

**FOREWORD**  
**2008 FOURTH AMENDMENT SYMPOSIUM**  
**THE FOURTH AMENDMENT AT THE**  
**INTERNATIONAL BORDER**

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The National Center for Justice and the Rule of Law,<sup>1</sup> which is a program of The University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. In furtherance of its mission, the Center has established the *Fourth Amendment Initiative*. The purpose of the Center's initiative is to promote awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and

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seizure principles.

A central pillar of the *Fourth Amendment Initiative* is its annual symposium on important search and seizure topics. On April 15, 2008, the Center hosted its annual symposium, which coincided with the second day of a conference entitled *The Fourth Amendment: Contemporary Issues for Appellate Judges*, sponsored by the Center in cooperation with the National Judicial College. The Center believes that the symposium—and the insightful articles published in this special edition of the *Mississippi Law Journal* that stemmed from the presentations at that event—significantly further the Center’s mission and, more importantly, make significant contributions to the understanding of search and seizure principles. The Center, and I personally, wish to thank the leading legal scholars who participated.

Five distinguished scholars spoke at the symposium and wrote articles for this edition of the law journal: Professor Robert Bloom, of Boston College Law School; Professor Susan A. Freiwald, of the University of San Francisco School of Law; Associate Professor Matthew Hall, of the University of Mississippi School of Law; Professor John Palfrey, Executive Director, Berkman Center for Internet and Society, at Harvard University School of Law; and Professor Harvey Rishikof, of the National War College. After providing an overview of the Supreme Court’s border doctrine jurisprudence, each of their articles will be introduced.

#### OVERVIEW OF THE INTERNATIONAL BORDER DOCTRINE<sup>2</sup>

Travelers, their baggage, goods, and other items crossing the international border<sup>3</sup> of the United States are subject to

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<sup>2</sup> This summary is largely drawn from THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 10.2. (Carolina Academic Press 2008).

<sup>3</sup> The power to search and seize without suspicion extends to persons and goods leaving the country. See generally Larry Cunningham, *The Border Search Exception as Applied to Exit and Export Searches: A Global Conceptualization*, 26 QUINNIPIAC L. REV. 1 (2007). It also extends to the functional equivalent of the international border. E.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). Border searches without suspicion may, under certain circumstances, include searches in the United States’

search.<sup>4</sup> This *sui generis* power is grounded on national sovereignty, that is, the federal government has both the right and obligation to protect the nation's borders from legally excludable persons and things.<sup>5</sup> That authority has strong historical roots.<sup>6</sup> There is language in the cases speaking of that

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interior of those who have recently crossed the border, based on surveillance starting at the border. *E.g.*, *United States v. Hill*, 939 F.2d 934 (11th Cir. 1991). Congress has given the Coast Guard and customs officials broad authority to stop and seize on water. *See, e.g.*, *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (individualized suspicion not required for Coast Guard or Customs Service to board vessel and to examine owner's documents in waters where vessel has ready access to open sea). Also, the Fourth Amendment is inapplicable to searches and seizures against aliens in international waters. *United States v. Bravo*, 489 F.3d 1, 8-9 (1st Cir. 2007). Attempts to protect national sovereignty have moved away from the immediate vicinity of the border and into areas appurtenant to it. Law enforcement efforts in such areas are not considered border searches, although the national interest in protecting against such activities as illegal immigration and smuggling have been viewed as weighty governmental interests. Several investigative techniques have been utilized by immigration authorities. Roving patrols by immigration authorities have been held to need articulable suspicion of criminal activity before stopping vehicles that are not known to have crossed the border, even though they are traveling near it. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

<sup>4</sup> *E.g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *Carroll v. United States*, 267 U.S. 132, 154 (1925). *See also* *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 62-63 (1974) (upholding regulation requiring record keeping of certain international banking transactions). *Cf.* *Von Cotzhausen v. Nazro*, 107 U.S. 215, 218 (1883) ("all 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 revenue laws).

<sup>5</sup> *E.g.*, *United States v. Montoya de Hernandez*, 473 U.S. 531, 538-39 (1985) (emphasizing sovereignty interests at the border); *Almeida-Sanchez v. United States*, 413 U.S. 266, 291 (1973) (White, J., dissenting) ("Jurisdiction over its own territory . . . is an incident of every independent nation."); *Carroll v. United States*, 267 U.S. 132, 154 (1925) (speaking of the power of "national self-protection"); *Boyd v. United States*, 116 U.S. 616, 623 (1886) (acknowledging the long pedigree and constitutionality of customs searches and seizures). "At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives." *Montoya de Hernandez*, 473 U.S. at 544.

<sup>6</sup> The power of customs officials to conduct searches at the border has an "impressive historical pedigree." *United States v. Villamonte-Marquez*, 462 U.S. 579, 585 (1983). "Since 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." *United States v. Montoya de*

power in absolutist terms: “The authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity.”<sup>7</sup> As another example, the Court has stated:

Border searches . . . from before the adoption of the Fourth Amendment, have been considered to be “reasonable” by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless “reasonable” has a history as old as the Fourth Amendment itself.<sup>8</sup>

Most recently, the Court has stated:

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Hernandez, 473 U.S. 531, 537 (1985). See also *United States v. Twelve 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 125 (1973) (“Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.”). 19 U.S.C. § 1581(a) provides that customs officials “at any time [may] go on board of any vessel or vehicle . . . and examine, inspect, and search the vessel or vehicle and every part thereof . . . .” That statute is derived from a statute passed by the First Congress, see *Villamonte-Marquez*, 462 U.S. at 584 (citing the Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 164) which “authorized customs officers to board and search vessels bound to the United States and to inspect their manifests, examine their cargoes, and prevent any unloading while they were coming in.” *Maul v. United States*, 274 U.S. 501, 505 (1927).

