) (requiring CBP to “detect, respond to, and interdict terrorists . . . and other persons who may undermine the security of the United States”); id. § 211(c)(6) (requiring CBP to “safeguard the borders of the United States to protect against the entry of dangerous goods”); see also 18 U.S.C. § 2252(a)(1) (2018) (prohibiting the knowing international transportation or shipment of child sexual abuse imagery); id. § 2252(a)(2) (prohibiting receipt or distribution of child sexual abuse imagery); id. § 2252(4) (outlawing possession of child sexual abuse imagery); 19 U.S.C. § 1583(c)(1)(A) (providing for the examination of outbound mail); 31 U.S.C. § 5316 (2018) (requiring the reporting of the export and import of certain monetary instruments)); Kelly A. Gilmore, Note, Preserving the Border Search Doctrine in a Digital World: Reproducing Electronic Evidence at the Border, 72 **Brook.**

massive problem.⁹⁶ CBP inspectors search for such contraband either manually, forensically, or both. Manual, or “basic,” searches are “examinations of an electronic device that do not entail the use of external equipment or software.”⁹⁷ Forensic, or “advanced,” searches “involve the

L. Rev. 759, 787 (2007) (“As the rest of the world has turned to laptops and wireless communication devices for the storage of personal information, it appears terrorists have as well. During the investigation of the 1993 World Trade Center bombing in New York, officials found detailed plans to destroy U.S. bound airliners in encrypted files on the suicide bomber’s laptop.”)

⁹⁶ See A Criminal Underworld of Child Abuse, Part 1, **The Daily** (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/podcasts/the-daily/child-sex-abuse.html> (describing child sexual abuse imagery as reaching epidemic proportions ten years ago when only 600,000 images and videos were reported to the National Center for Missing and Exploited Children annually, and in 2018, 45 million images and videos were reported); A Criminal Underworld of Child Abuse, Part 2, **The Daily** (Feb. 20, 2020), <https://www.nytimes.com/2020/02/19/podcasts/the-daily/child-sex-abuse.html> (noting that, in 2019, there were 70 million reports of child sexual abuse imagery—a more than fifty percent increase—and that this problem may only get worse as the one platform that vigorously polices itself, Facebook, transitions away from automatic scanning of images and videos transmitted via its messenger service to ameliorate user privacy concerns). An interesting question that these podcast episodes raise is whether the privacy of the people who transmit these images can coexist with the privacy of the abused children who appear in them. *Id.* In other words, does shielding the transmission of these images completely deny privacy to the exploited subjects of such images?

⁹⁷ *United States v. Kolsuz*, 890 F.3d 133, 146 n.6 (4th Cir. 2018).

connection of external equipment to a device...in order to review, copy, or analyze its contents.”⁹⁸

Since the Court has not yet ruled on the level of suspicion required for electronic border searches, whether manual or forensic, this Comment must undertake a brief survey of relevant lower court decisions to understand the debate surrounding this issue. A plurality of circuits have held that reasonable suspicion is not required for forensic electronic border searches or have issued opinions that are consistent with United States v. Touset, the Eleventh Circuit’s 2018 circuit-splitting decision that defied the Ninth Circuit’s reasonable-suspicion requirement.⁹⁹

⁹⁸ Id.

⁹⁹ See e.g., United States v. Touset, 890 F.3d 1227, 1233 (11th Cir. 2018); United States v. Jenkins, No. 5:11-CR-0602 (GTS), 2013 WL 12204395 (N.D.N.Y. Dec. 12, 2013) (finding that forensic electronic border searches are routine, so long as they are not destructive of the device or carried out in a particularly offensive manner); United States v. Feiten, No. 15-20631, 2016 WL 894452 (E.D. Mich. Mar. 9, 2016); United States v. Wanjiku, 919 F.3d 472, 484 (7th Cir. 2019); cf. United States v. Linarez-Delgado, 259 Fed. App’x. 506 (3d Cir. 2007) (holding that camcorders, as well as other electronic devices, may be searched without reasonable suspicion).

Further, four circuits—the Fifth,¹⁰⁰ Sixth, Tenth, and D.C. Circuit¹⁰¹—have not directly or materially ruled on this issue. That leaves the Ninth¹⁰² and Fourth¹⁰³ Circuits, which have clearly required reasonable suspicion for forensic electronic border searches, and the First¹⁰⁴ Circuit,

¹⁰⁰ United States v. Molina-Isidoro, 267 F. Supp. 3d 900 (W.D. Tex. 2016), aff'd, 884 F.3d 287 (5th Cir. 2018) (resolving case on good faith exception). But cf. Molina-Isidoro, 267 F. Supp. 3d at 908 (declining to extend Riley to searches of cell phones at the border); Molina-Isidoro, 884 F.3d at 292 (concluding that government agents may reasonably view Riley as not overriding caselaw that allows warrantless border searches of cellphones).

¹⁰¹ See e.g., United States v. Hassanshahi, 75 F. Supp. 3d 101 (D.D.C. 2014) (declining to decide the required level of suspicion); United States v. Kim, 103 F. Supp. 3d 32 (D.D.C. 2015) (same).

¹⁰² United States v. Cano, 934 F.3d 1002, 1007 (9th Cir. 2019); United States v. Cotterman, 709 F.3d 952, 957 (9th Cir. 2013).

¹⁰³ United States v. Aigbkaen, 943 F.3d 713, 720 (4th Cir. 2019); cf. United States v. Kolsuz, 890 F.3d 133, 137 (4th Cir. 2018) (resolving the case on the good faith exception in favor of the Government, but doing so because the CBP officers' search was based on a reasonable suspicion that the electronic device in question contained contraband).

¹⁰⁴ See Alasaad v. Nielsen, No.17-cv-11730-DJC, 2019 WL 5899371, at *1, *1 (D. Mass. Nov. 12, 2019). But see United States v. Molina-Gomez, 781 F.3d 13, 19 (1st Cir. 2015) (citing United States v. Braks, 842 F.2d 509, 512-13 (1st Cir. 1988)) (finding that only highly intrusive searches of the person and destructive property searches are non-routine).

which appears to be moving in the same direction. Notably, the Court has repeatedly reversed Ninth Circuit border search decisions.¹⁰⁵

In Touset, as noted above, the Eleventh Circuit held that “no suspicion is necessary to search electronic devices at the border.”¹⁰⁶ In this case, Xoom, a company that transmits money, notified Yahoo that it suspected that several of its email account holders were involved with child sexual abuse imagery based on a pattern of frequent low-money transfers to an individual in source countries for sex tourism and child sexual abuse imagery.¹⁰⁷ Yahoo then conducted its own investigation and found a file with child sexual abuse imagery in the account for the email address iloveyousomuch0820@yahoo.com, which listed a phone number in the Philippines.¹⁰⁸ After Yahoo contacted the National Center for Missing and Exploited Children, the Center contacted the Cyber Crime Center of the Department of Homeland Security (DHS).¹⁰⁹ DHS eventually discovered a Western Union account associated with the above email address that engaged in low-money transfers that listed the defendant’s name and a post office box in Marietta, Georgia.¹¹⁰ When the defendant arrived on an international flight in Atlanta, CBP

¹⁰⁵ Samuel A. Townsend, Note, Laptop Searches at the Border and United States v. Cotterman, 94 **B.U. L. Rev.** 1745, 1746 (2014) (providing Montoya de Hernandez and Flores-Montano as examples).

¹⁰⁶ United States v. Touset, 890 F.3d 1227, 1229 (11th Cir. 2018).

¹⁰⁷ Id. at 1230.

