

ESSAY

BORDER FICTION: DOES AN ANALOGY TO IMMIGRATION LAW ALLEVIATE FOURTH AMENDMENT ANXIETY?

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Does immigration law help resolve the Fourth Amendment problems posed by the movement of electronic information across the United States border? The answer, at least according to this Essay, is a conditional “yes.” The lens of immigration law helps to clarify the idea that the border consists of a real physical line accompanied by a series of legal fictions. Understanding the ways in which immigration law has grappled with these legal fictions eases at least some of the difficulty confronting analysis of the Fourth Amendment “border doctrine” as it applies to the movement of digital data across the country’s international border.

More specifically, this Essay explores several phenomena in immigration law and then draws an analogy between the resolution of those problems in immigration jurisprudence and potential resolutions under the border doctrine.¹ First, the

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¹ The Essay proceeds with the knowledge that the search for consistency through

Essay probes the division of immigration border crossings into a two-part typology and concludes that this typology could contribute to solving two problems under the border doctrine: the treatment of intranational electronic communications that incidentally cross the border and the question of when certain border searches constitute routine inspections rather than invasive intrusions. Next, the Essay examines the location of the border under immigration law, concluding that immigration's border rules apply not just at the physical border but also wherever the authorities locate an alien who recently entered the country without legal permission. This concept could aid in analyzing the appropriateness of applying the border doctrine to electronic information that enters the country without a moment for inspection paralleling the entry of letters or packages. Third, the Essay briefly touches on the extent to which immigration law builds on assumptions about the mental state of individuals who cross the border. Although a mental state analogy assists the border doctrine with regard to intranational communications that incidentally cross the border, it potentially impedes clear application of the border doctrine to many electronic communications when the parties have no knowledge of each other's physical location. Penultimately, the Essay then touches on the possibility that as with immigration enforcement, the federal government might consider the delegation of border doctrine responsibilities to state and local officials. The Essay concludes with the contention that border doctrine analysis would benefit from an explicit consideration of costs and benefits. Immigration law centrally considers cost-benefit analysis as part of the test for minimum constitutional due process. Although the Supreme Court has engaged in cost-benefit reasoning in criminal procedure cases, the jurisprudence of the border doctrine should explicitly recognize its importance

analogy does not necessarily lead to a just or wise result. *Cf.* *Bankers Life and Cas. v. United States*, 142 F.3d 973, 982 (7th Cir. 1998) ("While we do not doubt that 'foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines,' Ralph Waldo Emerson, *Self Reliance*, *Essays: First Series* (1841), we hope that our emphasis on consistency does not qualify as foolishness. On the contrary, consistency in the law forms the backbone of effective jurisprudence.").

in order to ensure consideration of the effects of suspicionless searches on a large scale.

Throughout, this Essay assumes familiarity with the Fourth Amendment's border doctrine and does not purport to offer a summary or detailed analysis of its principles.² Further, this Essay makes several assumptions about border doctrine analysis as it applies to electronic information. First, the Essay presumes that the transmission of electronic information through third-party conduits does not obviate the need for Fourth Amendment analysis.³ Second, the Essay further assumes that the electronic information in question is not covered by free speech principles.⁴ In other words, the Essay is predicated on the idea that government authorities would search an electronic communication not for its expressive content so much as for contraband or other illicit content, such as digitized images of child pornography or stolen classified information.⁵ Finally, an important caveat: I offer this Essay as an exercise in brain storming the ways in which an analogy with established immigration law could help understanding of issues arising under the border doctrine. I am not comfortable with the extent to which immigration law provides aliens with few constitutional rights, nor do I believe that the border doctrine

² For full coverage of the border doctrine, see generally THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 399-463 (Carolina Academic Press 2008).

³ See *Smith v. Maryland*, 442 U.S. 735, 742, 744-45 (1979) (holding that, by conveying a dialed phone number to the telephone company, a claimant "assumed the risk that the company would reveal to police the numbers he dialed"); *United States v. Miller*, 425 U.S. 435, 443 (1976) ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."); see also *Bunnell v. Motion Picture Ass'n of America*, 567 F. Supp. 2d 1148 (C.D. Cal. 2007) (finding, in a civil case under the Wiretap Act, that the defendant did not intercept emails but instead obtained them from electronic storage).