The earliest customs statute, Act of July 31, 1789, ch. 5, 1 Stat. 29, was passed two months before Congress proposed the Bill of Rights and contained an “acknowledgment of plenary customs power” to conduct warrantless inspections of vessels. *United States v. Ramsey*, 431 U.S. 606, 616 (1977). The 1789 Act granted customs officials “full power and authority” to enter and search “any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed;” in contrast, searches of any “particular dwelling-house, store, building, or other place” were authorized with a warrant upon “cause to suspect.” § 24, 1 Stat. 43. That provision was carried forward in the Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 170, and is distinct from the separate authority of customs to conduct suspicionless searches of articles and effects when presented for entry at the border. Because the 1790 Act was passed by the same Congress that promulgated the Fourth Amendment, “it is clear that the members of that body did not regard searches and seizures of this kind as ‘unreasonable,’ and they are not embraced within the prohibition of the amendment.” *Ramsey*, 431 U.S. at 617 (quoting *Boyd v. United States*, 116 U.S. 616, 623 (1886)).

<sup>7</sup> *Torres v. Puerto Rico*, 442 U.S. 465, 472-73 (1979).

<sup>8</sup> *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

Time and again, we have stated that “searches made at the border, pursuant to the long-standing right of 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.”<sup>9</sup>

The Supreme Court has never invalidated a search or seizure at the border. Obscuring the clarity of that fact and the underlying border doctrine principles are two aspects of the Court’s cases. First, as the balancing test to measure reasonableness became prevalent in the latter part of the twentieth century,<sup>10</sup> that test began to insinuate itself into the border doctrine opinions, even as the Court was noting that “the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border. . . .”<sup>11</sup> Second, some of the Court’s opinions have stated that, for intrusions beyond the scope of “routine” customs searches and inspections, the individual liberty interest protected by the Fourth Amendment is not outweighed by mere assertions of sovereignty and, in the balance of interests, individualized suspicion of illegal activity becomes necessary.<sup>12</sup> Hence, in *United States v. Montoya de Hernandez*,<sup>13</sup> the Court upheld the sixteen-hour detention of a person reasonably suspected to be a “balloon swallower,” which is a method of smuggling narcotics into the country by hiding them in the person’s alimentary canal.<sup>14</sup> In contrast to “[r]outine searches of the persons and effects of entrants . . . ,” which are not “subject to any requirement of reasonable suspicion, probable cause, or warrant,”<sup>15</sup> the detention in *Montoya de Hernandez* was viewed as nonroutine, but was nevertheless upheld, with the Court applying a balancing test:

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<sup>9</sup> *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004) (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1977)).

<sup>10</sup> See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 11.3.4 (Carolina Academic Press 2008).

<sup>11</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). See also *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

<sup>12</sup> See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985).

<sup>13</sup> 473 U.S. 531 (1985).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 538.

We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.<sup>16</sup>

In *Montoya de Hernandez*, the Court noted that it was expressing no view “on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches.”<sup>17</sup> In contrast, Justice Stevens, in his concurring opinion, believed that customs agents could “require that a nonpregnant person reasonably suspected of this kind of smuggling submit to an x-ray examination as an incident to a border search.”<sup>18</sup> Justice Brennan, dissenting, believed that travelers at the border could be routinely “subjected to questioning, patdowns, and thorough searches of their belongings.”<sup>19</sup> He believed that “body-cavity searches, x-ray searches, and stomach pumping” were “highly intrusive investigative techniques” that must be authorized by a judicial officer.<sup>20</sup>

Lower courts and commentators have used variations of the balancing test and the distinction between routine and nonroutine intrusions to evaluate border searches and seizures. There are two issues here: the distinction between routine and nonroutine intrusions, and the needed level of suspicion to justify those intrusions. As to the first, a vague and somewhat

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<sup>16</sup> *Id.* at 541. *Cf.* *United States v. Flores-Montano*, 541 U.S. 149, 155 n.3 (2004) (observing that delays of “one to two hours at international borders are to be expected.”).

<sup>17</sup> 473 U.S. at 541 n.4.

<sup>18</sup> *Id.* at 545 (Stevens, J., concurring).

<sup>19</sup> *Id.* at 551 (Brennan, J., dissenting).

<sup>20</sup> *Id.* *Cf.* *United States v. Lawson*, 461 F.3d 697, 700 (6th Cir. 2006) (“As to the x-ray of her luggage, the officers did not need reasonable suspicion before undertaking this examination, one that has become a customary feature of commercial airline travel. An x-ray examination of a *person*, it is true, may require some level of suspicion because it may present risks to health that an x-ray examination of luggage will not present and because it may permit greater intrusions into the privacy and dignity of the individual.”). *See generally* Lauren Bercuson, Comment, *Picture Perfect? X-Ray Searches at the United States Border Require Guidance*, 35 U. MIAMI INTER-AM. L. REV. 577 (2004) (discussing courts’ treatment of x-rays at the border and medical issues involved).

complex jurisprudence<sup>21</sup> attempting to distinguish between the two types of intrusions had developed prior to *United States v. Flores-Montano*,<sup>22</sup> with the courts creating lists of routine and nonroutine searches.<sup>23</sup> For example, patdowns<sup>24</sup> and shoe checks<sup>25</sup> are generally considered routine, but body cavity<sup>26</sup> or strip searches<sup>27</sup> are not.