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id.

officers searched his luggage, which contained an iPhone, a camera, two laptops, two external hard drives, and two tablets.¹¹¹ A forensic search of the laptops and hard drives revealed child sexual abuse imagery.¹¹² The defendant was later arrested and indicted for knowingly receiving, transporting, and possessing a computer or computer-storage device containing child sexual abuse imagery.¹¹³

Judge William Pryor first noted that “[i]mport restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations.”¹¹⁴ Next, he recounted that the Court has never required reasonable suspicion for a search of property at the border—only for “highly intrusive searches of a person’s body”¹¹⁵—nor has it distinguished between different types of property.¹¹⁶ Rejecting the importation of Riley-esque principles into the border search context, Justice Pryor added that “electronic devices should not receive special treatment because so many people now

¹¹¹ Id.

¹¹² Id.

¹¹³ Id. at 1231.

¹¹⁴ Id. at 1232 (quoting United States v. 12, 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 125 (1973)).

¹¹⁵ Touset, 890 F.3d at 1234 (“Property and persons are different.”).

¹¹⁶ Id. at 1233; cf. Orin S Kerr, The Fourth Amendment in Cyberspace: Can Encryption Create a “Reasonable Expectation of Privacy?” 33 Conn. L. Rev. 503, 532 (2001) (predicting that judges will “avoid creating one Fourth Amendment for the physical world and another for cyberspace”).

own them or because they can store vast quantities of records or effects.”¹¹⁷ Rather, he contended, CBP officers bear the same responsibilities “regardless of advances in technology, and “[i]f anything, the advent of sophisticated technological means for concealing contraband only heightens the need of the government to search property at the border unencumbered by judicial second-guessing.”¹¹⁸ Further, he argued that the Fourth Amendment does not guarantee the right to travel without inconvenience, citing reduced privacy expectations at the border and now-routine TSA screening procedures, and that passengers can leave any property they do not want searched, but not their bodies, at home.¹¹⁹

Nonetheless, five years earlier, the Ninth Circuit mandated reasonable suspicion for forensic electronic border searches in United States v. Cotterman.¹²⁰ While attempting to enter

¹¹⁷ Touset, 890 F.3d at 1233; see also id. at 1234 (noting that, in Riley, the Court limited its holding to the search-incident-to-arrest exception); id. at 1235 (citations and quotation marks omitted) (“In Riley, the Supreme Court explained that the rationales that support the search-incident-to-arrest exception—namely the concerns of harm to officers and destruction of evidence—did not ha[ve] much force with respect to digital content on cell phones because digital data does not pose comparable risks. But digital child pornography poses the same exact risk of unlawful entry at the border as its physical counterpart.”)

¹¹⁸ Id.; see also id. (“[C]hild pornography offenses overwhelmingly involve the use of electronic devices for the receipt, storage, and distribution of unlawful images.”).

¹¹⁹ Id. at 1235.

¹²⁰ 709 F.3d 952, 957 (9th Cir. 2013); see also United States v. Cano, 934 F.3d 1002, 1007 (9th Cir. 2019) (“clarify[ing] Cotterman by holding that ‘reasonable suspicion’ in this context means

the United States from Mexico, the defendant was referred to secondary inspection after the border agent discovered his prior conviction for seven counts relating to sexual conduct with minors.¹²¹ Forensic examination of two laptops produced hundreds of images and videos of child sexual abuse imagery.¹²² Judge Margaret McKeown first noted that, had the search ended with the initial manual examination of the laptops, it would have been valid.¹²³ Thus, no circuit split

that officials must reasonably suspect that the cellphone contains digital contraband,” rather than digital evidence).

¹²¹ Cotterman, 709 F.3d at 957.

¹²² Id. at 958.

¹²³ Id. at 960. Judge McKeown supported this conclusion with the assertion that the search was “in principle, akin to the search in [United States v. Seljan], where we concluded that a suspicionless cursory scan of a package in international transit was not unreasonable.” Id. However, the court in Seljan noted that the customs agents “opened and examined” three different packages belonging to the defendant over eighteen months and subsequently opened and carefully read the letters therein. 547 F.3d 993, 996 (9th Cir. 2008). “It is a strange hierarchy of values,” Schmerber v. California, 384 U.S. 757, 775 (1966) (Black, J. dissenting), that permits scrupulous personal examination of private letters by the Government but bars the use of software specifically designed to detect contraband that has been concealed. Cf. infra Part II.A.3 (contending that forensic electronic border searches are often less invasive than manual ones). Later in her opinion, still oblivious to the facts of Seljan and the operational design of forensic software, Judge McKeown compared the use of forensic software to “painstaking[ly] . . . reading a diary line by line looking for mention of criminal activity.” Cotterman, 709 F.3d at 962-63. But

exists with respect to the principle that manual or routine electronic border searches do not require reasonable suspicion. She then justified a reasonable-suspicion requirement for forensic electronic border searches based on heightened privacy concerns borne out of the volume and intimate nature of the contents of electronic devices.¹²⁴ Unlike the last three major Court decisions on border searches, Ramsey, Montoya de Hernandez, and Flores-Montano, Judge McKeown’s opinion all but omitted mention of the Government’s long-standing plenary authority to conduct suspicionless border searches and the reduced privacy expectations of international travelers, as Judge Consuelo Callahan elucidates in her concurrence in part.¹²⁵ Both her opinion and the dissent reached the same conclusion as the majority in Touset.

see infra note 231 (noting that officers often only access a thumbnail preview of images and videos that *the software program* identifies as relevant).

¹²⁴ Id. at 964. But see id. at 977 (Callahan, J., concurring in part) (citations omitted) (quoting United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 376 (1971) (“‘[A] port of entry is not a traveler’s home,’ even if a traveler chooses to carry a home’s worth of personal information across it”).

¹²⁵ See id. at 971 (Callahan, J., concurring in part) (“Accomplishing th[e] Herculean task [of finding and excluding any and all illegal and unwanted articles before they cross the border] requires that the government be mostly free from the Fourth Amendment’s usual restraints on searches of people and their property. Today the majority ignores that reality by ejecting a new rule requiring reasonable suspicion for any thorough search of electronic devices entering the United States. This flouts more than a century of Supreme Court precedent, is unworkable and unnecessary, and will severely hamstring the government’s ability to protect our borders.”)

In Alasaad v. Nielsen, which was decided on November 12, 2019, the District Court for the District of Massachusetts held that all electronic border searches, whether manual or forensic, require reasonable suspicion.¹²⁶ In one of the most recent challenges to CBP’s border search authority, several plaintiffs asserted that CBP officers had violated their Fourth Amendment rights under a wide variety of circumstances.¹²⁷ Judge Casper reasoned that the fact that electronic border searches are meant to uncover, inter alia, threats to national security and contraband “is not a strong counterweight to the intrusion on personal privacy evidenced by such searches” without citing any authority.¹²⁸ She also noted that the “deterrent effect” of the border search exception would not be significantly diminished under a reasonable suspicion requirement.¹²⁹ Further, Judge Casper maintained that, although only border searches of persons have been deemed nonroutine by the Court, border searches of property can be nonroutine too because of the nature and quantity of information on electronic devices—citing Riley—and the

¹²⁶ See No.17-cv-11730-DJC, 2019 WL 5899371, at *1, *14 (D. Mass. Nov. 12, 2019) (finding that there was no meaningful difference between the two classes of searches in terms of the privacy interests implicated).

¹²⁷ See generally Alasaad v. Nielsen, No. 17-cv-11730-DJC, 2018 WL 2170323, at *1 (D. Mass. May 9, 2018) (denying the government’s motion to dismiss and recounting the factual allegations in detail).

¹²⁸ Alasaad, No.17-cv-11730-DJC, 2019 WL 5899371, at *9.

