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BORDER SEARCHES IN A MODERN WORLD: ARE LAPTOPS MERELY CLOSED CONTAINERS, OR ARE THEY SOMETHING MORE?

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THE UNITED STATES District Court for the Central District of California gave hope to travelers who wished to take laptops across the border, but did not want the contents to be examined by U.S. Customs in their decision in *United States v. Arnold.*[1] However, the Ninth Circuit overturned the decision in *United States v. Arnold,*[2] so travelers with laptops will continue to worry that their private files will be searched at the border without reasonable suspicion. Courts have determined that laptop searches at the border do not require any amount of particularized suspicion, and therefore suspicionless laptop border searches do not violate the Fourth Amendment.[3] Due to these recent court decisions, businesses will have to reevaluate how they conduct international business trips. Customs officials will still be able to look at private, confidential client files that are taken across the border, without reasonable suspicion.[4] Business travelers will have to seriously consider whether or not they should take their work laptops across the border and whether their Blackberry or iPhone, containing confidential emails, should also be taken across the border. In fact, business travelers may have a duty to leave laptops at home when they con-

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1 454 F. Supp. 2d 999 (C.D. Cal. 2006), *overruled,* 533 F.3d 1003 (9th Cir. 2008).

2 533 F.3d 1003 (9th Cir. 2008).

3 *See generally id.*

4 *See id.* at 1008.

tain confidential information.[5] This article will discuss the history of the border search exception to Fourth Amendment protections, evaluate the current state of the law in U.S. Circuit Courts, and will come to the conclusion that there should be a strict policy put in place regarding laptop searches by customs officials in order to protect U.S. business travelers from having to make the choice between considerable expense to protect confidential client files and having U.S. Customs view confidential client files. Part I will discuss the history of the border search exception, Part II will focus on the current state of the law concerning border searches, and Part III will discuss ways to change the law in order to protect the constitutional interests of travelers. If business travelers know that customs officials will only search a laptop for physical things, such as bombs, then they will be safe to take laptops containing confidential information with them on international business trips. Courts have consistently declined to apply a standard of reasonable suspicion for border searches of laptops. If courts are unwilling to require that border searches of laptops require reasonable suspicion, then a new standard should be adopted that is below reasonable suspicion but more than a suspicionless search in order to deal with Fourth Amendment protections regarding modern technology. This new standard will help to balance the government's interest in protecting the country, but will also protect travelers' interests in their privacy when carrying laptops and other electronic storage devices across the border. This article will also conclude that the proper analogy for a laptop computer should not be that of a closed container, but that of a physical, bodily intrusion due to the large amount of personal memories and personal documents that can be stored on computers.[6] The analogy to a closed container is a false representation of what laptops actually contain—which can be as much information as one would expect to find in a person's house.[7]

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[5] Rasha Alzahabi, *Should You Leave Your Laptop at Home When Traveling Abroad? The Fourth Amendment and Border Searches of Laptop Computers*, 41 IND. L. REV. 161, 185 (2008).

[6] *See Arnold*, 533 F.3d at 1006.

[7] Brief for Ass'n of Corporate Travel Executives & Elec. Frontier Found. as Amici Curiae Supporting Defendant-Appellee at 16, United States v. Arnold, 533 F.3d 1003 (9th Cir. 2008) (No. 06-50581).

I. HISTORY AND BACKGROUND

A. THE FOURTH AMENDMENT PROTECTIONS

The first clause of the Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[8] The Fourth Amendment was designed to protect against general searches that have been "deemed obnoxious to the fundamental principles of liberty."[9] The Supreme Court has stated that the basic purpose of the Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[10] The Fourth Amendment should not be narrowly construed, but should instead be liberally construed in order to protect the right of people to be free from unreasonable searches and seizures.[11] The Supreme Court has determined that Fourth Amendment protection is not based upon the mere fact that there was a physical intrusion, but that it "protects people—and not simply 'areas'—against unreasonable searches and seizures."[12] The Fourth Amendment protections can be waived, though, if there is voluntary consent to the search by the party being searched.[13]

B. EXCEPTIONS TO FOURTH AMENDMENT PROTECTIONS

However, the "Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"[14] Some exceptions do exist to the Fourth Amendment's guarantees. One of these exceptions includes "routine searches and seizures at the border."[15] If a search falls under the border search exception, the government may conduct the search "without probable cause, reasonable suspicion, or a warrant."[16] Searches that occur at the border are "reasonable simply by virtue of the fact that they occur at the border."[17] A border search does not have to take place at the exact border of the United States to be considered a border search; it can also take place at the "functional

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[8] U.S. Const. amend. IV.
[9] Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).
[10] Camara v. Municipal Court, 387 U.S. 523, 528 (1967).
[11] *Go-Bart Importing Co.*, 282 U.S. at 357.
[12] Katz v. United States, 389 U.S. 347, 353 (1967).
[13] United States v. Roberts, 86 F. Supp. 2d 678, 687 (S.D. Tex. 2000).
[14] *Katz*, 389 U.S. at 350.
[15] United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).
[16] United States v. Romm, 455 F.3d 990, 996 (9th Cir. 2005).
[17] United States v. Flores-Montano, 541 U.S. 149, 152–53 (2004).

equivalent of a border," such as an American airport.[18] In some instances, border searches can also occur after the person or property has left customs or the functional border.[19] The purpose behind border searches being an exception is that, "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."[20] The United States has authority based on its inherent sovereign authority, to search the baggage of international travelers coming into the United States in order to "protect its territorial integrity."[21]

The Court recognized the border search doctrine exception to the Fourth Amendment in *United States v. Ramsey* and therein described the history of the exception.[22] In this case, a United States customs agent was inspecting mail when he found several envelopes from Thailand, which were "bulky" and addressed to four different addresses in Washington, D.C.[23] Since narcotics are known to come from Thailand, and because the letters were bulky and appeared to contain something that may have been contraband, the customs inspector opened one of the letters and found that it contained heroin.[24] The inspector then opened the other seven envelopes that appeared bulky and found that those also contained heroin.[25] The envelopes were then sent to Washington where a warrant was obtained, and the packages were resealed and delivered under surveillance.[26] The recipients of the packages were arrested, but they moved to have the heroin suppressed, arguing that the search violated their Fourth Amendment rights.[27] The court determined that the search of incoming mail was constitutional under the border search doctrine.[28]

Prior to the proposal of the Bill of Rights, the same Congress that proposed the Bill of Rights, which includes the Fourth

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[18] United States v. Arnold, 533 F.3d 1003, 1006 (9th Cir. 2008).
[19] United States v. Ramos-Saenz, 36 F.3d 59, 62 (9th Cir. 1994).
[20] *Montoya de Hernandez*, 473 U.S. at 537.
[21] *Arnold*, 533 F.3d at 1007.
[22] *See generally* United States v. Ramsey, 431 U.S. 606 (1977).
[23] *Id.* at 609.
[24] *Id.* at 609–10.
[25] *Id.* at 610.
[26] *Id.*
[27] *Id.* at 610–11.
[28] *Id.* at 624–25.