As to the level of suspicion needed, several decades of development created some unusual standards of reasonableness. For example, a “real suspicion” was said to justify a strip search,<sup>28</sup> a “clear indication” that a suspect was carrying contraband in a body cavity justified that examination,<sup>29</sup> but only a “minimal showing of suspicion” was needed for a

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<sup>21</sup> See, e.g., *United States v. Molina-Tarazon*, 279 F.3d 709, 713 (9th Cir. 2002) (border “searches of handbags, luggage, shoes, pockets and the passenger compartments of cars are clearly routine . . .” and may be conducted without reasonable suspicion and “the distinction between ‘routine’ and ‘nonroutine’ turns on the level of intrusiveness [of the search].”); *United States v. Robles*, 45 F.3d 1, 5 (1st Cir. 1995) (noting that “[t]he government concedes that drilling a hole in the cylinder was nonroutine,” and having “little difficulty concluding that drilling a hole into the cylinder was not a routine search”); *United States v. Braks*, 842 F.2d 509, 512 (1st Cir. 1988) (outlining the following factors for consideration in analyzing the invasiveness of a border search: “(1) whether search results in exposure of intimate body parts or requires suspect to disrobe; (2) whether physical contact between Customs officials and the suspect occurs during the search; (3) whether force is used to effect the search; (4) whether the type of search exposes the suspect to pain or danger; (5) the overall manner in which the search is conducted; and (6) whether the suspect’s reasonable expectations of privacy, if any, are abrogated by the search.”) (internal citations omitted).

<sup>22</sup> 541 U.S. 149 (2004).

<sup>23</sup> E.g., *Tabbaa v. Chertoff*, 509 F.3d 89, 98 (2d Cir. 2007); *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006).

<sup>24</sup> E.g., *Kaniff v. United States*, 351 F.3d 780, 784-88 (7th Cir. 2003) (collecting cases); *Davis v. State*, 754 A.2d 1111, 1114 (Md. Ct. Spec. App. 2000). Cf. *United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995) (requiring “minimal” suspicion for patdown).

<sup>25</sup> E.g., *United States v. Ramos-Saenz*, 36 F.3d 59, 61 (9th Cir. 1994).

<sup>26</sup> E.g., *United States v. Des Jardins*, 747 F.2d 499, 505 (9th Cir. 1984).

<sup>27</sup> E.g., *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006); *United States v. Oyekan*, 786 F.2d 832, 837 (8th Cir. 1986); *State v. Green*, 787 A.2d 186, 195 n.9 (N.J. Super. Ct. App. Div. 2001). Cf. *United States v. Braks*, 842 F.2d 509, 513 (1st Cir. 1988) (lifting up of skirt by defendant in private room revealing bulge of drugs in girdle considered routine border search); *Davis v. State*, 754 A.2d 1111, 1114 (Md. Ct. Spec. App. 2000) (“Only strip searches and body cavity searches consistently have been considered non-routine.”).

<sup>28</sup> *United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970).

<sup>29</sup> *United States v. Des Jardins*, 747 F.2d 499, 505 (9th Cir. 1984).

patdown.<sup>30</sup> These standards developed in the wake of *Terry v. Ohio*,<sup>31</sup> where it appeared that the individualized suspicion standard would become multiplicitous. That did not happen<sup>32</sup> and, indeed, in the context of a border seizure, the Court explicitly stated in *United States v. Montoya de Hernandez*<sup>33</sup> that it was rejecting reasonableness standards of individualized suspicion beyond reasonable suspicion and probable cause. Nonetheless, lower courts continue to use language suggesting different measures of reasonableness, albeit some have attempted to retrofit their jurisprudence to be consistent with Supreme Court case law.<sup>34</sup> Currently, the prevailing view appears to be that, for intrusive searches and seizures at the border, reasonable suspicion is needed.<sup>35</sup>

So how viable is the distinction between routine and nonroutine intrusions? In *United States v. Flores-Montano*,<sup>36</sup> the Court addressed the question whether customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband.<sup>37</sup> The district court had granted suppression on the basis of Ninth Circuit precedent requiring reasonable suspicion for "nonroutine" border searches, and the appellate court had summarily affirmed.<sup>38</sup> Flores-Montano arrived at a border crossing in a station wagon and, although the facts suggested

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<sup>30</sup> *United States v. Des Jardins*, 747 F.2d 499, 505 (9th Cir. 1984); *United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995).

<sup>31</sup> 392 U.S. 1 (1968).

<sup>32</sup> See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 6.3.2. (Carolina Academic Press 2008).

<sup>33</sup> 473 U.S. 531, 541 (1985).

<sup>34</sup> *E.g.*, *United States v. Oyekan*, 786 F.2d 832, 837 (8th Cir. 1986) (equating "real suspicion" with articulable suspicion, which justifies a strip search); *State v. Green*, 787 A.2d 186, 195 n.9 (N.J. Super. Ct. App. Div. 2001) (same and asserting need for articulable suspicion for nonroutine searches such as strip searches).

<sup>35</sup> *E.g.*, *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006); *Kaniff v. United States*, 351 F.3d 780, 784-88 (7th Cir. 2003); *United States v. Ramos-Saenz*, 36 F.3d 59, 61 (9th Cir. 1994); *United States v. Oyekan*, 786 F.2d 832, 837 (8th Cir. 1986); *State v. Green*, 787 A.2d 186, 195 n.9 (N.J. Super. Ct. App. Div. 2001).