¹²⁹ Id. at *10.

inconvenience to which travelers would be subjected if they left their electronic devices at home.¹³⁰

B. The Extraterritorial Application of the Constitution

The Court has yet to rule on whether, or to what extent, the Fourth Amendment applies extraterritorially to U.S. persons.¹³¹ Thus, for the time being, lower court precedents which are largely in agreement, such as In re Terrorist Bombings of U.S. Embassies in East Africa¹³² and United States v. Stokes,¹³³ govern. The Court has, however, ruled on the extraterritorial application of other parts of the Constitution and of the Fourth Amendment with respect to non-U.S. persons, and such rulings provide a useful foundation for understanding the above two cases.

The Court has frequently wavered back and forth between more formal and more functional approaches to extraterritoriality. A formal approach to extraterritoriality essentially denies the extraterritorial application of the Constitution altogether, only recognizing its

¹³⁰ Id. at *11-12.

¹³¹ However, in his dissenting opinion in United States v. Verdugo-Urquidez, Justice Brennan noted that “nothing in the Court's opinion questions the validity of the rule, accepted by every Court of Appeals to have considered the question, that the Fourth Amendment applies to searches conducted by the United States Government against United States citizens abroad.” 494 U.S. 259, 283 n.7 (1990).

¹³² 552 F.3d 157 (2d Cir. 2008).

¹³³ 726 F.3d 880 (7th Cir. 2013).

jurisdiction where the United States exercises de jure sovereignty.¹³⁴ A functional approach focuses more on elements of de facto sovereignty and the practical considerations of enforcing the Constitution abroad.¹³⁵ For example, the Court went from functional to formal to functional again from Reid v. Covert¹³⁶ to United States v. Verdugo-Urquidez¹³⁷ to Boumediene v. Bush,¹³⁸ respectively.

In what are commonly known as the Insular Cases,¹³⁹ the Court issued a series of opinions at the beginning of the twentieth century following the United States' acquisition of various territories from Spain, addressing fundamental questions regarding the Constitution's

¹³⁴ Boumediene v. Bush, 553 U.S. 723, 764 (2008). De jure sovereignty “implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there.” Id. at 754 (quoting Restatement (Third) of Foreign Relations Law of the United States § 206, cmt. b (1986)). However, determining whether a state enjoys de facto sovereignty over a certain territory involves an objective assessment of the power or control that that state exerts over such territory. Boumediene, 553 U.S. at 754. De facto sovereignty does not require a claim of right. Id.

¹³⁵ Id. at 764.

¹³⁶ 354 U.S. 1 (1957).

¹³⁷ 494 U.S. 259 (1990)

¹³⁸ 553 U.S. 723 (2008).

¹³⁹ De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904).

geographic scope for the first time¹⁴⁰ and finding that generally “the Constitution applies in full in incorporated territories surely destined for statehood but only in part in unincorporated territories.”¹⁴¹ Underlying the latter part of this holding was a practical—although partly racist—understanding that the extent to which the Constitution applies extraterritorially must still be decided “as questions arise.”¹⁴² For example, in Dorr v. United States, the Court held that Congress need not establish a system of laws that includes the right of trial by jury in the Philippines, an unincorporated territory.¹⁴³ Justice Day admitted that the people of the Philippines were entitled to fundamental constitutional rights and that, as a fundamental right, the right to trial by jury should logically “go[] wherever the jurisdiction of the United States extends.”¹⁴⁴ However, he ultimately concluded that trial by jury would be impossible to implement in the Philippines, a “territory peopled by savages” who did not need or understand such system, and would “work injustice and provoke disturbance rather than [] aid the orderly administration of justice.”¹⁴⁵

Then, in the post-World War II case of Johnson v. Eisentrager,¹⁴⁶ the Court denied habeas corpus protections to German soldiers who had been convicted of violating the laws of

¹⁴⁰ Boumediene v. Bush, 553 U.S. 723, 756 (2008).

¹⁴¹ Id. at 757.

¹⁴² Dorr, 195 U.S. at 149.

¹⁴³ Id.

¹⁴⁴ 339 U.S. 763 (1950).

¹⁴⁵ Dorr, 195 U.S. at 148.

¹⁴⁶ Id.

war and imprisoned, under U.S. custody, in Germany, “balance[ing] the constraints of military occupation with constitutional necessities.”¹⁴⁷ Its holding partially relied on the fact, if the Constitution applied extraterritorially to enemy soldiers, that the Fifth Amendment would protect such persons from military trial, and the Sixth from civil trial, thereby preventing any trial at all.¹⁴⁸ The Court also reasoned:

To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call [During active hostiles, s]uch trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.¹⁴⁹

Thus, here, as well as in the Insular Cases, practical considerations largely controlled the extraterritorial application of the Constitution. Although this case partially turns on the petitioners’ relationship to the United States, such analysis is not necessarily inconsistent with a functional approach. After all, as this Comment will discuss below with respect to Reid v. Covert and United States v. Verdugo-Urquidez, it leaves open the possibility that those persons outside of territory under the United States’ de jure sovereignty with a closer relationship to the United States can enjoy certain constitutional protections.

In Reid v. Covert, the Court rejected the idea that “when the United States acts against citizens abroad it can do so free of the Bill of Rights,” finding that the Fifth and Sixth

¹⁴⁷ Boumediene, 553 U.S. at 762.

¹⁴⁸ Eisentrager, 339 U.S. at 782.

¹⁴⁹ Id. at 778-79.

Amendments apply extraterritorially to U.S. citizens.¹⁵⁰ Two civilian spouses, one in England and the other in Japan, had killed their servicemember husbands and were tried by U.S. military courts without a grand jury indictment or a jury pursuant to agreements with England and Japan.¹⁵¹ Writing for the plurality, Justice Black first seized on the sweeping language contained in both amendments, such as “no person” and “all criminal prosecutions.”¹⁵² He then noted that the reason treaties—like the ones with England and Japan—did not have to be made in “pursuance” of the Constitution in the same manner as federal laws was so that international agreements made under the Articles of Confederation, including the peace treaties which concluded the Revolutionary War, would remain in effect.¹⁵³ Although he largely relied on legislative history to argue that the United States cannot exercise power under an international agreement without observing constitutional prohibitions, Justice Black’s approach can be categorized as formal because he spurned the suggestion that constitutional protections “are inoperative when they become inconvenient.”¹⁵⁴

Reid’s two concurring opinions, however, took a functional approach. In his concurrence, Justice Frankfurter asserted that the geographic scope of the Constitution must be determined on a case-by-case basis, consistent with the findings of the Insular Cases.¹⁵⁵ Most importantly,

¹⁵⁰ 354 U.S. 1, 5 (1957).

¹⁵¹ Id. at 3-4.

¹⁵² Id. at 8.

¹⁵³ Id. at 16-17.

¹⁵⁴ Id. at 14.

¹⁵⁵ Reid, 354 U.S. at 50-51 (Frankfurter, J., concurring).

Justice Harlan read the Insular Cases to hold that whether a constitutional provision has extraterritorial effect depends upon the “particular circumstances, the practical necessities, and the possible alternatives which Congress had before it” and whether judicial enforcement of the provision would be “impracticable and anomalous.”¹⁵⁶ This concurrence later served as the analytical foundation for Justice Kennedy’s concurrence in Verdugo and, later still, Justice Kennedy’s majority opinion in Boumediene.¹⁵⁷ Further, practical considerations significantly influenced Chief Justice Rehnquist’s plurality opinion in Verdugo.¹⁵⁸

In Verdugo, the plurality held that the Fourth Amendment only applies extraterritorially to persons with a “substantial connection” to the United States.¹⁵⁹ Since the defendant was a resident and citizen of Mexico and his property was in Mexico, Chief Justice Rehnquist found that the Fourth Amendment was inapplicable, and the Court did not address the level of suspicion that the Fourth Amendment would require if the defendant had had a substantial connection to the United States.¹⁶⁰ Contrasting the Fourth Amendment’s “the people” with the Fifth and Sixth Amendment’s “no person” and examining the Fourth Amendment’s legislative history, Chief Justice Rehnquist wrote that “the people” refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with a particular

¹⁵⁶ Id. at 74-75 (Harlan, J., concurring).