Amendment, by statute "granted customs officials 'full power and authority' to enter and search 'any ship or vessel'" which they felt had "'any goods, wares or merchandise subject to duty'" concealed onboard the ship.[29] This power to enter ships was differentiated from the limited power that officials had to enter and search "'any particular dwelling-house, store, building, or other place,'" which would require a warrant in order to search.[30] The Court found it important that the same Congress that proposed the Bill of Rights, which protected individuals from unreasonable searches, enacted a statute which allowed customs to search incoming vessels.[31] The Congress must have thought that customs searches of incoming vessels were reasonable without a warrant since it failed to include those as searches that were prohibited when proposing the Fourth Amendment.[32] Border searches, since before the Fourth Amendment was enacted, have been deemed reasonable for the mere fact that they occur at the border, and the nation has a strong interest in protecting itself and not allowing contraband to cross the border into the country.[33] Therefore, travelers who enter the United States may expect themselves and their property to be searched without a warrant in order for the nation to protect itself from the entry of contraband.[34] The Court affirmed the exception of the warrantless search at the border and determined that envelopes at the border were free to be searched without warrant under the exception since they, like international travelers, were entering the United States from another country.[35] The Court declined to afford any extra protection to letters simply because they were mailed and not carried into the country.[36]

Searches at the border that do not require particularized suspicion are those searches of the following items: "(1) the contents of a traveler's briefcase and luggage, (2) a traveler's 'purse, wallet, or pockets,' (3) papers found in containers such as pockets, and (4) pictures, films and other graphic materials."[37] In general, courts have determined that closed containers and

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[29] *Id.* at 616.
[30] *Id.*
[31] *Id.* at 616–17.
[32] *See id.*
[33] *Id.* at 619.
[34] *Id.* at 618.
[35] *Id.* at 620.
[36] *Id.*
[37] United States v. Arnold, 533 F.3d 1003, 1007 (9th Cir. 2008) (citations omitted).

their contents can be searched at the border without particularized suspicion.[38] The Supreme Court has determined that border searches of persons or packages "rest on different considerations and different rules of constitutional law from domestic regulations."[39]

An example of a border search that did not require particularized suspicion occurred in *United States v. Tsai*.[40] In *Tsai*, Immigration and Naturalization Service (INS) agents in Guam stopped two passengers who were about to board a flight to Hawaii, and the agents discovered that the passengers were using falsified passports in an attempt to enter the United States.[41] INS discovered, while Tsai was on a flight from Guam to Hawaii, that Tsai had stayed at the same hotel as the detained passengers and that he was the only passenger to take the same flights as the two passengers.[42] INS determined that Tsai was attempting to help the passengers enter the United States illegally.[43] When Tsai arrived at the airport in Hawaii, INS agents met him and detained him for an interview where an agent searched through his bags and found airline tickets for the two passengers who had used falsified passports.[44] Agents informed him that he was to be detained, and when the arrest warrant arrived, he was arrested.[45] Tsai argued that the search of his bags should have required particularized suspicion because it was not a routine search, and therefore, did not respect his Fourth Amendment rights.[46] Tsai argued that the search was not routine because agents already suspected him of criminal activity in Guam, and when they stopped him in order to interview him and search his bags, it was for a criminal investigation and not for enforcing immigration laws at the borders.[47] The court rejected this argument, finding that whether the search was for a criminal investigation was not the standard of whether a border search was "routine," but rather the characterization stems from an exami-

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[38] *Id.*

[39] United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 125 (1973).

[40] 282 F.3d 690 (2002).

[41] *Id.* at 692–93.

[42] *Id.* at 693.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 694.

[47] *Id.*

nation of how intrusive was the search.[48] The court found that the search was routine since a search of luggage is not as intrusive as a strip search, which invades a traveler's personal privacy and requires particularized suspicion in the Ninth Circuit.[49] The court held that a warrant requirement cannot be imposed on warrantless searches that occur at the border simply due to the motivation behind the search.[50] However, motivation is not totally irrelevant when determining if Fourth Amendment protections have been violated.[51] A border search may violate Fourth Amendment rights if it is conducted, as a general scheme, in order to primarily focus on criminal control purposes.[52] In the case of Tsai, the border search did not violate the Fourth Amendment because it was an individual search of Tsai, and an individual may be subjected to "broadly applicable search schemes on the same basis as other individuals" if that scheme does, in fact, apply to that individual.[53] In Tsai's case, the validity of the border search process in general was not in question, it was merely his individual search, which the court determined to be valid.[54]

C. Reasonable Suspicion

However, some searches at the border require "reasonable suspicion" in order to be conducted in a constitutional manner.[55] Border searches that require reasonable suspicion are those where the customs agents wish to do an alimentary canal search.[56] Reasonable suspicion is the correct standard in these types of situations because it "effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause."[57]

In *United States v. Montoya de Hernandez*, a woman arrived in Los Angeles, California, on a flight from Bogota, Colombia, and customs officials subsequently detained her under suspicion of drug smuggling.[58] After Montoya de Hernandez answered ques-

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48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.* at 695.
52 *Id.*
53 *Id.*
54 *Id.*
55 United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985).
56 *Id.*
57 *Id.*
58 *Id.* at 532–33.

tions from the customs officials and after a subsequent strip search, the officials suspected that she was a person "who attempts to smuggle narcotics into this country hidden in her alimentary canal."[59] Customs officials gave the woman several options, including having x-rays taken or being put on a return flight to Colombia, and the woman chose to fly back to Colombia.[60] She was detained in the customs office and was informed that if she had a bowel movement female customs officers would "inspect her stool for balloons."[61] She remained in the customs office for sixteen hours while waiting on the flight, and during that time did not eat or drink anything, nor did she use the restroom; thus, a court order was issued in order to conduct a rectal examination, which led to the discovery of balloons of cocaine.[62] The Court determined that the customs officials must have reasonable suspicion in order to detain the woman for alimentary canal smuggling.[63] The Court determined that the reasonable suspicion standard for customs officials is that they "must have a 'particularized and objective basis for suspecting the particular person' of alimentary canal smuggling."[64] The Court determined that there was reasonable suspicion in this case.[65]