⁴ See *United States v. Ramsey*, 431 U.S. 606, 623-24 & n.18 (1977) (holding that the search of a letter for contraband, with regulatory protection of the contents, did not raise First Amendment concern).

⁵ With the child pornography serving as the equivalent of the heroin at issue in *Ramsey*. See *id.*

accords United States citizens sufficient protection. This Essay does not attempt to deploy a critique of either body of jurisprudence, nor does it suggest whether the remedy lies in the reformulation of constitutional law or in statutory protections.

THE LEGAL FICTION OF THE BORDER

As a starting point, consider the concept of the border under immigration law. As a geopolitical boundary giving shape to the United States, the immigration border plays an essential role in defining the nation—the people. Fundamentally, immigration law governs the movement of people across the border. Nevertheless, in terms of jurisprudence, immigration law engages in a dramatically aggressive legal fiction regarding the border.

Imagine an alien arriving, for the first time, in the United States via airplane at Boston's Logan Airport. Conventional wisdom would hold that as the plane touches the tarmac the alien has landed on United States soil.⁶ Yet, under immigration law, no such legal transition takes place. Immigration law treats a newly-arriving alien, even one standing on our soil at the airport, as standing just on the other side of our border awaiting permission to step over.⁷ The implications of this legal fiction profoundly affect the alien's legal status. Despite an arriving alien's physical presence within our territory, immigration jurisprudence dictates that the individual's rights

⁶ One might even expect that the transition into United States territory occurs as the plane enters the country's airspace.

⁷ See 8 U.S.C. § 1225(a)(1) (2006) ("An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission."); see also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides.").

differ very little from someone requesting a visa at one of our consulates overseas.⁸ Most significantly, a newly-arriving alien possesses no due process rights.⁹ Upon a determination that the alien does not qualify for entry into the United States, regardless of whether the alien obtained a visa ahead of time, the immigration authorities could send the alien home immediately with no legal recourse and certainly no hearing.¹⁰ In contrast, a returning lawful permanent resident, even one found inadmissible by the immigration authorities at the border, would receive a full deportation hearing (or in the language of the immigration statutes, a “removal” hearing) and would enjoy the right to seek review in federal court.¹¹

Why the stark contrast? In a nutshell, under immigration law, a newly-arriving alien does not constitute a “person” under the Fifth Amendment’s Due Process Clause.¹² For purposes of

⁸ Many cases explain the consular non-reviewability doctrine. *See, e.g.*, *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984, 986 (D.C. Cir. 1929); *United States ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 970-71 (9th Cir. 1986); *Ventura-Escamilla v. INS*, 647 F.2d 28, 30-31 (9th Cir. 1981); *Garcia v. Baker*, 765 F. Supp. 426, 428 (N.D. Ill. 1990).

⁹ *See* Adam B. Cox. & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 822 (2007) (“Courts have at times suggested that the government may exclude such a noncitizen for any reason—even on the basis of race or some other ground that would ordinarily be constitutionally suspect. Similarly, courts have sometimes intimated that the government is free to enforce its exclusion policy with whatever summary procedures it deems appropriate, on the ground that the Due Process Clause does not constrain the government in such situations.” (footnote omitted)); *but see id.* at 822 n.63 (questioning whether courts have understated the rights of arriving aliens).

¹⁰ *See* 8 U.S.C. § 1225(b)(1)(A) (2006) (“If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible . . . the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.”); 8 C.F.R. § 235.3(b) (2008).

¹¹ *See* 8 U.S.C. § 1225(b)(2) (2006); Cox & Posner, *supra* note 8, at 822 (“The government is more constrained by the Constitution when it takes an immigration-related action against a noncitizen who has achieved a greater constitutional status than a first-time arriving alien. Courts suggest that noncitizens may receive additional constitutional protections when they have entered the territory of the United States, when they have established significant ties to the United States, or when they have achieved a legal immigration status under statutory and regulatory immigration law.”).