¹⁵⁷ See United States v. Verdugo-Urquidez, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring); Boumediene v. Bush, 553 U.S. 723, 759 (2008); id. at 770.

¹⁵⁸ Verdugo-Urquidez, 494 U.S. at 273-74.

¹⁵⁹ Id. at 271.

¹⁶⁰ Id.

country to be considered part of that community.¹⁶¹ He also reasoned that, in contrast to the Insular Cases, the alleged constitutional violation in this case occurred in a foreign territory, where Fourth Amendment claims are “even weaker,” rather than in those territories governed by Congress.¹⁶² As a practical matter, he noted that a warrant issued by a U.S. magistrate would be a “dead letter” outside of the United States and requiring one would present great difficulties in determining what is reasonable in the way of searches and seizures conducted abroad.¹⁶³

In his concurring opinion, Justice Kennedy more closely aligned his analysis with the functional approaches employed in the Insular Cases and Eisentrager. He reasoned that there is “no rigid and abstract rule” that every provision of the Constitution applies extraterritorially, “no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.”¹⁶⁴ Here, he found, adherence to the warrant requirement would be impracticable and anomalous because of the absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials.¹⁶⁵

¹⁶¹ Id. at 265–68.

¹⁶² Id. at 268.

¹⁶³ Id. at 274.

¹⁶⁴ Id. at 277–78 (Kennedy, J. concurring).

¹⁶⁵ Id. at 278 (Kennedy, J. concurring).

In Boumediene, the Court held that the writ of habeas corpus extends to enemy alien combatants held at Guantanamo Bay.¹⁶⁶ With respect to Verdugo, Justice Kennedy only cited his concurring opinion and not to the plurality, rejecting the Government's arguments that the writ did not apply because the United States does not have de jure sovereignty over Guantanamo.¹⁶⁷ He examined the writ's history, primarily through Scotland's and Ireland's legal relationship with England at the time of the Constitution's framing.¹⁶⁸ Justice Kennedy reasoned that it ran to Ireland, but not Scotland because English law applied in Ireland, but not in Scotland.¹⁶⁹ This was despite the fact that England had de jure sovereignty over Scotland but not over Ireland.¹⁷⁰ Thus, Justice Kennedy continued, the fact that no laws other than those of the United States apply at Guantanamo weighs in favor of the writ's extension.¹⁷¹ Further, he noted that the United States clearly maintains de facto sovereignty over this territory.¹⁷² Nevertheless, Justice Kennedy

¹⁶⁶ Boumediene v. Bush, 553 U.S. 723, 771 (2008). For a compelling argument as to why the Jury Trial Clause applies to enemy alien combatants held at Guantanamo Bay, see generally Thomas McDonald, Comment, A Few Good Angry Men: Application of the Jury Trial Clause of the Sixth Amendment to Non-Citizens Detained at Guantanamo Bay, 62 **Am. U. L. Rev.** 701 (2013).

¹⁶⁷ Boumediene, 553 U.S. at 760–61.

¹⁶⁸ Id. at 751.

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ Id.

¹⁷² Id. at 755.

cautioned that, under the Insular Cases, constitutional provisions should only be applied extraterritorially “sparingly and where [they are] most needed.”¹⁷³

Justice Kennedy ultimately devised three factors for determining the extraterritorial reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.¹⁷⁴ Applying the first factor, he distinguished between this case and Eisentrager, noting that, although the petitioners were also not U.S. citizens, the prisoners in Eisentrager received far greater procedural protections regarding the determination that they were enemy combatants.¹⁷⁵ Second, Justice Kennedy reasoned that, in contrast to the German prison over which the United States held temporary control after World War II in Eisentrager, Guantanamo “is no transient possession” and “is within the constant jurisdiction of the United States.”¹⁷⁶ Third, extending the writ would not interfere with the military mission of a secure prison facility on a small, isolated, and heavily fortified military base; no other government has competing jurisdiction over the territory; the detention facility is not located in an active theater of war; and there are few practical barriers to the running of the writ.¹⁷⁷

¹⁷³ Id. at 759.

¹⁷⁴ Id. at 766.

¹⁷⁵ Id. at 766–67.

¹⁷⁶ Id. at 768–69.

¹⁷⁷ Id. at 769–70.

1. The Extraterritorial Application of the Fourth Amendment

Although the Court has not yet had an opportunity to rule on the extraterritorial application of the Fourth Amendment to U.S. citizens, several lower courts¹⁷⁸ have held that the Fourth Amendment's requirement of reasonableness—and not the Warrant Clause—governs extraterritorial searches of U.S. citizens.¹⁷⁹ The most notable of such decisions is the Second

¹⁷⁸ In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157 (2d Cir. 2008); United States v. Stokes, 726 F.3d 880, 892–93 (7th Cir. 2013); United States v. Agosto-Pacheco, No. 18-082 (FAB), 2019 WL 4566956, at *1, *9 (D.P.R. Sept. 20, 2019). Considering that In re Terrorist Bombings came down more than five months after Boumediene, it is strange that the Second Circuit did not cite or discuss Boumediene at all. Although the Boumediene holding was relatively narrow, Justice Kennedy did not explicitly cabin it to the Suspension Clause, and one would reasonably expect any federal court ruling on a question regarding the extraterritorial application of the Constitution to address the legal effect of—at that time—the most significant Supreme Court ruling on that question in almost two decades, even if the two cases address different parts of the Constitution. Cf. Stephen I. Vladeck, Boumediene's Quiet Theory: Access to Courts and the Separation of Powers, 84 **Notre Dame L. Rev.** 2107, 2108 (2009) (noting that Boumediene raises the question of whether constitutional provisions other than the Suspension Clause apply at Guantanamo).

¹⁷⁹ See also Jay V. Prahbu, et al, When Your Cyber Case Goes Abroad: Solutions to Common Problems in Foreign Investigations, 67 **DOJ J. Fed. L. & Prac.** 167, 178–79 (2019) (“Foreign searches [] need only satisfy the Fourth Amendment's reasonableness standard . . .”).

Circuit's in In Re Terrorist Bombings of U.S. Embassies in East Africa.¹⁸⁰ In this case, U.S. intelligence agents conducted telephone surveillance in Kenya of the defendant, a U.S. citizen and suspected Al Qaeda associate.¹⁸¹ On the basis of intelligence collected through such surveillance, U.S. agents also searched the defendant's home with the help of Kenyan authorities.¹⁸²

Judge Jose Cabranes first reasoned that neither search required a warrant because no legal authority suggests otherwise; a warrant issued by a U.S. judicial officer would likely have no legal significance abroad; and U.S. officials are not required to obtain warrants from foreign judicial officers.¹⁸³ He also noted that whether U.S. judicial officers are even authorized to issue warrants for overseas searches is unclear.¹⁸⁴ Nonetheless, U.S. officials must still meet the Fourth Amendment's reasonableness requirement, under which the totality of the circumstances are examined to balance individual privacy interests and government interests.¹⁸⁵

Judge Cabranes then found that the search of the defendant's home was reasonable because the Government had a powerful need to gather additional intelligence on Al-Qaeda's activities in Kenya, which it had linked to the defendant, and the intrusion on the defendant's

¹⁸⁰ Supra note 178.

¹⁸¹ In re Terrorist Bombings, 552 F.3d at 159, 161.

¹⁸² Id. at 160.

¹⁸³ Id. at 169–71.

¹⁸⁴ Id. at 171.