"Real suspicion" is also required by Ninth Circuit courts when a strip search is to be conducted.[66] "No one should be subject to the indignity of" a search where the person has crossed the border and is required to undress and be subjected to a skin search "unless there are compelling reasons to do so."[67] In *Guadalupe-Garza*, the Ninth Circuit illustrated this idea by determining that the appellant's motion to suppress heroin recovered from a strip search should be granted because the search was conducted illegally.[68] In that case, Guadalupe-Garza entered the United States at Calexico, California, where a customs inspector found him to be nervous and asked him to come into the customs office for questioning.[69] The customs officer strip

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[59] *Id.* at 533–34.
[60] *Id.* at 534–35.
[61] *Id.* at 535.
[62] *Id.*
[63] *Id.* at 541–42.
[64] *Id.*
[65] *Id.* at 542.
[66] United States v. Guadalupe-Garza, 421 F.2d 876, 879 (9th Cir. 1970).
[67] *Id.*
[68] *Id.* at 880.
[69] *Id.* at 877.

searched him and, after doing so, noticed "hypodermic needle marks" on his arm.[70] Without giving Guadalupe-Garza any advice about his constitutional rights, customs officials took him to the hospital where he was forced to take "oral emetics" and subsequently "disgorged the contents of his stomach," which included two balloons of heroin.[71] The court determined that in order to balance protecting the rights of travelers and allowing customs officials to efficiently do their jobs they would now require "'real suspicion' justifying the initiation of a strip search."[72] The court articulated that real suspicion would require "subjective suspicion supported by objective, articulable facts" and that if a strip search was allowed to be conducted with only subjective suspicion, then the "protections of the Fourth Amendment would evaporate."[73] In this case, the court determined that "the objective facts did not warrant a real suspicion that appellant was concealing something on his person" and, therefore, the motion to suppress the heroin that was recovered from Guadalupe-Garza should be granted.[74]

In *United States v. Flores-Montano,* the Court recognized that another situation where particularized suspicion would be required is where there is a search that is destructive of property.[75] In this case, customs officials stopped Flores-Montano when he tried to drive into the United States in southern California.[76] The customs inspector inspected the car and asked Flores-Montano to leave the car, and it was taken to a second inspection.[77] At the secondary inspection a mechanic was called in to remove the gas tank from the car.[78] The tank was removed, and the mechanic hammered off a "hardening substance that is used to seal openings" from the tank, then opened an access plate and discovered 37 kilograms of marijuana.[79] The search of a gas tank does not damage the vehicle because it is a brief procedure that can be easily reversed.[80] Flores-Montano filed a motion to suppress the marijuana that was found during the search be-

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[70] *Id.*
[71] *Id.* at 878.
[72] *Id.* at 879.
[73] *Id.*
[74] *Id.* at 879–80.
[75] 541 U.S. 149, 155–56 (2004).
[76] *Id.* at 150.
[77] *Id.*
[78] *Id.* at 151.
[79] *Id.*
[80] *Id.* at 155.

cause he felt that the search required reasonable suspicion, and without reasonable suspicion, customs had violated his Fourth Amendment rights.[81] The Court stated that there are certain situations when a level of suspicion should be required in a border search but determined that searching a vehicle did not require a level of suspicion after comparing vehicle searches to the search of a person.[82] The Court recognized that a level of suspicion should be required "in the case of highly intrusive searches of the person-dignity and privacy interests of the person being searched."[83] However, the Court declared that the "[c]omplex 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."[84] The Court also recognized that "some searches of property are so destructive as to require a different result," but that in this case the search was not destructive to the point to require a particularized suspicion.[85] The Court determined that even though the search is involved enough to interfere "with a motorist's possessory interest," it is justified by "the Government's paramount interest in protecting the border."[86]

II. SUSPICIONLESS BORDER SEARCHES OF LAPTOPS: CURRENT LAW

In *United States v. Romm*, the Ninth Circuit did not even discuss whether a suspicionless search of a laptop at the border was different than a routine search of a closed container.[87] Romm was denied entry into Canada when a Canadian border official requested that he turn his computer on and found child pornography websites in Romm's internet history, which was in violation of the terms of Romm's probation.[88] Romm then flew into Seattle where U.S. customs agents, who had been informed by Canadian officials that Romm was denied entry into Canada, searched his laptop and found images of child pornography.[89] Romm moved to suppress the evidence that was found during

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81 *Id.* at 154.
82 *Id.* at 152.
83 *Id.*
84 *Id.*
85 *Id.* at 155–56.
86 *Id.* at 155.
87 *See* United States v. Romm, 455 F.3d 990, 997 (2006).
88 *Id.* at 994.
89 *Id.*

the search.[90] Romm's main argument was that he had never officially crossed the border, so his search should not be considered a border search.[91] However, the court determined that a traveler who had been refused legal entry to another country had to reenter the United States and was therefore subject to a border search without a warrant or suspicion.[92] After the court determined that Romm was subject to a border search, it held that the search of a laptop at the border was reasonable.[93] The court did not discuss the implications of a laptop search before coming to its conclusion, it just stated that searches at the border are reasonable because they occur at the border, and therefore, since the search of Romm's laptop occurred at the border, it was reasonable.[94]

A. Analogy to Closed Containers

Certain courts have analogized laptops to closed containers, which require no suspicion when being searched at the border. Others have argued for a different analogy—to the human body—so that suspicion will be required in order for customs to search the contents of a laptop at the border. Travelers who wish to have their personal information or confidential client information on their laptops protected will want the courts to analogize laptops to the human body so that customs officials will have to have a level of suspicion before searching through the contents of their laptops.