¹² *See* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“It is true that aliens who have once passed through our gates, even illegally, may be expelled

the application of constitutional due process rights at the immigration border, only a United States citizen or an alien with pre-existing ties to the country constitutes a person.¹³ Thus, immigration law takes an extraordinarily legalistic, rather than realistic, view of the border even when the issue at hand concerns the most fundamental question of who amounts to a human-being deserving of full legal cognition. The immigration border is not a physical demarcation, but instead an abstract legal construct.

In distinction, because Fourth Amendment jurisprudence deals primarily with events inside the United States and with individuals fully entitled to constitutional protection, the border receives starkly different treatment. Courts tend to view the border as a physical line and accordingly apply Fourth Amendment border doctrines only at or in proximity to that physical border.¹⁴ Because the vast majority of Fourth Amendment cases arise in contexts where the normal rules of reasonable suspicion or probable cause apply to searches and seizures, Fourth Amendment jurisprudence treats the border doctrine with suspicion, only reluctantly suspending those traditional protections against governmental intrusion.¹⁵

If there is a lesson to learn from immigration law on this front, it lies in the idea that the Constitution operates differently at the border. Phrased differently, immigration law

only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’”) (internal citations omitted).

¹³ See *id.* Indeed, under immigration law, this concept is not only unsurprising, it is closer to the norm than the exception. The vast majority of people in the world—including the many who wish to come legally or illegally to the United States—fall outside the protections of the Constitution. See generally Note, *The Extraterritorial Constitution and the Interpretive Relevance of International Law*, 121 HARV. L. REV. 1908 (2008).

¹⁴ Some cases extend the border to its functional equivalent—airports or package sorting centers. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973); *United States v. Abbouchi*, 502 F.3d 850, 854 (9th Cir. 2007).

¹⁵ For instance, scholars refer to the “border search exception.” See Larry Cunningham, *The Border Search Exception as Applied to Exit and Export Searches: A Global Conceptualization*, 26 QUINNIPIAC L. REV. 1 (2007).

teaches that the border is not a locus for constitutional exceptionalism, but instead the constitution applies uniquely at the border and in a manner that entails the application of legal fiction rather than realism.

THE IMMIGRATION TYPOLOGY

Turning from grand theory to more mundane matters, immigration law presents a two-part typology of border crossings that might aid in the analysis of Fourth Amendment concerns at the digital border. First, immigration law distinguishes between what we might call “incidental” border crossings and “genuine” border crossings. Secondly, immigration law treats border crossing differently depending upon whether the individual seeking entry is a citizen, a resident alien, or a newly-arriving alien.

An incidental border crossing occurs, for instance, when a flight leaves Los Angeles International Airport and lands at Honolulu International Airport. Factually, all the passengers departed from and reentered into the territory of the United States. Nevertheless, for immigration purposes, no border crossing occurred, and no one on the flights need demonstrate their admissibility into the country.¹⁶ The presence of the passengers outside the United States took place only incidentally to their transport from one point in the territory of the country to another. In contrast, a genuine border crossing occurs whenever people seek to enter the United States from a point outside—a point from which they had access to a foreign or international territory.

Further, as alluded to previously, immigration doctrine prescribes different levels of process for different categories of entrants into the United States. A United States citizen, who demonstrates citizenship at the border,¹⁷ could return to the country, and presumably could challenge any immigration proceeding immediately in federal court, asserting that the

¹⁶ *Cf.* 8 U.S.C. § 1221(a) (2006) (mandating an arrival manifest for arriving passengers only for flights from outside the United States).

¹⁷ *See* 8 C.F.R. § 235.1(b) (2008).

immigration authorities lacked jurisdiction.¹⁸ A resident alien (a lawful permanent resident, an asylee, or a long-term visitor) seeking to reenter the country would normally receive admission but upon a finding of inadmissibility, would face a removal hearing. In distinction, a newly-arriving alien, upon a finding of inadmissibility, would face expedited removal proceedings and would not receive a hearing.