¹⁸⁵ Id. at 171–72.

privacy was restrained and limited.¹⁸⁶ He supported the latter conclusion with the following facts: the search was not covert; it was during the daytime and in the presence of the defendant's wife; the scope of the search was limited to items which were believed to have foreign intelligence value; proper minimization procedures were followed; and U.S. officials monitored the defendant's telephone communications for nearly a year before concluding that it was necessary to search his home.¹⁸⁷ Further, although Judge Cabranes described the telephone surveillance as broad—encompassing calls made for commercial, family, or social purposes and loosely minimizing the information collected—and as a significant invasion of privacy, it was reasonable because of the inherent challenges of foreign intelligence collection.¹⁸⁸

¹⁸⁶ Id. at 174.

¹⁸⁷ Id. at 173–74.

¹⁸⁸ Id. at 175–76. Specifically, Judge Cabranes identified the following difficulties: (1) complex, wide-ranging, and decentralized organizations warrant sustained and intense monitoring in order to understand their features and identify their members; (2) foreign intelligence gathering of the sort considered here must delved into the superficially mundane because it is not always readily apparent what information is relevant; (3) members of covert terrorist organizations often communicate in code or at least more ambiguous language, so more extensive and careful monitoring of these communications may be necessary; and (4) because the monitored conversations were conducted in foreign languages, the task of determining relevance and identifying coded language was further complicated. Id.

Another significant lower court decision is United States v. Stokes,¹⁸⁹ in which the Seventh Circuit agreed with the Second Circuit's earlier decision. In this case, the defendant, originally a teacher in Miami, was placed on probation by a Florida court after indecently touching two minors who were his students.¹⁹⁰ He then received permission to complete his probation in Thailand, where he engaged in sexual acts with minors for several years.¹⁹¹ In 2002, ICE agents based in Thailand were tipped off to the fact that the defendant had been fired from another teaching job in Bangkok for indecently touching male students, opening an investigation thereafter.¹⁹² About ten months later, ICE agents and the Royal Thai Police searched the defendant's home in Thailand, recovering more than 6,000 images of the defendant's sexual activity with minors from a digital camera, multiple compact discs, and a computer.¹⁹³ Prosecutors then indicted the defendant for traveling in foreign commerce for the purpose of engaging in a sexual act with person under eighteen years old and extradited him to the United States.¹⁹⁴ Judge Diane Sykes found that no warrant was required for the reasons cited in the

¹⁸⁹ 726 F.3d 880 (7th Cir. 2013).

¹⁹⁰ Id. at 885.

¹⁹¹ Id. at 885–86.

¹⁹² Id. at 886.

¹⁹³ Id.

¹⁹⁴ Id. at 886–87.

Second Circuit's decision and that the warrantless¹⁹⁵ search of the defendant's home was reasonable under the Fourth Amendment.¹⁹⁶ She reasoned that investigators had probable cause that the defendant had committed a crime and evidence of it would be found in his home.¹⁹⁷ Judge Sykes also noted that the manner of the search was reasonable because the law enforcement team acted pursuant to a Thai search warrant; the search took place during the daytime hours; officers waited for the defendant to arrive before entering his home; the defendant was not restrained during the search; containers were not broken open; and the entire search only lasted about two hours.¹⁹⁸

¹⁹⁵ "There is no question that the warrant [issued by a Thai judicial officer] used very general language," and more importantly, there was no warrant issued by a U.S. judicial officer, so the search was effectively warrantless. Id. at 891.

¹⁹⁶ Id. at 893.

¹⁹⁷ Id. ("Stokes had been fired from two Thai schools in one year for touching children inappropriately. His colleagues at a third school told investigators that he continued to engage in similar behavior. Stokes had a history of sexually assaulting children[] and a criminal conviction for inappropriately touching a child in the United States. He was seen regularly hugging and kissing one particular male student. Two credible informants separately indicated that Stokes, an unmarried, middle-aged man, intimated that he was sexually attracted to children and boasted about living with young Thai boys. ICE Investigators also verified through cooperation with Thai authorities that a witness had, on at least one occasion, seen young boys reporting to Stokes's private quarters.")

¹⁹⁸ Id.

Although foreign intelligence collection is not one of the objectives of extraterritorial electronic border searches, In re Terrorist Bombings, as well as Stokes, provide some guidance as to under what circumstances an extraterritorial search is reasonable under the Fourth Amendment in general. These cases suggest that such searches are reasonable when there is no damage to physical property; the scope of the search is limited to items that constitute digital contraband or otherwise fall under CBP officers' authority to inspect or exclude; the search was not conducted covertly or without notice to the defendant; and the search is not too lengthy.¹⁹⁹ All of these factors are consistent with border search jurisprudence's definition of reasonableness.²⁰⁰

II. Analysis

This Comment's analysis will proceed in two parts: first, arguing that forensic electronic border searches conducted at the U.S. border and ports of entry do not require reasonable suspicion;²⁰¹ second, asserting that, even if they do, forensic extraterritorial electronic border

¹⁹⁹ Id.; In re Terrorist Bombings, 552 F.3d 157, 173-74 (2d Cir. 2008).

²⁰⁰ See United States v. Flores-Montano, 541 U.S. 149, 155-56 (2004) (damage to physical property); United States v. Montoya de Hernandez, 473 U.S. 531, 542 (1985) (finding that detention of person being searched must be reasonably related to the circumstances which justified it initially); United States v. Stanley, 545 F.2d 661, 667 (9th Cir. 1976) (“[T]he individual is on notice that his privacy may be invaded when he crosses the border”); Montoya de Hernandez, 473 U.S. at 543 (permitting CBP officers to detain an individual “for such time as necessary to confirm their suspicions”).

²⁰¹ See infra part II.A.

searches at Preclearance locations do not.²⁰² The first part will rely on the historical distinction between searches of one’s person and one’s property; on the assertion that Riley and Carpenter do not control the Court’s analysis in the border search context; and on the fact that forensic electronic searches are often less invasive than manual searches.²⁰³ The second part will contend (1) the Fourth Amendment applies at Preclearance locations; (2) travelers’ privacy expectations are further reduced in a foreign country; and (3) the Government’s legitimate interests, already at their “zenith” at traditional border control locations, are even greater at Preclearance locations.²⁰⁴

A. Forensic electronic border searches do not require reasonable suspicion.

This part of my analysis will argue that forensic electronic border searches that are conducted on U.S. territory do not require reasonable suspicion. First, this Comment will distinguish between border searches of property and border searches of persons and examine how the Ninth Circuit and the district court in Alasaad v. Nielsen failed to apply this distinction. Second, it will demonstrate that Riley does not apply in the border search context. Third, this Comment will note that forensic electronic searches can be less invasive of one’s privacy than manual searches.

²⁰² See infra part II.B

²⁰³ See infra part II.A.

²⁰⁴ See infra part II.B.

1. Searches of property and persons implicate fundamentally different privacy interests.

That nonroutine border searches require reasonable suspicion, and that routine ones do not, is undisputed.²⁰⁵ Further, most courts that require reasonable suspicion for forensic electronic border searches do not contend that manual electronic border searches mandate such suspicion.²⁰⁶ Thus, the issues are whether forensic electronic border searches are somehow nonroutine and whether they implicate significantly different privacy interests than manual searches. Border search jurisprudence, as well as other Fourth Amendment case law, answers in the negative and suggests that a far greater disparity in privacy concerns exists between searches of property and persons.

The Court has only found searches of the alimentary canal and strip, body cavity, and involuntary x-ray searches—all of which are searches of the person—to be nonroutine.²⁰⁷ Dissenting from the majority opinion in Montoya de Hernandez, Justice Brennan went so far as to suggest that a warrant should be required for intrusive searches of the person, which constitute “an extreme invasion of personal privacy.”²⁰⁸ In contrast, in Flores-Montano, Chief Justice Rehnquist explicitly distinguished between “highly intrusive searches of the person” and searches of property, finding that vehicles can be searched at the border without reasonable

²⁰⁵ E.g., United States v. Cano, 934 F.3d 1002, 1012 (9th Cir. 2019).