Travelers saw a glimmer of hope for protection of private information on their laptops in the recent *United States v. Arnold* decision handed down by the Central District of California, where the court held that the standard for border searches of information stored on electronic storage devices should be reasonable suspicion.[95] In that case, Michael Arnold arrived at the Los Angeles International Airport from the Philippines and was selected for secondary questioning at customs.[96] Customs officials began to inspect his luggage, "which contained his laptop computer, a separate hard drive, a computer memory stick (also

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[90] *Id.* at 993.
[91] *Id.* at 996.
[92] *Id.*
[93] *Id.* at 997.
[94] *Id.*
[95] 454 F. Supp. 2d 999, 1001 (C.D. Cal. 2006), *overruled*, 533 F.3d 1003 (9th Cir. 2008).
[96] *Id.*

called a flash drive or USB drive), and six CDs."[97] A customs official told Arnold to turn his computer on so that she could see if it was working.[98] After the computer had booted up, the officials began to open folders that were on the computer's desktop.[99] The folders contained photographs of nude women and other photographs and images, which the customs officials believed depicted child pornography.[100] Arnold's computer and storage devices were seized until federal agents received a warrant to search them and then found more images in their search.[101] Arnold subsequently brought a motion to suppress the images that were found.[102]

The court was determining an issue of first impression for the Ninth Circuit—"whether the government can conduct a border search of the private and personal information stored on a traveler's computer hard drive or electronic storage devices without Fourth Amendment review."[103] The court recognized that its decision in the case would have an important impact on border searches because of developments in modern technology, which allow "individuals and businesses to store vast amounts of private, personal and valuable information within a myriad of portable electronic storage devices including laptop computers, personal organizers, CDs, and cellular telephones."[104]

The court determined that "opening and viewing confidential computer files implicates dignity and privacy interests."[105] The government argued that the search did not require reasonable suspicion because the customs officials were searching Arnold's laptop, a piece of tangible property, and not his person, so the search was routine.[106] The court disagreed with this contention, and found that the information contained on laptops and electronic storage devices "renders a search of their contents substantially more intrusive than a search of the contents of a lunchbox or other tangible object."[107] The court found that laptops and electronic storage devices are different than other

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97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.* at 1000.
103 *Id.*
104 *Id.*
105 *Id.* at 1003.
106 *Id.*
107 *Id.*

tangible objects because they have the potential to contain "vast amounts of information" such as personal "medical information, photos and financial records" and, in the case of business travelers, confidential client information or trade secrets.[108] The court concluded that a search of private, personal information on a laptop or other electronic storage device could be "just as much, if not more, of an intrusion into the dignity and privacy interests of a person . . . because electronic storage devices function as an extension of our own memory."[109] Therefore, the court concluded that "any border search of the information stored on a person's electronic storage device be based, at a minimum, on a reasonable suspicion."[110] The court determined that the government did not have a reasonable suspicion to search Arnold's laptop and electronic storage devices, so it granted Arnold's motion to suppress the images found on his laptop.[111]

On rehearing, the Association of Corporate Travel Executives (ACTE) and Electronic Frontier Foundation (EFF) wrote an amici curiae brief in support of the district court's decision to grant the motion to suppress.[112] The ACTE had an interest in this case due to individual ACTE members who had been randomly searched at the border and had their laptops seized and because they have an interest in protecting the confidential information that is stored on their laptop computers.[113] The EFF joined in the brief because they want the government to recognize "the threats that new technologies pose to civil liberties and personal privacy."[114] In their brief, the ACTE and EFF argued that the district court decision should be upheld because information stored on a laptop is unique, and a standard should be adopted to protect the privacy of citizens.[115] The brief also argues that without a standard, the government can abuse its power and avoid Fourth Amendment restrictions even with the "particularly invasive and unconstrained nature of these searches."[116]

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[108] *Id.* at 1003–04.

[109] *Id.* at 1000.

[110] *Id.*

[111] *Id.* at 1001.

[112] Brief for the Amici Curiae, *supra* note 7.

[113] *Id.* at 2.

[114] *Id.*

[115] *Id.* at 4.

[116] *Id.*

The government argued in its brief on the issue that the motion to suppress should be denied because courts have previously recognized that "[n]o suspicion is required to search computer media at the border."[117] The government stated that the court had used the wrong analogy when deciding what to compare computers to—the court should not have analogized computers with the human mind.[118] The government argued that computers should be analogized to other containers, those which suspicion is not required to search at the borders, instead of being differentiated from containers as the district court described them.[119]

Arnold also argued that a First Amendment exception should be found to border searches being conducted without a standard of suspicion.[120] He stated that reasonable suspicion should be required in border searches "where the risk is high that expressive material will be exposed" due to the principles of the First Amendment.[121]

The Ninth Circuit reversed the decision to grant Arnold's motion to suppress.[122] The court determined that the district court's decision that found that particularized suspicion is required to search laptops at the border was incorrect due to an erroneous basis on cases involving the search of a person.[123] Arnold argued that the search of his laptop was so intrusive that the search should have required suspicion.[124] The court rejected this argument, stating that the "prior approach of using an intrusiveness analysis to determine the reasonableness of property searches at the international border" should no longer be used.[125] The court recognized that some border searches of property are '"so destructive as to require' particularized suspicion," but determined that the search of Arnold's laptop was not destructive, and therefore, did not require particularized suspicion.[126] The court also rejected Arnold's analogy of a border search of a laptop to a search of a home, which falls under the

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117 Government's Opening Brief at 32, United States v. Arnold, 533 F.3d 1003 (9th Cir. 2008) (No. 06-50581).

118 *Id.*

119 *Id.* at 33.

120 United States v. Arnold, 533 F.3d 1003, 1006 (9th Cir. 2008).

121 *Id.*

122 *Id.* at 1010.

123 *Id.* at 1008.

124 *Id.*

125 *Id.*

126 *Id.* at 1007–08.

protection of the Fourth Amendment.[127] The Supreme Court has declined to support such an analogy, "expressly rejecting applying the Fourth Amendment protections afforded to homes to property which is '*capable of functioning as a home*' simply due to its size."[128] The court instead analogized a laptop to a container and pointed out that the Supreme Court, for purposes of determining what level of protection should be required under the Fourth Amendment, has refused to differentiate between containers of information and contraband "with respect to their quality or nature."[129] In short, the court determined that laptop computers and electronic storage devices are considered nothing more than containers for purposes of determining Fourth Amendment protection and found that they deserved no particularized suspicion for border searches.[130]

In *United States v. Roberts*, the Southern District of Texas denied a motion to suppress items found during a warrantless border search of the defendant's laptop as he was leaving the United States.[131] Roberts was leaving the United States on a flight to France but was detained by a customs agent who had been warned that Roberts would be coming through the airport and possibly carrying child pornography.[132] The agent told Roberts that he would have to inspect his computer and diskettes to see if they could be taken out of the country.[133] Roberts subsequently signed a consent form to allow customs to search through his things but then argued for a motion to suppress, stating that the search violated his Fourth Amendment rights.[134] Roberts specifically argued that the search violated his Fourth Amendment rights because officials were attempting to use the border search doctrine to avoid having to protect his Fourth Amendment rights, which should not be allowed.[135] The court rejected this argument and determined that border searches are not required to be conducted using a certain policy, and this border search therefore did not violate the Fourth Amendment if it was a valid search.[136]

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127 *Id.* at 1009.
128 *Id.* (quoting California v. Carney, 471 U.S. 386, 393–94 (1985)).
129 *Id.*
130 *See generally id.*
131 *See generally* United States v. Roberts, 86 F. Supp. 2d 678 (S.D. Tex. 2000).
132 *Id.* at 680.
133 *Id.* at 681.
134 *Id.* at 681–82.
135 *Id.* at 682–83.
136 *Id.* at 686.