<sup>36</sup> 541 U.S. 149 (2004).

<sup>37</sup> *Id.* at 152.

<sup>38</sup> *Id.* at 151.

that there was reasonable suspicion of criminal activity,<sup>39</sup> the federal government declined to argue the point because it wanted to test the Ninth Circuit precedent.<sup>40</sup> A customs inspector, after brief questioning and tapping of the gas tank of the vehicle, referred Flores-Montano to a secondary station.<sup>41</sup> After more tapping, a mechanic was called, who arrived twenty to thirty minutes later.<sup>42</sup> The car was raised on a lift, the gas tank removed and disassembled, and marijuana recovered from inside of it.<sup>43</sup> “Th[at] process took [about] 15 to 25 minutes.”<sup>44</sup>

The Supreme Court unanimously found that the search was reasonable, with the Court maintaining that customs authorities have plenary authority to conduct such a search.<sup>45</sup> The Court grounded its view on the belief that border searches are intrinsic to sovereignty, that there was significant historical support for such searches, that Congress had consistently authorized border intrusions, and that the government had a “paramount interest in protecting the border.”<sup>46</sup> Addressing the viability of the distinction between “routine” and “nonroutine border searches,” the Court asserted:

[T]he reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles. Complex balancing tests to determine what is a “routine” search of a vehicle, as opposed to a more “intrusive” search of a person, have no place in border searches of vehicles.

The Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, we have stated that

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<sup>39</sup> See, e.g., *id.* at 150-51.

<sup>40</sup> See *id.* at 151.

<sup>41</sup> *Id.* at 150-51.

<sup>42</sup> *Id.* at 151.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 155.

<sup>46</sup> *Id.* at 152-53.

“searches made at the border, pursuant to the longstanding right of 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.”<sup>47</sup>

Keeping open the possibility that some intrusions may be unreasonable, *Flores-Montano* specifically referenced drilling into vehicles and, quoting *Ramsey*,<sup>48</sup> expressed no view on “whether, and under what circumstances, a border search might be deemed unreasonable because of the particularly offensive manner it is carried out.”<sup>49</sup> The Court did not, however, repeat the routine-nonroutine distinction of previous cases.<sup>50</sup>

In light of *Flores-Montano*, some lower court opinions are setting aside the routine-nonroutine distinction, as applied to searches of objects, and instead are focusing on the manner in which the search was conducted.<sup>51</sup> Hence, in *United States v. Hernandez*,<sup>52</sup> the Ninth Circuit observed that the “routine/non-routine analytical framework has been denounced by the Supreme Court insofar as searches of property are concerned.”<sup>53</sup> The *Hernandez* court applied *Flores-Montano* to

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<sup>47</sup> *Id.* at 152-53 (citation omitted).

<sup>48</sup> *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

<sup>49</sup> 541 U.S. at 155 n.2. *Cf.* *United States v. Lawson*, 461 F.3d 697, 702 (6th Cir. 2006) (“customs officers . . . did not violate . . . Fourth Amendment when they cut the liner [of traveler’s] luggage, then drilled a hole in it”); *United States v. Hernandez*, 424 F.3d 1056, 1057 (9th Cir. 2005) (“initial search of the vehicle, which involved merely pulling back the interior panels of the doors on the vehicle in such a manner that they could be replaced without damage, was not especially destructive or otherwise carried out in an offensive manner”); *United States v. Chaudhry*, 424 F.3d 1051, 1053 (9th Cir. 2005) (concluding “that a single 5/16-inch hole drilled in the bed of a pickup truck does not require reasonable suspicion . . .”).

<sup>50</sup> *Id.*

<sup>51</sup> *See* *United States v. Romm*, 455 F.3d 990, 997 n.11 (9th Cir. 2006) (interpreting *Flores-Montano* to suggest “that the search of a traveler’s property at the border will always be ‘routine’ . . .”). Other courts continue to use the routine–non-routine framework. *E.g.*, *United States v. Whitted*, 541 F.3d 480, 485-86 (3d Cir. 2008) (maintaining routine–non-routine framework and holding that search of passenger cabin of cruise ship returning to the United States required reasonable suspicion).

<sup>52</sup> 424 F.3d 1056 (9th Cir. 2005).

<sup>53</sup> *Id.* at 1058 n.2. *See also* *United States v. Cortez-Rocha*, 394 F.3d 1115, 1119-20 (9th Cir. 2005) (holding that destruction of spare tire not unreasonably destructive and

the situation in which customs officials removed a door panel on a vehicle:

[T]he initial search—which involved removal of the interior door panels in “an easy way, [so] that if we [don’t] find anything [we] can put it back together without damage. Very gently”—caused no significant damage to, or destruction of, the vehicle. Nor did it undermine the safety of the vehicle, or present any potentially harmful effects to the health of the motorist. . . . [T]he damage involved through the removal of the door panel in this case was minimal. In short, the gentle removal of the door panel was not “so destructive as to require a different result.” . . . Neither can it be said that the search was conducted in a particularly offensive manner. . . . Therefore, reasonable suspicion was not required prior to conducting the search.<sup>54</sup>