²⁰⁶ E.g., id. at 1016.

²⁰⁷ United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985); id. at 541 n. 4.

²⁰⁸ Id. at 556 (Brennan, J., dissenting).

suspicion, and no justice disagreed.²⁰⁹ Further, while the Court has long, and often, held that “an invasion of bodily integrity implicates an individual’s most personal and deep-rooted expectations of privacy,” congressionally-authorized suspicionless border searches of property predate the Fourth Amendment.²¹⁰

Applying the above principles to the facts of Alasaad v. Nielsen reveals how the Court would decide such a case. In that case, plaintiffs sued CBP, alleging that several of its officers violated the Fourth Amendment’s protection against unreasonable searches and seizures when the officers searched their electronic devices at ports of entry to the United States.²¹¹ Many of the plaintiffs’ stories present minor or no issues under the Fourth Amendment and the border search exception. The main complaint most plaintiffs had was that CBP officers searched their devices without individualized suspicion,²¹² which officers may do for any other piece of property.²¹³ Another concern was the length of time for which their persons and their devices were detained.²¹⁴ However, nothing in the facts suggests that either were detained for longer than

²⁰⁹ United States v. Flores-Montano, 541 U.S. 149, 152 (2004).

²¹⁰ Missouri v. McNeely, 569 U.S. 141, 148 (2013) (quotations marks omitted); Act of July 31, 1789, 1 St. 29, 43.

²¹¹ Alasaad v. Nielsen, No. 17-cv-11730-DJC, 2019 WL 5899371, at *1, *1 (D. Mass. Nov. 12, 2019).

²¹² See e.g., Alasaad v. Nielsen, No. 17-cv-11730-DJC, 2018 WL 2170323, at *1, *5 (May 9, 2018) (denying motion to dismiss).

²¹³ Flores-Montano, 541 U.S. at 151-52.

²¹⁴ Alasaad, No. 17-cv-11730-DJC, 2019 WL 5899371, at *3.

“necessary to confirm [the CBP officers’] suspicions” in violation of Montoya de Hernandez’s holding.²¹⁵ There, officers conducted a highly intrusive alimentary canal search and detained the defendant for “almost 24 hours,”²¹⁶ which the Court concluded was not unreasonably long.²¹⁷ Here, officers generally examined the plaintiffs’ property for about twenty minutes and, at most, three and a half hours.²¹⁸ Even the fact that one plaintiff, a non-U.S. citizen,²¹⁹ was personally detained for seven hours while officers searched his phone pales in comparison to the detention of the defendant in Montoya de Hernandez.²²⁰ Only the plaintiff whose phone’s functionality was damaged has a colorable claim, given that the search was somewhat destructive of his property.²²¹

²¹⁵ United States v. Montoya de Hernandez, 473 U.S. 531, 543 (1985);

²¹⁶ Id. at 546 (Brennan, J., dissenting) (emphasis in original).

²¹⁷ Id. at 544.

²¹⁸ See Alasaad, No. 17-cv-11730-DJC, 2018 WL 2170323, at *5-*8.

²¹⁹ Cf. Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) (“The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.”)

²²⁰ Alasaad, No. 17-cv-11730-DJC, 2018 WL 2170323, at *6.

²²¹ United States v. Flores-Montano, 541 U.S. 149, 155-56 (2004).

Although the Ninth Circuit argued that the Government could not reasonably expect travelers to leave devices or files they did not want searched at home or on a home computer because of the inconvenience that would impose, the Eleventh Circuit rightly countered that “the Fourth Amendment does not guarantee the right to travel without great inconvenience.”²²² To support this assertion, Judge Pryor provided the example of the extensive TSA screening procedures which are now required for all airplane passengers.²²³ Thus, although all the Alasaad plaintiffs were undoubtedly subjected to “great inconvenience” while traveling, the inconvenience associated with air travel—not to mention the centuries-old requirement that international travelers must go through customs—is reasonably expected, and the Government cannot be expected to abdicate its role in preventing the introduction of contraband into the United States to spare less than one percent of international travelers to the United States from inconvenience. In Flores-Montano, the Court likewise acknowledged that “[r]espondent points to no cases indicating the Fourth Amendment shields entrants from inconvenience or delay at the international border.”²²⁴

²²² United States v. Touset, 890 F.3d 1227, 1235 (11th Cir. 2018).

²²³ Id.

²²⁴ Flores-Montano, 541 U.S. at 155 n.3; see also United States v. Kolsuz, 890 F.3d 133, 152 (4th Cir. 2018) (Wilkinson, J. concurring) (“The general search that all of us must undergo at airports attests to the difficulties of ensuring airborne security through individualized suspicion. Our new world has brought inconvenience and intrusions on an indiscriminate basis, which none of us welcome, but which most of us undergo in the interest of assuring a larger common good. Our old world of relative security and relative privacy, if indeed it ever existed, is now gone with the

Additionally, the Ninth Circuit misapplied the Court’s note in Ramsey that it was not deciding whether a border search might be deemed “unreasonable” under the Fourth Amendment “because of the particularly offensive manner in which it is carried out.”²²⁵ Judge McKeown understood this note to mean that “particularly offensive” searches require reasonable suspicion.²²⁶ However, this reading is inaccurate for at least two reasons. First, Chief Justice Rehnquist explained in Ramsey that “unreasonable” meant “embraced within the prohibition of the Fourth Amendment,” or in other words, inconsistent with or in violation of the Fourth Amendment.²²⁷ Second, in the footnote, “particularly offensive” modifies the “manner” of the search, not the search itself.²²⁸ In this sense, while the act of searching an electronic device may be particularly offensive to some due to, for instance, the contents of the device, theoretically, the searcher must do so in an offensive manner to violate the Fourth Amendment.²²⁹ After all, in

wind. It is painful to dream of retrieving what is ours no longer.”); id. at 153 (“At what point the domestic conveniences of cell phone use should ripen into transnational entitlements is primarily for the political branches to determine.”).

²²⁵ United States v. Ramsey, 431 U.S. 606, 618 n.13 (1977).

²²⁶ United States v. Cotterman, 709 F.3d 952, 963 (9th Cir. 2013).

²²⁷ Ramsey, 431 U.S. at 622.

²²⁸ Id. at 618 n. 13.

²²⁹ I say “theoretically” because the Court has never held a search to have been conducted in a “particularly offensive manner.” United States v. Flores-Montano, 541 U.S. 149, 154 n.2 (2004) (“We again leave open the question ‘whether, and under what circumstances, a border search

Montoya de Hernandez, the Court found the alimentary canal search was carried out in a reasonable manner, although the “humiliating” or highly intrusive nature of such a search requires reasonable suspicion.²³⁰ If a twenty-four-hour detention that included officials’ refusal to allow the defendant to use the bathroom in private and a compulsory rectal examination can be conducted in a reasonable manner, surely an impersonal, automatic, software-driven search of an electronic device can be.²³¹ That such searches can uncover highly personal private information does not alter the Fourth Amendment calculus, since CBP officers have been searching physical containers holding intimate articles without individualized suspicion for centuries.²³² More importantly, since the Court has only determined the level of suspicion required for “highly intrusive [border] searches of the person,” no Supreme Court precedent supports the argument that border searches of property may be, by their nature, highly intrusive of one’s privacy and

might be deemed unreasonable because of the particularly offensive manner in which it is carried out (internal quotation marks omitted).”).

²³⁰ United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985).