The court determined that the search of Roberts's laptop and diskettes was a "routine expert search" and was "valid under the Fourth Amendment" because it did not seriously invade his privacy.[137] The court laid out the factors for considering intrusiveness of a traveler's privacy, as recognized by the First Circuit:

> (1) whether the search results in the exposure of intimate body parts or requires the 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.[138]

The court recognized that strip searches and body-cavity searches are non-routine, and that searches that destroy property have been considered non-routine, but declined to construe the laptop search as non-routine.[139] This court also analogized the laptop to a closed container.[140] The search of a closed container, such as a piece of luggage, is considered a routine border search for purposes of Fourth Amendment protection.[141] The court held that a "search of Roberts' [sic] computer and diskettes would not have been destructive or so personally invasive as to be nonroutine."[142] The court found that the motion to suppress should be denied since the search of Roberts' laptop did not violate his Fourth Amendment rights.[143]

In *United States v. Ickes*, Ickes was stopped at the border in order for customs agents to search his van when he attempted to enter the United States from Canada.[144] Agents discovered a videotape of a tennis match, which focused particularly on a young boy, and were then compelled to search the van more thoroughly, at which point they discovered marijuana and photographs of nude or semi-nude young boys.[145] Agents arrested Ickes and continued to search the van, and they discovered a

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137 *Id.* at 688.

138 *Id.*

139 *Id.*

140 *Id.* at 688–89.

141 *Id.*

142 *Id.* at 688.

143 *See generally id.*

144 393 F.3d 501, 502 (4th Cir. 2005).

145 *Id.* at 502–03.

computer and seventy-five disks containing child pornography.[146] Ickes filed a motion to suppress the contents of his computer and the disks, arguing that the search had been a violation of his Fourth Amendment and First Amendment rights.[147] The court discussed the border search exception to the Fourth Amendment and stated that the government has a larger interest in a search at the border than the traveler has an interest in protecting privacy since the traveler should not expect his privacy at the border to be as protected as it would be in his or her own home.[148] The government has a greater interest than the entrant since the government is trying to prevent the entry of contraband into the United States in order to protect its citizens.[149]

Ickes attempted to argue that there should be a First Amendment exception to the border search doctrine, stating that the search of his computer was invalid because it "involved the search of expressive material."[150] The court rejected this argument since the main purpose of the border search doctrine is for the United States to protect itself, and if the First Amendment exception were to apply, the government would not be able to search for terrorist communications, which the court deemed to be expressive material.[151] If a First Amendment exception to the border search doctrine were granted, this "would create a sanctuary at the border for all expressive material—even for terrorist plans" and would "undermine the compelling reasons that lie at the very heart of the border search doctrine."[152] Moreover, if a First Amendment exception were granted, this would cause many problems for officials who would have to determine the scope of the exception in disputes that may not be resolved easily.[153] The agents would first have to determine whether the traveler was carrying expressive information and if it was covered by First Amendment protections, and if they determined it was material afforded protections by the First Amendment, they would then have to decide if they had

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146 *Id.* at 503.

147 *Id.*

148 *Id.* at 506.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

probable cause to search the material.[154] This would cause too many problems, especially given that the border search doctrine was intended to be an expansive exception so that officials could efficiently protect the country.[155] Thus, the court declined to find a First Amendment exception to the border search doctrine.[156] Ickes also argued that a search of his laptop and the court's decision in his case was too broad and meant that any international traveler would be subject to a search of the files on their computers.[157] The court declined to entertain this argument because they felt it was "far-fetched" since "[c]ustoms agents have neither the time nor the resources to search the contents of every computer."[158] The court also felt that laptop searches would not be initiated unless a customs agent had observed behavior that they felt warranted a search and that the "essence of the border search doctrine" relies on the observations of customs agents.[159] The court refused to see a constitutional argument and determined that "to state the probability that reasonable suspicions will give rise to more intrusive searches is a far cry from enthroning this notion as a matter of constitutional law."[160]

In *United States v. Bunty*, the Eastern District of Pennsylvania, a court situated in the Third Circuit, held that the border search of a laptop computer does not require reasonable suspicion.[161] In this case, Bunty was returning to the United States from London, where he had been working for three weeks, when he was stopped by customs officials for secondary questioning.[162] Customs officials detained Bunty for secondary questioning because they had discovered his name in the National Criminal Information Center database, which showed that he had been arrested on sexual abuse charges.[163] During the secondary ques-

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154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* at 506–07.

158 *Id.* at 507.

159 *Id.*

160 *Id.* But, is this true? The Fourth Amendment was put in place to protect against unreasonable searches, and the court simply dismisses the gravity of this protection by stating that customs officials will not search any more than their reasonable suspicion leads them to believe they should search. The author believes that Ickes had a valid constitutional argument against the search of the contents of his laptop.

161 2008 WL 2371211, *3 (E.D. Pa. 2008).

162 *Id.* at *1.