The first step in the immigration typology might help resolve the Fourth Amendment dilemma of whether intranational digital communications (which travel from inside the United States to inside the United States and happen to cross the boundaries of the country due to the vagaries of electronic communications technology) fall under the ambit of the special search and seizure rules of the Fourth Amendment border doctrine.¹⁹ Accordingly, an intranational phone call bounced off a satellite, or a similar email routed through a switch in Europe, both constitute the equivalent of “incidental” border crossings. Immigration law suggests that no particular border doctrine should apply. Where Fourth Amendment analysis might consider whether such communications constitute an exception to the border doctrine, which itself represents an exception to the normal Fourth Amendment rules, immigration law treats this pattern seamlessly and fluidly, rather than conceptualizing of it as an exception to an exception. Under immigration law, an incidental border crossing does not entail a request for admission into the United States. By

¹⁸ See 8 C.F.R. § 235.3(b)(5)(iv) (2008) (detailing the treatment of claims of United States citizenship); *cf.* 8 U.S.C. § 1101(a)(3) (2006) (defining “alien” as a person not a citizen of the United States).

¹⁹ As Professor Tom Clancy notes:

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

CLANCY, *supra* note 2, at 412.

analogy, an intranational electronic communication that incidentally crosses the border does not trigger the border doctrine.

The second step in the immigration typology could assist courts in analyzing the propriety of examining digitized information on laptop computers carried by international passengers.²⁰ To the extent courts continue to analyze such searches to determine whether they constitute routine exams (permissible without any particularized suspicion) or non-routine and invasive (requiring suspicion adequate to justify the intrusion), the immigration typology militates in favor of giving prominent consideration to the owner's status—citizen, resident alien, or arriving alien. In broad terms, and absent other considerations,²¹ an analogy to immigration law might lead to the following doctrine: (1) border officials may search an arriving alien's laptop with no suspicion, (2) border officials may search a resident alien's laptop only with suspicion, and with the balance struck in favor of allowing a very invasive search based only on minimal suspicion, and (3) border officials may search a citizen's laptop only with suspicion, and with the balance struck in favor of allowing a particularly invasive search based only on heightened suspicion. Alternately, and perhaps more simply, the immigration analogy dictates that arriving aliens face searches of their laptops routinely, resident aliens face such searches on a semi-routine basis, and citizens face searches on non-routine grounds.

Perhaps, the analogy to the immigration typology can stretch even farther to cover international electronic communications generally. One might divide international electronic communications between those communications that originate in the United States and those that originate abroad.

²⁰ For the debate over laptop computers, see *United States v. Arnold*, 523 F.3d 941 (9th Cir. 2008); *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005); and the significant body of law review commentary already surrounding these cases.

²¹ This analysis does not purport to delve into the First Amendment implications of border officials examining the expressive content of digital information contained on the laptop. Perhaps it makes the most sense to conceive of the border officials as searching for contraband data such as images of child pornography.

Conceivably, communications originating in the United States analogize to citizens or resident aliens, while those originating abroad analogize to arriving aliens. Searches of the former should require reasonable suspicion, while the Fourth Amendment border doctrine should allow suspicionless searches of the latter. This effort ultimately breaks down and becomes facile because so many electronic communications will entail dialog such that surveillance of one end of the exchange inevitably trenches on the other end as well. Similarly, a significant number of exchanges will entail communication with a United States citizen or resident alien abroad and a counterpart here in the country, rendering the analogy strained at best.

THE LOCUS OF THE BORDER

Another aspect of immigration jurisprudence that illuminates Fourth Amendment issues regarding digital information arises upon consideration of the treatment of aliens who enter the United States illegally, without admission at the border. These aliens, despite their presence inside the United States, remain for up to two years in the same status as newly-arriving aliens: they face removal without hearing.²² As such, the immigration border constitutes not only a physical border at the nation's boundary, but a continuing legal status attaching wherever the government locates an unadmitted alien within the United States. Understood differently, immigration border rules apply not just at the time a person crosses the physical border; the border rules also alter the status of any person who fails to legally cross the physical border. Aliens illegally in the United States continue under the legal fiction of standing at the border seeking admission. One might go so far as to say that immigration law views the border having a legal locus attached to a person, rather than only to the physical line demarcating the boundary of the United States. While the physical border is porous, the legal border remains consistent.