²³¹ Cf. United States v. Feiten, No. 15-206, 2016 WL 894452 (E.D. Mich. Mar. 9, 2016) (internal quotation marks omitted) (“The OS Triage[, a software used for forensic laptop searches,] is actually less invasive of personal privacy than is a search done by hand. A border agent inspecting a computer manually, page-by-page in an electronic format, would access any document or program stored on the device, but a forensic preview using OS Triage merely allows a thumbnail preview of pictures and videos on a computer and can identify which of those pictures and videos have file names that match known file names of child pornography.”)

²³² See supra note 27.

require particularized suspicion.²³³ As this Comment argues below, to the extent that lower courts have found that Riley is one such case, they are incorrect.

2. Riley does not control the Court’s analysis in the border search context.

Riley, and the Riley-esque principles reaffirmed in Carpenter, do not apply electronic border searches. In Cotterman, the Ninth Circuit nonetheless asserted that electronic devices are different from every other type of property.²³⁴ Judge McKeown wrote, “[t]he private information individuals store on digital devices—their personal ‘papers’ in the words of the Constitution—stands in stark contrast to the generic and impersonal contents of a gas tank.”²³⁵ Of course, given the scarcity of border search jurisprudence and recency of the Flores-Montano decision, Judge McKeown’s choice of a gas tank as a piece of property other than an electronic device to which she could compare electronic devices is not surprising. Nonetheless, if Judge McKeown wished to make a true distinction between electronic devices and other types of property, she would have chosen a closer analogue: a physical object with non-generic and personal contents. For example, if one instead compares electronic devices to brief cases filled with medical and financial records, her distinction falls away.

Regardless, the purpose of this Comment, much less this section, is not to argue that Riley was wrongly decided or that Riley-esque principles do not have their place in certain contexts. Rather, this section seeks to demonstrate that Riley does not control in the border search context. After all, the Court did not intend for its Riley holding to be applied outside of

²³³ Flores-Montano, 541 U.S. at 152.

²³⁴ United States v. Cotterman, 709 F.3d 952, 964 (9th Cir. 2013).

²³⁵ Id.

the search-incident-to-arrest context, with Chief Justice Roberts warning against “untether[ing] the rule from the justifications underlying the” exception.²³⁶

Ensuring officer safety and preventing the destruction of evidence justify the search-incident-to-arrest exception, which are entirely distinct justifications from any that could be reasonably associated with the border search exception, such as preventing the introduction of contraband into the United States.²³⁷ Therefore, applying Riley to the border search context would be inconsistent with Riley itself.²³⁸ Further, in Riley, Chief Justice Roberts narrowly resolved the issue of whether the search-incident-to-arrest exception applies to cellphones by reasoning that neither justification for the search-incident-to-arrest exception applies, arguably making his discussion of the privacy interests implicated by cellphone searches dicta.²³⁹ Consequently, it would be even more far-fetched to apply Riley’s principles out of context.

²³⁶ Id. at 205 (quoting Riley v. California, 573 U.S. 373, 386 (2014)); see also Helen Hong, Border Searches of Digital Devices, 67 **DOJ J. Fed. L. & Prac.** 199, 207 (2019) (“[U]nlike the Supreme Court in Riley, the majority [in Cotterman] did not focus on whether border searches of digital devices bear some nexus to the justification for supporting the searches as a category.”).

²³⁷ Chimel v. California, 395 U.S. 752, 763 (1969).

²³⁸ See United States v. Vergara, 884 F.3d 1309, 1312 (11th Cir. 2018) (“[In Riley,] the Supreme Court expressly limited its holding to the search-incident-to-arrest exception.”).

²³⁹ See Riley, 573 U.S. at 386.

Nonetheless, in Alasaad, Judge Casper reasoned that Riley could be applied to the border search context largely because both exceptions tilt in favor of the Government.²⁴⁰ Any time courts permit the government to conduct searches and seizures without a warrant they are, by definition, recognizing that government interests outweigh individual privacy interests and weighing their analysis in favor of the Government.²⁴¹ That Chief Justice Roberts himself in Riley left open the question of whether “other case-specific Riley exceptions may still justify a warrantless search of a particular phone” suggests that it is equally, if not more, likely that the border search exception continues to apply to cellphones and other electronic devices as it does to other forms of property in the absence of an explicit Court holding to the contrary.²⁴² Bolstering this wager is the fact that both phone searches at issue in Riley were manual.²⁴³ Thus, relying on Riley to require reasonable suspicion for forensic electronic border searches, but not for manual ones—which, in the electronic border search context, is the one principle on which most lower courts agree²⁴⁴—involves a strange contortion of precedent that ignores the distinct facts and reasoning of Riley.

²⁴⁰ Alasaad v. Nielsen, No.17-cv-11730-DJC, 2019 WL 5899371, at *1, *12 (D. Mass. Nov. 12, 2019).

²⁴¹ United States v. Montoya de Hernandez, 473 U.S. 531, 537-538 (1985).

²⁴² Riley, 573 U.S. at 402; see also United States v. Saboonchi, 48 F. Supp. 3d 815, 817 (D. Md. 2014) (finding that the “[t]he border search is one such case-specific exception” and, thus, that the border search exception is “unaffected” by Riley).

²⁴³ Riley, 573 U.S. at 379; id. at 380.

²⁴⁴ See supra part I.A.1.

3. Forensic electronic border searches are often less invasive than manual ones.

Requiring reasonable suspicion for forensic electronic border searches, but not for manual searches, is a perplexing holding because the former are often less invasive than the latter. A border officer inspecting an electronic device manually could access any document or program stored on the device.²⁴⁵ However, one kind of forensic software used to inspect laptops only allows a thumbnail preview of pictures and videos on the laptop and identifies which of those pictures and videos have file names that match those known files of child sexual abuse imagery.²⁴⁶ This software “cannot locate deleted files or files that may be stored in carved or unallocated space nor can it access files that have been password-protected.”²⁴⁷ The use of this software—which one judge called an “exercise of electronic restraint on the part of border agents”²⁴⁸—is not dissimilar to a canine sniff for narcotics in a piece of luggage, where the only information the sniff discloses is the presence or absence of contraband.²⁴⁹ Thus, that a canine sniff is not even a search within the meaning of the Fourth Amendment supports the notion that forensic searches, which often only disclose the presence or absence of digital contraband such as child sexual abuse imagery, do not require reasonable suspicion.²⁵⁰ Further, if one views

²⁴⁵ United States v. Feiten, No. 15-20631, 2016 WL 894452, at *1, *6 (E.D. Mich. Mar. 9, 2016).

²⁴⁶ Id.

²⁴⁷ Id.

²⁴⁸ Id.

²⁴⁹ United States v. Place, 462 U.S. 696, 707 (1983).

²⁵⁰ Id.

electronic devices as digital equivalents to homes at the border, any software that locates deleted files is merely searching the digital analog of garbage abandoned and left outside the curtilage of the home. The latter is not entitled to a reasonable expectation of privacy, so neither is the former.²⁵¹

B. Forensic extraterritorial border searches may be conducted without reasonable suspicion.

In general, “when the United States acts against citizens abroad it can[not] do so free of the Bill of Rights.”²⁵² However, whether a particular provision of the Constitution applies extraterritorially must be determined “as questions arise.”²⁵³ Specifically, one must consider whether judicial enforcement of the constitutional provision in question would be “impracticable and anomalous.”²⁵⁴ At Preclearance locations, CBP officers perform the same border search function that they do at traditional border and port of entry locations, exercising authorities for the search of the person and property of U.S. persons.²⁵⁵ Judicial enforcement of the Warrant Clause abroad with respect to electronic border searches would be “impracticable” and

²⁵¹ *California v. Greenwood*, 486 U.S. 35, 40 (1988).

²⁵² *Reid v. Covert*, 354 U.S. 1, 5 (1957).

²⁵³ *Dorr v. United States*, 195 U.S. 138, 149 (1904).

²⁵⁴ *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (Kennedy, J. concurring).