163 *Id.*

tioning, agents searched through Bunty's luggage and discovered two laptops, flash drives, floppy disks, and compact discs.[164] Agents decided to look through the files that were contained on the disks, so they inserted them into a government computer and searched the files to discover that they contained child pornography.[165] The agents also asked Bunty to enter his password on the laptops in order for the agents to search the files they contained, and after entering an incorrect password into one of the laptops, agents informed Bunty that they would be keeping the laptops for further inspection.[166] Agents subsequently found child pornography on the laptops and a warrant was issued in order to conduct a search of Bunty's home where more child pornography was found.[167] After being indicted and charged, Bunty moved for a motion to suppress the evidence that was discovered in the border search and the evidence found at his residence.[168] He argued that his Fourth Amendment rights had been violated because the agents searched his computer and electronic storage device without reasonable suspicion.[169] He argued that the warrant and search of his home had resulted from the border search, and therefore, that evidence should also be suppressed since the border search was unconstitutional.[170] The court stated that the Supreme Court had not yet dealt with the issue of constitutionality of suspicionless laptop searches at the border, thus it drew its reasoning from other federal courts that had held that suspicionless laptop searches at the border were routine, and therefore constitutional under the border search exception to the Fourth Amendment.[171] The court determined that the border search was routine because Bunty could point out nothing to distinguish it from the other laptop searches that federal courts had deemed needed no reasonable suspicion.[172] Furthermore, the court discussed that even if reasonable suspicion were required, the agents who searched Bunty's laptop and electronic storage equipment had reasonable suspicion.[173] The court determined

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164 *Id.*
165 *Id.* at *2.
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.*
170 *Id.*
171 *Id.* at *3.
172 *Id.*
173 *Id.*

that the reasonable suspicion standard had been met given that the agents knew of Bunty's criminal record, saw a letter from his probation officer giving him permission to travel to London, and had reason to search his things since the floppy disks that he carried with him could fit into neither of the laptop computers he traveled with for work purposes.[174] The court ultimately denied his motion to suppress the evidence that had been gathered at the airport and at his home.[175]

In sum, modern courts have declined to give Fourth Amendment protection to laptops and other electronic storage devices during border searches. The courts have analogized laptops to closed containers and have declined to require particularized suspicion in order for customs agents to search through the actual files on a laptop or contained on another type of electronic storage device crossing the United States border.[176]

III. THE BORDER SEARCH EXCEPTION SHOULD BE CHANGED IN ORDER TO PROTECT THE PRIVACY OF THOSE TRAVELING WITH LAPTOPS

Border searches of the content on laptops and external media storage devices, without a required level of suspicion, is a controversial topic, but it does not need to be, since a standard can be developed that promotes both the traveler's interests and the government's interests. On one side, the government feels that it should have the power to search through the files on a traveler's laptop in order to protect the citizens of the United States from the entry of contraband at the border.[177] On the other hand, travelers feel that their privacy is violated when customs officials go through the files on their laptops, and business travelers are dealing with the consequences of having confidential information stored on their computers when traveling. Some travelers who have confidential information on laptops and iPhones have decided to delete email messages off of their phones before entering the United States in order to protect the confidential information from being exposed to a border

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[174] *Id.*

[175] *Id.*

[176] *See generally* United States v. Arnold, 533 F.3d 1003 (9th Cir. 2008).

[177] *See id.* at 1007.

search.[178] This can create not only a true inconvenience for travelers, it also creates travelers who essentially have no privacy, and the majority of which have done nothing wrong. Some travelers may not even be aware of the implications of taking their laptops on travels into the United States. In fact, according to a survey conducted in October of 2006, only six percent of business travel managers realized that customs agents can, at random, seize computers at the border and copy and retain files on the computer.[179]

Modern courts that have dealt with the issue of border searches of laptops have declined to offer Fourth Amendment protection to files contained on computers or electronic storage devices that travelers bring into the United States.[180] However, courts should recognize our changing technology and the implications that it has on those traveling across the border. The district court decision in *Arnold* seemed to have correct reasoning when it found that a border search of a laptop and electronic storage devices should require particularized suspicion since it "[i]mplicates [p]rivacy and [d]ignity [i]nterests of a [p]erson."[181] Modern courts should follow the rationale of the district court opinion in order to come to the correct conclusion that laptop searches should require particularized suspicion. Some argue that if the courts continue to uphold suspicionless border searches of laptops it will "render meaningless the Fourth Amendment's prohibition against unreasonable searches and seizures."[182]

A. The Law Should Change to Fit Technology

Laptops are not merely closed containers—they are unique pieces of technology that allow people to save their most precious memories, important files, and confidential information all in one place. Courts have gotten stuck by trying to analogize laptops with things that courts have already determined do not require particularized suspicion—closed containers.[183] Laptops

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[178] *Critics Worry About Laptop Searches at Border: Rummaging Through Gadgets Brings Up Fourth Amendment Concerns*, MSNBC, Dec. 8, 2008, http://www.msnbc.msn.com/id/28113582/.

[179] Brief for the Amici Curiae, *supra* note 7, at 8.

[180] *See generally Arnold*, 533 F.3d 1003.

[181] United States v. Arnold, 454 F. Supp. 2d 999, 1003 (C.D. Cal. 2006), *overruled*, 533 F.3d 1003 (9th Cir. 2008).

[182] Brief for the Amici Curiae, *supra* note 7, at 2.

[183] Alzahabi, *supra* note 5, at 180.

are more than closed containers, though. Courts should look outside of this analogy and recognize that computers implicate something more than just a container. In fact, some people have said that a laptop computer can "contain as much information about us as our homes contain—perhaps more."[184] When the government searches through the files contained on a person's laptop it is able to glean as much information as it would be able to if it had extensively searched that person's home.[185] As people naturally presume the privacy of their homes, which is protected under the Fourth Amendment, they also presume that the contents of their laptops are private, even when they are traveling.[186] A laptop is not often easily left at home. Travelers may need to take their laptop with them but have no place to store their files that are on the computer and so are forced to take these private, confidential files with them. Should travelers be punished by being subjected to suspicionless searches for inevitably having to carry around files that, if they could conveniently be, would be left at home? Some courts have even recognized the privacy concerns that computers implicate by stating that "'for most people, their computers are their most private spaces.'"[187] The courts should recognize that a "standard that reasonably protects the privacy of our citizens" should be required when it comes to border searches of information contained on a laptop.[188]

Moreover, if the courts are looking to analogize laptops to something, they should find that computers are more accurately analogized to the human body than to a closed container. The Supreme Court has provided that particularized suspicion must be required when an alimentary canal search is conducted due to privacy interests.[189] Particularized suspicion should also be required when a laptop search is conducted because the information contained on a laptop can implicate privacy interests in much the same way that the alimentary canal search implicates privacy interests.[190] The courts should adopt the rationale of

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184 Brief for the Amici Curiae, *supra* note 7, at 12.

185 *Id.* at 16.

186 *See id.* at 12.