How does this immigration concept relate to digital

²² See 8 U.S.C. § 1225(b)(1)(A) (2006); 8 C.F.R. § 235.3(b) (2008).

information? The Fourth Amendment border doctrine applies to things and people as they cross the border. Electronic information simply does not cross the border in the same tidy manner. It enters the United States both from space via satellite and, even when it enters via a land line, it may move virtually immediately to its destination inside the country without pausing at a shipping or distribution hub as it crosses the physical border. Even if electronic information presented no other unusual concerns, this fact alone would render application of the border doctrine difficult. A vast quantity of electronic information enters the United States without an opportunity for inspection, paralleling the treatment of people and things at the physical border.

Although immigration law provides an imperfect analogy, it certainly offers guidance. The Fourth Amendment could treat digital information that enters the United States without opportunity for inspection in the same manner as immigration law treats unadmitted aliens inside the country. In a legal fiction, that information would remain for a reasonable length of time metaphorically standing at the border awaiting inspection. This proposed rule is not without significant complication. The vast majority of people legally in the United States possess identification that facilitates an efficient screening for immigration purposes. Information does not authenticate itself so readily—for example, a domestic child pornography digital image file could closely resemble a foreign file. Further, the prospect of allowing suspicionless searches, under the border doctrine, of digital information in the hands of people within the United States poses considerable civil liberties concern.

The proposal of treating digital information that enters the United States without a formal border crossing in the same manner as an unadmitted alien also has some potential for helping to resolve a perplexing difference between physical international communication via letters and packages, on the one hand, and electronic communications, on the other hand. With physical communication, the border crossing occurs at the initiation of the sender, and it takes place in short order thereafter, through the relatively centralized channels of

shipping and sorting facilities. With electronic communication, the border crossing may likely occur at the initiation of the recipient and may take place long after the sender has acted. Further, electronic communications more typically travel through the relatively decentralized channels of the internet. With email (assuming inaccurately that the message travels as one piece of data)²³ the communication would travel from the sender to the recipient's email server (a trip that might entail one or more border crossings) and then to the recipient's computer (another trip that might entail one or more border crossings). Although electronic surveillance technology may permit monitoring of the communication as it crosses a border at either of these stages, it may also be the case that the government cannot examine the message until it takes up residence (or is viewed) inside the United States. By focusing on the "unadmitted" electronic communication, rather than the moment that data literally entered the country, the border doctrine could prevent the particularities of electronic communications technology from vitiating the government's prerogative to conduct searches of all that crosses the border.

IMMIGRATION MENTAL STATE

Consideration of the role of mental state in immigration border crossings may also illuminate the problems inherent in the application of the border doctrine to electronic communications. Morally, immigration law works, at least in part, because very few people cross the border unintentionally or in ignorance of the legal significance of such activity. Aliens seeking entry generally understand they need a visa, aliens legally within the United States know they need a reentry permit, and United States citizens generally understand they need a passport. Under immigration law, movement across the border without proper documentation subjects one to immigration consequences—knowledge and settled expectations

²³ See John Palfrey, *The Public and the Private at the United States Border with Cyberspace*, 78 MISS. L.J. 241, 261 (2008) ("Any communications of any significant size are divided into separate packets for travel across the network").

undergird the legal regime.²⁴

Perhaps a similar pattern pertains in the realm of the Fourth Amendment. Although the Supreme Court seems to predicate the border doctrine primarily on sovereignty, the reasonableness of the rule also appears to lie in notions of volition. Presumably, those who present themselves or their property at the border expect some level of examination, and we could even understand them to implicitly consent to search. If this line of reasoning holds true, the previous analogy between intranational communications that incidentally cross the border and intranational travel that incidentally crosses the border gains strength. Part of the underlying logic for treating the two cases similarly arises from the intent of the participant—to the extent the individual possesses any intent to cross the border or send data across the border, it exists only for the purpose of completing the intranational act. Accordingly, the individual lacks the mental state necessary to reach a conclusion of implied consent for a border search.

The mental state rationale, however, makes analysis of electronic communications more difficult. We can discern the intent to cross a border from the address on international packages or letters; no such inference readily arises with email or internet communications because the parties may not know each other's physical location.²⁵ Because this mental state arises only as a speculative accessory to the Supreme Court's actual justification for the border doctrine, it should not defeat the application of the rule to electronic communications.