#### LETTERS AND DATA AS TARGETS; THE TECHNOLOGICAL BORDER

In *United States v. Ramsey*,<sup>55</sup> the Court was confronted with a situation in which a customs official, based on reasonable suspicion, opened letters mailed from Bangkok, Thailand, to addresses in Washington, D.C.<sup>56</sup> Congress and applicable postal regulations had authorized the opening of an envelope if there

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observing that, “[a]lthough cutting a spare tire is certainly damaging to that tire, the important factor is whether the procedure results in significant damage to, or destruction of, the vehicle,” with a focus on “operation of the vehicle . . .”); *United States v. Camacho*, 368 F.3d 1182, 1186 (9th Cir. 2004) (upholding suspicionless border search in which officers used radioactive density meter called “Buster” to search inside of spare tire); *United States v. Bennett*, 363 F.3d 947, 951 (9th Cir. 2004) (noting that, although most border searches involving vehicles do not require any articulable level of suspicion, “especially destructive searches of property . . . may require reasonable suspicion.”). *But cf.* Recent Case, *United States v. Cortez-Rocha*, 394 F.3d 1115 (9th Cir. 2005), 118 HARV. L. REV. 2921 (2005) (criticizing court’s methodology and stating that “the Ninth Circuit should have seized the opportunity to impose a balancing test for determining the reasonableness of destructive border searches, thereby according principled protection to Fourth Amendment rights in a context where such protection is sorely needed.”).

<sup>54</sup> *Hernandez*, 424 F.3d at 1059. The court added that, “[o]nce the initial package of marijuana was found, of course, the officers had ample suspicion to justify the further removal of, and damage to, the door panels, glove box and other components of the vehicle, in an effort to locate additional stashes of marijuana.” *Id.* at 1059 n.5.

<sup>55</sup> 431 U.S. 606 (1977).

<sup>56</sup> *Id.* at 608.

was “reasonable cause to suspect” that there was merchandise imported contrary to the law.<sup>57</sup> The Court upheld the inspection, which uncovered heroin in each of the envelopes.<sup>58</sup> Addressing the “fear that [i]f the Government is allowed to exercise the power it claims, the door will be open to the wholesale, secret examination of all incoming international letter mail,”<sup>59</sup> the Court concluded that that concern was not present in the case before it:

Here envelopes are opened at the border only when the customs officers have reason to believe they contain other than correspondence, while the reading of any correspondence inside the envelopes is forbidden. Any “chill” that might exist under these circumstances may fairly be considered not only “minimal,” but also wholly subjective.<sup>60</sup>

Although reasonable suspicion was present, and the Court found the search justified on that ground, much of the opinion takes a much broader view of governmental authority at the border. The Court rejected the view that letter envelopes should be treated differently than other packages or wrappers:

It is clear that there is nothing in the rationale behind the border-search exception which suggests that the mode of entry will be critical. It was conceded at oral argument that customs officials could search, without probable cause and without a warrant, envelopes carried by an entering traveler, whether in his luggage or on his person. Surely no different constitutional standard should apply simply because the envelopes were mailed not carried. The critical fact is that the envelopes cross the border and enter this country, not that that [sic] 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.”<sup>61</sup>

The *Ramsey* Court continued:

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<sup>57</sup> *Id.* at 611.

<sup>58</sup> *Id.* at 612.

<sup>59</sup> *Id.* at 632.

<sup>60</sup> *Id.* at 624 (internal citations omitted).

<sup>61</sup> *Id.* at 620 (internal citations omitted).

Almost a century ago this Court rejected such a distinction in construing a protocol to the Treaty of Berne, 19 Stat. 604, which prohibited the importation of letters which might contain dutiable items. *Cotzhausen v. Nazro*, 107 U.S. 215 (1883). Condemning the unsoundness of any distinction between entry by mail and entry by other means, Mr. Justice Miller, on behalf of a unanimous Court, wrote:

“Of what avail would it be that every passenger, citizen and foreigner, without distinction of country or sex, is compelled to sign a declaration before landing, either that his trunks and satchels in hand contain nothing liable to duty, or if they do, to state what it is, and even the person may be subjected to a rigid examination, if the mail is to be left unwatched, and all its sealed contents, even after delivery to the person to whom addressed, are to be exempt from seizure, though laces, jewels, and other dutiable matter of great value may thus be introduced from foreign countries.”

The historically recognized scope of the border-search doctrine, suggests no distinction in constitutional doctrine stemming from the mode of transportation across our borders.<sup>62</sup>

Accordingly, *Ramsey* rejected the dissent’s view that Congress had shown heightened respect for “the individual’s interest in private communication,”<sup>63</sup> finding that “no such support may be garnered from the history of the Fourth Amendment insofar as border searches are concerned.”<sup>64</sup> The majority also rejected any distinction “between letters mailed into the country, and letters carried on the traveler’s person.”<sup>65</sup>

There are several significant intimations in *Ramsey*, given

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<sup>62</sup> *Id.* at 620-21.

<sup>63</sup> *Id.* at 626 (Stevens, J., dissenting).

<sup>64</sup> *Id.* at 612 n.8 (majority opinion).