187 Alzahabi, *supra* note 5, at 180 (citing U.S. v. Ziegler, 474 F.3d 1184, 1189 (9th Cir. 2007).

188 Brief for the Amici Curiae, *supra* note 7, at 4.

189 United States v. Arnold, 533 F.3d 1003, 1007 (9th Cir. 2008).

190 United States v. Arnold, 454 F. Supp. 2d 999, 1000 (C.D. Cal. 2006), *overruled*, 533 F.3d 1003 (9th Cir. 2008).

the district court in *Arnold*, when the court determined that the search of personal information stored on a laptop 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."[191] The court determined that these privacy interests were implicated because a laptop or an electronic storage device functions "as an extension of our own memory."[192] Simply because the search was not a physical search of the person does not mean that it should not deserve Fourth Amendment protection when the government is conducting such an invasive search into an object that is "capable of storing our thoughts" and "vast amounts of private, personal and valuable information."[193]

However, the courts need not analogize a laptop to anything in order to provide protection for private information stored on a laptop. Laptops are unique—they are different from human bodies and different from closed containers. The courts should recognize this uniqueness and develop a new standard of particularized suspicion in order to protect the Fourth Amendment rights of travelers. The Supreme Court has before discussed the need "that constitutional projections must evolve with modern technology and social practices."[194] The computer has also come to play a vital role in modern society, and the courts should recognize this and be willing to create new law and break from precedent in order to adapt constitutional standards to modern living.[195]

B. Does a Laptop Search Really Prevent Contraband from Entering the Country?

The purpose behind the broad scope of the border search exception to the Fourth Amendment is that the government is seeking to prevent the entry of contraband into the United States in order to protect its citizens.[196] However, the contents of a laptop may enter the country even if customs officials stop every international passenger and search their laptops for con-

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191 *Id.*

192 *Id.*

193 *Id.* at 1000–01.

194 Brief for the Amici Curiae, *supra* note 7, at 24 (quoting Katz v. United States, 389 U.S. 347, 352 (1967): "To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.").

195 *Id.*

196 United States v. Ickes, 393 F.3d 501, 506 (4th Cir. 2005).

traband. A computer is unique, and the files on it can be emailed into the country. A person wishing to bring contraband into the United States need not do more than hit the send button on their email—they would not have to go through the lengths of flying internationally into the country with their laptop in order to deposit the contraband. A smuggler need not risk a suspicionless search at the border; they can email the contraband or "simply post the information on the internet" if they desired to get contraband into the United States.[197] There is no reason that customs officials should have "unchecked power"[198] to search laptops because there is no guarantee that this would even keep our citizens safe since the information can be transmitted through the internet, and requiring a particularized suspicion would do no more to allow entry of contraband into the country than would the internet.

A border search of a gas tank on a car does not require particularized suspicion since it is not an alimentary canal search and does not implicate the privacy interests that come along with the intrusion of a person, and it is not so destructive as to implicate Fourth Amendment protections.[199] The search of a gas tank can actually help the government to accomplish its goal behind the border search doctrine of protecting citizens from contraband entering the borders[200] because there are only certain ways that drugs may be carried into the country—and all require a physical border to be crossed. Since a physical border is required to be crossed to get drugs into the United States, it is easy to see that the government would need expansive border search authority to search without suspicion if the search does not implicate the physical privacy of a human and is not too destructive. In the case of information contained on a laptop, this is simply not the case. Requiring particularized suspicion would not undermine the government's authority or purposes, since a physical crossing of the border is not the only way that contraband contained on a laptop can enter the country.[201] A valid reason for searching a laptop without suspicion would be to have the laptop simply opened and turned on in order to detect bombs

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197 Brief for the Amici Curiae, *supra* note 7, at 5–6.

198 *Id.*

199 *See generally* United States v. Flores-Montano, 541 U.S. 149 (2004).

200 *Ickes*, 393 F.3d at 506.

201 Alzahabi, *supra* note 5, at 177 ("Child pornography or other illegal photos will still enter into our country, regardless of these suspicionless searches, due to the nature of the Internet and electronic communications").

or drugs which smugglers may try to hide in order to bring them across the border.[202] This truly would comport with the government needing to have expansive power to conduct border searches in order to prevent contraband from entering the country in order to protect its citizens.[203] Thus, when searching a laptop, border officials should only be able to conduct searches in order to ensure that physical contraband is not being brought into the United States.[204] Clicking upon icons and opening files on a traveler's computer does not check for physical contraband that can only enter the country physically, and thus does not support the reasoning behind the border search doctrine.[205] Checking for physical contraband comports with the rationale behind the border search exception since it will truly keep contraband out of the country instead of searching for contraband that could easily enter the country through other means, such as the internet.[206]

C. Developing a New Standard for Laptop Searches

An argument has been made that "reasonable suspicion" should be required before customs agents are able to search laptops at the border.[207] However, since courts have been reluctant to apply this standard, perhaps courts should look into adopting a new standard specifically applicable to laptops. Courts have declined to analogize the search of a laptop to a search of a traveler's "alimentary canal," which would require reasonable suspicion by officials before conducting the search.[208] If the courts will not find that a laptop should be protected against suspicionless searches by having a standard of reasonable suspicion, just as the dignity of the human body should be protected, then perhaps the courts should develop a standard lower than reasonable suspicion, but still higher than no suspicion at all, in order to conduct a border search through all of the files on a traveler's computer. This would strike a balance between the government's desire to protect its citizens by searching for contraband at the border, and protecting travelers' Fourth Amendment rights against unreasonable searches.

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202 Brief for the Amici Curiae, *supra* note 7, at 6.

203 *Ickes*, 393 F.3d at 506.

204 Alzahabi, *supra* note 5, at 177.

205 *Id.*

206 *Id.*

207 *Id.* at 185–86.

208 United States v. Arnold, 533 F.3d 1003, 1007 (9th Cir. 2008).

This standard would still allow customs officials to conduct their jobs, but would afford more protection to confidential and private materials that passengers carry on their laptops. In fact, in *United States v. Ickes* the court rejected Ickes' argument that if the court upheld suspicionless border searches of laptops then every international traveler could have their laptop searched because the court felt customs agents did not have the resources, but also because they most likely would only search through the files of a laptop if they felt that there was a reason to do so given "the traveler's conduct or the presence of other items in his possession suggest the need to search further."[209] However, if the court felt that the customs agents would only search through the files on a computer when they felt there was a need to because of the circumstances, why would the court have a problem with determining that a laptop search requires particularized suspicion? It seems that the court is already saying that there "most likely" would be a particularized suspicion before a customs agent entered into a search of a laptop.[210] If this were truly the case, then the court should have no problem with developing a requirement of some type of particularized suspicion before a laptop search is conducted at the border.