DELEGATION TO STATE AND LOCAL LAW ENFORCEMENT

Immigration law presents an unusual model for joint federal, state, and local enforcement that may offer some promise for the Fourth Amendment border doctrine as it applies

²⁴ *Cf.* 8 U.S.C. § 1326 (2006) (prescribing criminal penalties for aliens who enter the United States after denial of admission or who reenter the United States after removal).

²⁵ With the increasing use of mobile phones, the same logic holds increasingly true for phone communications as well.

to electronic information.²⁶ Under contemporary immigration law and jurisprudence, the immigration power constitutes a virtually exclusive federal province.²⁷ Nevertheless, state and local governments have long possessed the authority to enforce criminal immigration laws and have recently received increased power to participate in civil immigration enforcement.²⁸ The Supreme Court has repeatedly stated that the immigration power, like the border doctrine, constitutes a plenary power in the hands of the federal government, arising directly out of national sovereignty itself.²⁹

Accordingly, given the similar status of the two powers, it might be possible for the federal government to share the border doctrine power with state or local law enforcement. This notion may take on particular vigor as legal focus shifts from the traditional physical border to the electronic border. The physical border presents relatively few ports of entry for letters and packages—the nation’s international air and seaports mainly. While, of course, these ports of entry lie within states, their small number makes federal customs and immigration enforcement practicable. The electronic border knows no such limitations. Rather than consisting of the nation’s boundaries plus airports, the electronic border would more properly be

²⁶ For coverage of the debate over state and local enforcement of civil immigration laws, see generally Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2003); and LISA M. SEGHETTI, STEPHEN R. VIÑA & KARMA ESTER, CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT (2005), <http://www.au.af.mil/au/awc/awcgate/crs/r132270.pdf>.

²⁷ See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976).

²⁸ See, e.g., Seghetti et al., *supra* note 26, at 6-22.

²⁹ Compare *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (acknowledging the plenary power of customs officials), and *United States v. Montoya de Hernandez*, 473 U.S. 531, 537-39, 544 (1985) (likening customs officials conducting border searches to immigration officials), with *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (describing the long tradition of according plenary power over immigration to Congress and the Executive).

conceived of as consisting of all telecommunications networks—including satellites. Thus, the exponential growth of the border as it makes the transition from physical to electronic may overwhelm the capacity of the federal government to conduct adequate screening efforts. Similarly, as explained above, the prevalence of electronic information that, like an illegal alien, has not formally crossed a border may also outstrip the resources of the federal government. A partnership between federal authorities and state and local officials could conceivably ameliorate this problem.³⁰

COST / BENEFIT ANALYSIS

Although immigration jurisprudence accords aliens with few constitutional liberties, the Fifth Amendment's Due Process Clause does provide some solace, at least for aliens legally admitted to the United States.³¹ Indeed, an analogy with due process analysis represents the greatest benefit that immigration law has to offer the Fourth Amendment's border doctrine. Under the seminal *Mathews v. Eldridge* test, courts weighing whether or not a particular procedure accords a litigant constitutionally adequate process consider three factors: (1) the private interest at stake, (2) the risk of error under current procedures and the reduction of risk possible with additional procedures, and (3) the costs and lost efficiencies of implementing additional procedures.³² Essentially, this test directs the court to consider the costs and benefits of procedures. Moreover, cost-benefit analysis directs the court to look beyond the case at hand and examine the effects of the rule on other cases—or at least other iterations of the same. The test looks toward statistical considerations (risk and reduction of risk) and toward the effects of repetitive application (cost and lost efficiency).

³⁰ Of course, such a partnership could also raise concerns paralleling those arising from proposed partnerships for civil immigration enforcement.

³¹ See *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (applying the standard due process to immigration proceedings).

³² *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Why does cost-benefit analysis hold promise for border doctrine cases? Fundamentally, border doctrine searches, because they occur without particularized suspicion, affect an enormous number of individuals for each case that nets the government criminal conduct.³³ Yet, if the cases most actively litigated arise out of those “hits” rather than out of the “misses,” a danger arises. The search program superficially appears successful after the fact of a positive result—it appears justified because it succeeded. Inversely, the search program appears questionable if it rarely or never finds criminal conduct. Because the cases in which criminal conduct comes to light receive more attention, they tend to skew perception of the statistical reality. This is the investigator’s version of the “prosecutor’s fallacy”³⁴—the logical problem of believing that you have used a good investigatory process because you have caught a criminal.