<sup>65</sup> *Id.* at 623; *see also id.* at 623 n.16. *See also* United States v. Fortna, 796 F.2d 724, 738-39 (5th Cir. 1986) (upholding suspicionless document search at border); United States v. Soto-Teran, 44 F. Supp. 2d 185, 190-91 (E.D.N.Y. 1996) (upholding suspicionless inspection of sealed envelope and cursory inspection of letter but indicating that close reading needed reasonable suspicion), *aff’d*, 159 F.3d 1349 (2d Cir. 1998).

the migration of so much information to digital form and the ability to send it anywhere in the world where there is an Internet connection. First, what about searches that examine digital data on computers and other storage devices at the border? Given that computers and other electronic devices can hold legally excludable information, do federal agents have the right to examine devices that could store such information? *Ramsey* clearly permits reasonable suspicion based searches if it is accepted that data on a computer are the functional equivalent of a writing and that a computer file is the electronic equivalent of an envelope.<sup>66</sup> But are suspicionless searches permitted? Here, one may seek to distinguish between mail, which is regulated by statutory and postal regulations, and digital data, which is not. *Ramsey*, however, rejected such a distinction.<sup>67</sup> Nonetheless, First Amendment and privacy concerns seem to lurk.

In *United States v. Arnold*,<sup>68</sup> the district court asserted that reasonable suspicion was required to conduct searches of laptop computers at the border. The court concluded:

Fourth Amendment protection extends to the search of this type of personal and private information at the border. While not physically intrusive as in the case of a strip or body cavity search, the search of one's private and valuable personal information stored on a hard drive or other electronic storage device can be just as much, if not more, of an intrusion into the dignity and privacy interests of a person. This is because electronic storage devices function as an extension of our own memory. They are capable of storing our thoughts, ranging from the most whimsical to the most profound. Therefore, government intrusions into the mind—specifically those that would cause fear or apprehension in a reasonable person—are no less deserving of Fourth Amendment scrutiny than

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<sup>66</sup> See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 12.4.8. (Carolina Academic Press 2008).

<sup>67</sup> *Ramsey*, 431 U.S. at 623-24. Cf. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 62-63 (1974) (upholding regulations requiring banks to report commercial transactions that "take place across national boundaries" against a Fourth Amendment challenge based in part on the border doctrine).

<sup>68</sup> 454 F. Supp. 2d 999 (C.D. Cal. 2006), *rev'd*, 523 F.3d 941 (9th Cir. 2008).

intrusions that are physical in nature.<sup>69</sup>

*Arnold* is difficult to reconcile with the broad searches approved of at the border by Supreme Court cases, which make no distinction based on the objects sought (so long as it is not a search of a person) and the methods employed (so long as they are not particularly destructive). Other courts, including the Ninth Circuit which reversed the lower court's decision in *Arnold*, examining the question of whether customs agents can search the files on a computer at the border have rejected the reasoning underlying the district court's opinion in *Arnold*.<sup>70</sup> Thus, in *United States v. Ickes*,<sup>71</sup> the court viewed computer files the same as any other "cargo" subject to inspection at the border. The court noted:

Particularly in today's world, national security interests may require uncovering terrorist communications, which are inherently "expressive." Following Ickes's logic would create sanctuary at the border for all expressive material—even for terrorist plans. This would undermine the compelling reasons that lie at the very heart of the border search doctrine.<sup>72</sup>

*Ickes* added that a distinction grounded on First Amendment materials would be impractical and unwarranted, based on case law rejecting heightened protections from searches and seizures for First Amendment materials.<sup>73</sup> The *Ickes* court also observed that, as a practical matter, computer

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<sup>69</sup> *Arnold*, 454 F. Supp. 2d at 1000-01. See also Christine A. Coletta, Note, *Laptop Searches at the United States Borders and the Border Search Exception to the Fourth Amendment*, 48 B.C. L. REV. 971 (2007) (asserting that laptop searches at the border must be justified by articulable suspicion).

<sup>70</sup> See *United States v. Romm*, 455 F.3d 990, 997, 997 n.11 (9th Cir. 2006) (positing laptop search was routine border search and interpreting *Flores-Montano* to suggest "that the search of a traveler's property at the border will always be deemed 'routine,'" including search of computers); *People v. Endacott*, 79 Cal. Rptr. 3d 907, 909 (Cal. Ct. App. 2008) (upholding suspicionless border search of laptop computers). Cf. *United States v. Irving*, 452 F.3d 110, 124 (2d Cir. 2006) (declining to decide whether examination of computer disks routine or nonroutine search because search supported by reasonable suspicion); *United States v. Roberts*, 274 F.3d 1007 (5th Cir. 2001).

<sup>71</sup> 393 F.3d 501 (4th Cir. 2005).

<sup>72</sup> *Id.* at 506.

<sup>73</sup> *Id.* at 506-07.

searches at the border were not likely to occur unless the traveler's conduct or other facts suggested a need for further search.<sup>74</sup> The court maintained: "The essence of border search doctrine is reliance upon the trained observations and judgments of customs officials, rather than upon constitutional requirements applied to the inapposite context of this sort of search."<sup>75</sup> Such discretionary limitations on border searches are, one could argue, none at all—but that is, it appears, the essence of the border search doctrine.<sup>76</sup>

Putting aside the question of how intrusive a search or seizure can be, perhaps a more difficult question presented by today's world is how to define the border.<sup>77</sup> The Court's cases all

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<sup>74</sup> *Id.* at 507.

<sup>75</sup> *Id.*

<sup>76</sup> See Kelly A. Gilmore, Note, *Preserving the Border Search Doctrine in a Digital World: Reproducing Electronic Evidence at the Border*, 72 BROOK. L. REV. 759 (2007) (arguing that border search doctrine applies to permit suspicionless searches of laptop computers and electronic hand-held devices such as PDAs and iPods).