²⁵⁵ *See* 19 U.S.C. § 1629 (inspections and pre-clearance in foreign countries); 8 U.S.C. § 1125a (pre-inspection at foreign airports); 8 U.S.C. § 235.5 (pre-inspection has the same effect as the final determination of admissibility).

“anomalous” for the reasons cited in In re Terrorist Bombings.²⁵⁶ Specifically, (1) a warrant has never been required for any border search;²⁵⁷ (2) the Preclearance agreements concluded thus far have not included a warrant requirement;²⁵⁸ (3) U.S. warrants would be a “dead letter” abroad;²⁵⁹ and (4) it is unclear whether U.S. judicial officers possess the authority to issue warrants for extraterritorial searches.²⁶⁰ However, several courts have at least proven their ability to assess the reasonableness of extraterritorial searches.²⁶¹

In cases in which the Court has found that a particular constitutional provision does not apply extraterritorially, such as Eisentrager and Verdugo, the main pitfall was the defendants’ relationship to the United States—or the lack thereof—a non-issue with respect to U.S.

²⁵⁶ 552 F.3d 157, 169-171 (2d Cir. 2008).

²⁵⁷ See supra Introduction.

²⁵⁸ See e.g., Agreement Between the Government of the United States of America and the Government of the Commonwealth of The Bahamas on Preclearance, U.S.-The Bahamas, art. III(d), Apr. 23, 1974, 25 U.S.T. 646 (“The Government of the Commonwealth of The Bahamas shall . . . furnish appropriate law enforcement assistance to the United States inspectors, including, upon request by a United States inspector, search by a Bahamian law enforcement officer in the presence of a United States officer of any person subject to preclearance . . . based on suspicion that such person is seeking to carry into the United States . . . merchandise or other articles the entry of which into the United States is prohibited or restricted . . .”).

²⁵⁹ In re Terrorist Bombings, 552 F.3d at 171 (citing Verdugo-Urquidez, 494 U.S. at 274).

²⁶⁰ In Re Terrorist Bombings, 552 F.3d at 171.

²⁶¹ See supra part I.B.1.

persons.²⁶² Thus, at least with respect to U.S. persons, the Fourth Amendment applies to forensic extraterritorial electronic border searches at Preclearance locations.²⁶³ Further, because CBP officers perform the same function that they do at traditional border locations, Preclearance locations act as functional equivalents of the border, and the border search exception applies.²⁶⁴

Additionally, the Government’s legitimate interests, already at their “zenith” at traditional border locations, are even greater at Preclearance stations, and since Fourth Amendment claims are generally weaker where the United States does not enjoy de jure sovereignty, travelers’ privacy expectations are further reduced abroad.²⁶⁵ With respect to the former, the establishment of Preclearance locations builds on the traditional justification for the border search exception, preventing the introduction of contraband into the United States. After 9/11 and, in particular, the attempted terrorist attack on Northwest Airlines Flight 253 from Amsterdam to Detroit on December 25, 2009, the Preclearance program was greatly expanded to “address threats at the earliest possible point” and stop terrorists who sought to “avoid U.S. screening and targeting efforts by carrying out attacks on U.S.-bound aircraft before arrival in the United States.”²⁶⁶ Thus,

²⁶² See *Johnson v. Eisentrager*, 339 U.S. 763, 782 (1950); *Verdugo-Urquidez*, 494 U.S. at 271.

²⁶³ Cf. Brittany Davidson, Note, Shoot First, Ask Questions Later: Constitution Rights at the Border after Boumediene, 64 *Am. U. L. Rev.* 1547, 1568-69 (2015) (asserting that, under *Boumediene*, the Fourth Amendment applies in Mexican territory near the U.S.-Mexico border).

²⁶⁴ See *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

²⁶⁵ See *Verdugo-Urquidez*, 494 U.S. at 268.

²⁶⁶ CBP, *Preclearance Expansion: FY2016 Guidance for Prospective Applicants*, available at <https://www.cbp.gov/sites/default/files/assets/documents/2016->

even if territorial forensic electronic border searches require reasonable suspicion, extraterritorial ones do not because the balance of interests favors the Government. However, were an extraterritorial electronic border search ever to be challenged as unlawful, the court would have to consider the In re Terrorist Bombings and Stokes factors listed above: whether there was any damage to physical property; whether the scope of the search was appropriately limited; whether the search was conducted covertly or without notice to the defendant; and whether the search was longer than necessary to confirm the officers' suspicions.²⁶⁷

Conclusion

Before the Fourth Amendment was even ratified, U.S. customs officers exercised plenary authority to prevent the entry of contraband into the United States and to search ships and other containers in furtherance of that powerful governmental interest. Despite this longstanding authority, lower courts have been sharply divided on whether to restrict CBP's ability to inspect electronic media at the border or functional equivalents of the border because of the privacy concerns that they implicate or whether to empower CBP to flexibly respond to a novel medium for smuggling easily hidden digital contraband into the United States. An additional

May/FY16_Preclearance_Guidance_Feb2016_05%2016%2016_final_0.pdf (last visited Jan. 26, 2020); see also 9/11 Commission Report 389 (2004), available at [http:// www.9-11commission.gov/report/911Report.pdf](http://www.9-11commission.gov/report/911Report.pdf) (“The further away from our borders that screening occurs, the more security benefits we gain.”); see generally Gregory W. Bowman, Thinking Outside the Border: Homeland Security and the Forward Deployment of the U.S. Border, 44 **Hous. L. Rev.** 189 (2007) (describing U.S. efforts to “push the border outward” and asserting their validity under international law).

²⁶⁷ Supra part I.B.1.

complicating factor that this Comment has considered is extraterritoriality. In other words, it has examined what level of suspicion is required for electronic border searches at CBP Preclearance locations.

First, this Comment demonstrated that searches of one's person implicate far greater privacy concerns than searches of property; Riley does not control in the border search context; and forensic electronic border searches are often less invasive than manual ones, all for the proposition that forensic electronic border searches at the U.S. border and ports of entry do not require reasonable suspicion. Then, it noted that, based on the Supreme Court precedent available and harmonious lower court jurisprudence, the Fourth Amendment applies to U.S. persons abroad and maintained that CBP officers at Preclearance locations are only subject to a flexible reasonableness requirement under the Fourth Amendment. This reasonableness requirement weighs in favor of not imposing an unduly burdensome reasonable suspicion constraint on CBP officers at Preclearance locations, given the further reduced privacy expectations of travelers at these locations and the further heightened government interest in preventing the entry of contraband and dangerous persons into the United States.

Some have gone so far as to argue that the required level of suspicion for electronic border searches is “principally a legislative question, not a judicial one” and that the political branches “are much better equipped . . . to appreciate both the privacy interests at stake and the magnitude of the practical risks involved.”²⁶⁸ However, until Congress enacts legislation on this

²⁶⁸ E.g., *United States v. Kolsuz*, 890 F.3d 133, 148-49 (4th Cir. 2018) (Wilkinson, J., concurring) (“Might we wish to hear in a manner more probing than appellate briefs and oral argument exactly what are the dimensions of the threats we face? What makes us think the

issue, courts should apply border search doctrine pursuant to longstanding jurisprudence and historical practice that accords significant deference to the Executive Branch in this context. CBP Preclearance, and customs inspections in general, may be highly “vexatious” at times, but it is quickly becoming the United States’ first line of defense in an increasingly interconnected and increasingly complex world that requires elastic and innovative legal doctrines to permit the detection of the very few items and enemies who mean us harm.

elective branches would downgrade the significant privacy interests the majority rightly identifies? Might the other two branches, if given a fair chance, have something to say? And do not Articles I and II, which set forth the legislative and executive roles in matters of grave international import, give them the right to say it? Who are we to propound the idea that democratic bodies, where Fourth Amendment reasonableness is concerned, have nothing to contribute?”).