By explicitly deploying cost-benefit analysis as part of the reasonableness inquiry into the validity of a border doctrine search program, the courts would ensure consideration of the statistical reality of the program, and its effects on innocent parties, rather than risk the possibility of improper focus on the potentially misleading success of the program. Indeed, the Supreme Court has repeatedly stated, in suspicionless search cases, that empirical evidence regarding the statistical success

³³ One could refer to suspicionless searches, like those conducted under the border doctrine, as “stochastic” searches. They take their logic not from particularized suspicion underlying each search, but from the assertion that statistically they will catch criminal conduct. The problem with such an assertion is that, statistically, any programmatic search or surveillance of the public will catch some number of criminals.

³⁴ The classic version of the prosecutor’s fallacy arises if genetic testing reveals that only one in 100,000 people have the same DNA as the suspect and the perpetrator. This information appears incriminating. But, if the events occur in a city of 1,000,000 people, then nine innocent people have DNA that matches the perpetrator. This information appears powerfully exculpatory. In the case of the border doctrine, the *ex post* phenomena of litigating the case of the apparently guilty creates a similar false impression regarding the effectiveness of the screening procedures at the border. If we learn that only one out of every 100,000 searches results in a positive, we might not feel the same confidence in the process *ex ante* that we enjoy during the prosecution of the one success.

of the search program matters.³⁵ The Court has stopped short of mandating evidence that the program contributes to law enforcement and that it produces some reasonable number of hits, but has instead struck down one program, in part, because it lacked such evidence and upheld another, in part, because it possessed this kind of evidentiary support.³⁶ Border doctrine jurisprudence would benefit enormously if the Court explicitly recognized its practice of examining empirical evidence in the special needs cases and applied similar reasoning to border doctrine cases by demanding either empirical evidence or, at least, a cost-benefit analysis. It seems a Catch-22 to require empirical evidence of a reasonable program that may not yet have an established track record; but even a proposed program will have potential costs and benefits.

Critics may contend, with significant force, that cost-benefit analysis will erode civil liberties by focusing a court unduly on law enforcement (or national security) benefits and allowing those interests to outweigh one individual's rights. While this criticism may prove accurate, this Essay operates on the intuition that current analysis of border doctrine cases skews in the opposite direction—it tends to minimize the intrusion on many innocents because a seemingly guilty party appears before the court. A court conducting cost-benefit analysis, by necessity, will consider not just the litigant snared by the border search, but all those innocents upon whose interests the government intruded. In other words, this Essay takes the position that cost-benefit analysis—by directing courts to consider the effect of programmatic search programs on the innocent—will result in

³⁵ See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 454-55 (1990); *Delaware v. Prouse*, 440 U.S. 648, 659-63 (1979).

³⁶ Cf. Lawrence Rosenthal, *The Crime Drop and the Fourth Amendment: Toward an Empirical Jurisprudence of Search and Seizure*, 29 N.Y.U. REV. L. & SOC. CHANGE 641, 680 (2005) (“[S]urely we should at least consider the rate at which a given investigative practice has disclosed criminal activity when assessing its constitutionality. The Fourth Amendment proscribes ‘unreasonable’ searches and seizures; that would seemingly make empirical evidence of the efficacy of a challenged practice highly relevant. Evidence that a challenged practice pays important law enforcement dividends seems no less important. Yet it is striking that the Supreme Court—with only rare exceptions like *Martinez-Fuerte* and *Sitz*—neither looks at nor insists on empirical evidence.”).

the aggregation of individual rights and the weighing of that aggregate interest (rather than a single guilty individual's interest) against society's law enforcement agenda.

CONCLUSION

Immigration law and jurisprudence may offer some significant assistance in resolving particular dilemmas arising with the application of the border search doctrine to the movement of electronic information. The most important contribution, however, would come if courts considering the reasonableness of programmatic, or statistical, searches—such as the vast majority of the suspicionless searches conducted at the border—performed some form of cost-benefit analysis as courts do when considering the constitutionality of immigration procedures under the constitutional guarantee of procedural due process.