<sup>77</sup> Compare David R. Johnson & David Post, *Law and Borders—the Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1400 (1996) (arguing that new rules must govern the Internet that should be distinct from the "current territorially based legal systems") with Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1201 (1998) (arguing "that regulation of cyberspace is feasible and legitimate from the perspective of jurisdiction and choice of law."). Goldsmith cites examples of nation-states regulating content on the Internet within their borders:

A government can choose to have no Internet links whatsoever and to regulate telephone and other communication lines to access providers in other countries. China, Singapore, and the United Arab Emirates have taken the somewhat less severe steps of (i) regulating access to the Net through centralized filtered servers, and (ii) requiring filters for in-state Internet service providers and end-users . . . . Germany has chosen to hold liable Internet access providers who have knowledge of illegal content and fail to use "technically possible and reasonable" means to filter it.

*Id.* at 1227-28. He also notes:

Cyberspace information can only appear in a geographical jurisdiction by virtue of hardware and software physically present in the jurisdiction. Available technology already permits governments and private entities to regulate the design and function of hardware and software to facilitate discrimination of cyberspace information flows along a variety of dimensions, including geography, network, and content.

*Id.* at 1225-26. Whether it is permissible under the United States Constitution to restrict access to the Internet is not the question here; it is whether the sovereign power permits the government to search and seize data that violates the laws of the United States or is otherwise excludable. Goldsmith's article indicates that foreign governments recognize that the international border may be digital in nature. See also Harvey

concern the physical border or its functional—but still physical—equivalent. Hence, a person at the border with a laptop is still at the border. Instead, what if that person, while in a foreign country, emailed child pornography images to his home computer, which is located in the United States? If a letter can be searched coming into the country, what about emails, their attachments, or other forms of electronic communications? If they cannot, what is to stop the wholesale creation of offshore businesses specializing in child pornography, illegal gambling, or copyright violations? What is to stop the digital transfer of terrorist plans?<sup>78</sup> On the other hand, in today's world, the most routine in-state phone call may be routed to a satellite; an email to someone in the United States from someone in the United States may pass anywhere over the Internet. Are such communications now permissibly examined as border searches? One possible solution to such a quandary is to find the border search doctrine inapplicable, based on the wholly intra-national nature of the origin and destination of the

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Rishikof, *Long Wars of Political Order—Sovereignty and Choice: the Fourth Amendment and the Modern Trilemma*, 15 CORNELL J.L. & PUB. POL'Y 587, 618 (2006) (concluding that “[a] political order with international penetrating and expansive technology for counterintelligence purposes will come at the expense of privacy, personal autonomy, and sovereignty as borders and transportation become increasingly transparent. This new political order will be very different from the classic 19th century liberal state, which for the last 200 years has been the ideal model of personal autonomy.”).

<sup>78</sup> In response to criticisms of its intelligence interception program implemented in response to the 2001 terrorists attacks on the United States, the Bush Administration released a paper entitled: “Legal Authorities Supporting Activities of the National Security Agency Described by the President” (U.S. Department of Justice 01/19/06). That paper discussed the “intercept[ion] of international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations.” *Id.* at 1. The report grounded the authority to do so on the president's inherent powers in national security matters and in Congressional authorizations after 9/11. *See id.* Remarkably, it did not ground that authority on the border search doctrine. Indeed, it merely noted that the activities were consistent with the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-1862 (2000 & Supp. II 2002), and added that “the monitoring of international communications into or out of the United States of U.S. citizens” was not regulated by FISA. *Id.* at 19 n.6. In the section addressing Fourth Amendment concerns, the paper asserted that the actions are justified by reference to the balancing test to measure reasonableness and observed that the only targets of the international communications intercepts were those who were reasonably suspected to be agents of al Qaeda or an affiliated organization. *See id.* at 41.

communication, ignoring the technical means by which the communication is achieved. This functional approach satisfies the sovereignty concerns underlying the border search doctrine.

#### ARTICLES FOR THIS SYMPOSIUM

The contributors to this symposium offer a variety of views on these difficult issues. Professor Palfrey in his article, *The Public and the Private at the United States Border with Cyberspace*, provides background on the “points of control” where data may be obtained and the methods by which governments and private parties collect digital information about citizens and others.<sup>79</sup> As he observes: “In the twenty-first century, a state can come to know more about each of its citizens via surveillance than ever before in human history.”<sup>80</sup> Although he recognizes that the Fourth Amendment has been held not to apply to data collected by a private third party, he maintains that “[t]he meaning of the public and the private is changing, in material ways, both from the perspective of the observer and the observed. We need to rethink legal protections for citizens from state surveillance in a digital age as a result of this third-party data problem.”<sup>81</sup> He argues for a “sliding scale . . . to distinguish between those transactions . . . that use digital networked technologies that give rise to some legal protection and those that do not.”<sup>82</sup>

Professor Robert M. Bloom, in his article, *Border Searches in the Age of Terrorism*, offers a caution in the concluding sentence of his contribution to this symposium: “If the war on terrorism is fought in a way that ignores our democratic ideals, we have lost the war.”<sup>83</sup> Prior to that caution, he examines the history of the border search doctrine, including an examination of the significant reorganization of the border enforcement

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<sup>79</sup> John Palfrey, *The Public and the Private at the United States Border with Cyberspace*, 78 MISS. L.J. 241 (2008).

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

<sup>81</sup> *Id.* at 242.

<sup>82</sup> *Id.* at 289.

<sup>83</sup> Robert Bloom, *Border Searches in the Age of Terrorism*, 78 MISS. L.J. 295, 327 (2008).

apparatus resulting from 9/11.<sup>84</sup> In his view, the border search doctrine fits comfortably within the Supreme Court's balancing test to measure reasonableness, and the routine–non-routine distinction remains a viable analytical structure. He observes: “Routine versus non-routine distinction usually focuses on the physical aspects of the search, such as disrobing, exposing intimate body parts, forced intrusions causing pain, and physical contact.”<sup>85</sup> Hence, “[w]hen the scope of the intrusion increases to the extent that the border search is no longer routine, then some justification might be required.”<sup>86</sup> Professor Bloom applies that framework to a variety of circumstances, including computer searches, which he believes should require “some level of justification.”<sup>87</sup> His final focus is on Fourth Amendment cases involving terrorism concerns after 9/11, and he uses them to draw “some conclusions about the effect the emerging emphasis on terrorism and national security concerns will likely have on border searches in this post-9/11 world.”<sup>88</sup>

Professor Susan Freiwald, in *Electronic Surveillance at the Virtual Border*, offers a summary of the treatment of the interception of two forms of electronic communication: traditional telephone calls, and email.<sup>89</sup> Her purpose is to consider “how the law has created intangible borders to regulate government surveillance of communications” and that those “intangible borders function the same way as traditional physical borders functioned historically” in that they “demarcate those ‘places’ in which our government imposes burdens and grants privileges from those ‘foreign places’ in which it does neither.”<sup>90</sup> Freiwald observes that the legal framework for intercepting telephone calls creates a virtual border, depending largely upon who the target of the investigation is. Thus,

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<sup>84</sup> *Id.* at 300-17.

<sup>85</sup> *Id.* at 310 n.92.

<sup>86</sup> *Id.* at 305.

<sup>87</sup> *Id.* at 315.

<sup>88</sup> *Id.* at 300.

<sup>89</sup> Susan Freiwald, *Electronic Surveillance at the Virtual Border*, 78 MISS. L.J. 329 (2008).

<sup>90</sup> *Id.* at 331.

electronic surveillance law has determined “when foreign persons acquire Fourth Amendment protections and when U.S. Persons lose them.”<sup>91</sup>

Professor Matthew R. Hall, in his essay entitled *Border Fiction: Does an Analogy to Immigration Law Alleviate Fourth Amendment Anxiety?*, offers some analogies to immigration law’s treatment of the border.<sup>92</sup> His essay applies elements of that analogy to electronic communications and to physical entries into the country. He also offers some reflections on assumptions that immigration law uses about the mental state of individuals who cross the border and suggests that the “federal government might consider the delegation of border doctrine responsibilities to state and local officials.”<sup>93</sup> He ultimately concludes that the most important contribution an immigration law analogy would have is the use of a “cost-benefit analysis” for border searches similar to what “courts do when considering the constitutionality of immigration procedures under the constitutional guarantee of procedural due process.”<sup>94</sup>

The final contributor, Professor Harvey Rishikof, in *Combating Terrorism in the Digital Age: A Clash of Doctrines*, examines the challenges confronting the nation as the three branches of government seek to address the issues described in the title to his article.<sup>95</sup> He offers observations on the relationship of critical trends in the marketplace, the nature of modern threats to the state, theories of sovereignty, and Supreme Court analysis of the Fourth Amendment. He articulates a series of propositions: the “digital information super highway is *omnipresent* and *omniaccessible* and *irreversible*,”<sup>96</sup> the “threats are individualized, multivaried, potentially lethal on a mass scale, and potentially devastatingly

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<sup>91</sup> *Id.* at 361.

<sup>92</sup> Matthew R. Hall, *Border Fiction: Does an Analogy to Immigration Law Alleviate Fourth Amendment Anxiety?*, 78 MISS. L.J. 363 (2008).

<sup>93</sup> *Id.* at 364.

<sup>94</sup> *Id.* at 380.

<sup>95</sup> Harvey Rishikof, *Combating Terrorism in the Digital Age: A Clash of Doctrines: The Frontier Of Sovereignty—National Security And Citizenship—The Fourth Amendment—Technology And Shifting Legal Borders*, 78 MISS. L.J. 381 (2008).

<sup>96</sup> *Id.* at 385.

costly;<sup>97</sup> there is a “clear and justified need” to patrol the border;<sup>98</sup> and all nations view borders as “unique areas of sovereign power that trump both domestic and international norms.”<sup>99</sup> Professor Rishikof believes that these propositions create “a social force of extreme state anxiety over border control.”<sup>100</sup>

Turning specifically to combating terrorism in the digital age, he maintains that, to be successful, “a ‘sea’ of information” must be analyzed.<sup>101</sup> Yet, he asserts, the executive, legislature, and courts have approached the propositions he sketches from their own “institutional competencies,” resulting in “unsatisfactory from all policy perspectives.”<sup>102</sup> He offers several prescriptions for reform, including institutional reform of the intelligence and law enforcement communities, ending the “debate over executive authority and congressional reticence,” including the judiciary in surveillance activities, and adopting a more international approach to the issues.<sup>103</sup> Professor Rishikof concludes that this is “a challenge we must meet” because “so much is at stake” and “how we treat borders and data will define the power of the state and privacy in the twenty-first century.”<sup>104</sup>

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<sup>97</sup> *Id.* at 390.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 393.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 400.

<sup>102</sup> *Id.* at 428.

<sup>103</sup> *Id.* at 429.

<sup>104</sup> *Id.* at 430.