Developing a standard would help modern travelers save time and expense when traveling internationally. Instead of travelers taking the time to delete confidential emails and files off of their laptops and Blackberrys before traveling and then synching them back with a computer left at the office or at home,[211] travelers would know that customs officials would be required to have a reason before searching through their computer files and may feel more comfortable with traveling internationally with their computer.

D. The First Amendment Should be an Exception to the Border Search Doctrine

Border agents cross an "important constitutional threshold" when they "cease looking for physical contraband inside a computer and instead begin reviewing the electronic files on the computer."[212] The First Amendment protects certain "presump-

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[209] United States v. Ickes, 393 F.3d 501, 506–07 (4th Cir. 2005).

[210] *Id.* at 507.

[211] *See Critics Wary of Laptop Searches at Border: Rummaging Through Gadgets Brings Up Fourth Amendment Concerns*, *supra* note 178.

[212] Brief for the Amici Curiae, *supra* note 7, at 23.

tively protected material" from searches conducted without suspicion.[213] In searches where there is a search for and seizure of "presumptively protected material," it is required that the "Fourth Amendment be applied with 'scrupulous exactitude' in such circumstances."[214]

The contents of laptops can be the same content that courts have already determined are presumptively protected material. In *United States v. Arnold*, Arnold argued that a First Amendment protection should apply to his case because there was a high risk that expressive material would be exposed.[215] He also argued that the court should "promulgate a reasonable suspicion requirement for border searches where the risk is high that expressive material will be exposed."[216] The Ninth Circuit incorrectly rejected Arnold's First Amendment argument by relying on the Fourth Circuit's decision in *United States v. Ickes*, where the court refused to find that the First Amendment should create an exception to the border search doctrine.[217] The Fourth Circuit held that the First Amendment could not be an exception, because if it were in effect it would "protect terrorist communications which are inherently expressive," would create a standard which customs agents would not be able to use since it would require them to decide which material was expressive, and the exception would "contravene the weight of Supreme Court precedent" on the issue.[218] Therefore, the court determined that the material on Arnold's laptop could not be protected by carving out a First Amendment exception to the border search doctrine.[219]

The court in *Heidy v. United States Customs Service* conceded the fact that customs agents may in fact have to briefly read documents in order to determine what they are, but that once agents begin reading a document for the intellectual content, they cross a First Amendment threshold which may encroach upon a person's constitutional rights.[220] In *Heidy*, customs officials

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213 *Id.* at 22.

214 *Id.* at 22 (quoting Stanford v. Texas, 379 U.S. 476 (1965)).

215 533 F.3d 1003, 1006 (9th Cir. 2008).

216 *Id.* (It is safe to assume that when Arnold referred to "searches where the risk is high that expressive material will be exposed" he was referring to laptop searches when customs officials begin opening files on computers where expressive material may be stored.).

217 *Id.* at 1010.

218 *Id.*

219 *Id.*

220 681 F. Supp. 1445, 1450 (C.D. Cal. 1988).

seized written materials from the plaintiffs, who were United States citizens, as they returned to the United States from Nicaragua.[221] Customs officials reviewed some of the materials in order to see if they violated a United States statute that prohibits persons from bringing materials into the United States that advocates treason or insurrection against the United States.[222] In reviewing the documents, customs officials made photocopies of all of the documents.[223] In the end, none of the materials the customs agents reviewed violated the statute prohibiting the entry of treasonous materials.[224] Plaintiffs contend that some of the photocopies and records of the documents were not returned, even though customs agents found that they did not violate the statute.[225] In order to support their argument that customs officials had misapplied the United States statute when they searched the plaintiffs' documents and retained copies of them, the plaintiffs argued that the customs officials had violated their constitutional rights when they conducted the search and retained the documents.[226] The plaintiffs argued that the suspicionless border search exception to the Fourth Amendment should end when "substantial encroachment on their first amendment rights begins."[227] The court agreed with this statement and recognized that customs officials reading materials for the purpose of discovering the intellectual content of the material encroached upon First Amendment protections.[228] The court recognized that the purpose of the border search exception to the Fourth Amendment was to prevent the entry of physical contraband into the United States, which was clearly different from the intellectual content of written materials that the plaintiffs were bringing into the country.[229] The court stated that items such as "[f]irearms, diseased foods and more recently controlled substances (drugs)" were the physical items that the border search doctrine intended to keep out of the United States.[230] The *Heidy* court recognized that intellectual content is different from physical items that are crossing the border and

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221 *Id.* at 1446.
222 *Id.*
223 *Id.* at 1447.
224 *Id.*
225 *Id.*
226 *See id.* at 1447–48.
227 *Id.* at 1449.
228 *Id.* at 1449–50.
229 *Id.* at 1450, n.14.
230 *Id.*

that there should be a different standard applied in order to protect First Amendment rights.[231] Courts today should recognize this difference and the implications that it has on suspicionless border searches of laptops. Laptops contain materials with intellectual content and should be afforded at least some particularized suspicion before files are opened and examined in order to avoid the violation of First Amendment rights.[232]

E. Implications if the Law Stays the Way it is Today

If courts continue to uphold suspicionless border searches of laptops, the United States could have real problems concerning Fourth Amendment protections and privacy implications. The Supreme Court has stated that the basic purpose of the Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[233] The Fourth Amendment was created by the Founders to protect citizens from general searches that required no oversight.[234] A "suspicionless unrestricted search of a laptop" is no different than the general searches that the Framers were seeking to eliminate.[235] If courts do not change how they rule on cases involving modern technology, "rules created to prevent general searches for physical evidence may result in the equivalent of general searches for digital evidence."[236] In fact, this was an argument of Ickes in *United States v. Ickes.* Ickes argued that if the court upheld the suspicionless search of his laptop, then '"any person carrying a laptop computer . . . on an international flight would be subject to a search of the files on the computer hard drive.'"[237] The court rejected this argument because they felt it was too "far-fetched" since customs officials had neither the time nor the resources to engage in a search of every person's laptop computer.[238] The court also thought that an invasive laptop search would not be conducted unless a customs official had reason to conduct the search.[239] It may be the case today that Ickes' argument is not logical because customs agents do not

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231 *See id.* at 1450–51.

232 Brief for the Amici Curiae, *supra* note 7, at 23.

233 Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

234 Brief for the Amici Curiae, *supra* note 7, at 17.

235 *Id.* at 18.

236 *Id.* at 19 (citing Orin Kerr, *Searches and Seizures in a Digital World,* 119 Harv. L. Rev. 531, 569 (2005)).

237 United States v. Ickes, 393 F.3d 501, 506–07 (4th Cir. 2005).

238 *Id.* at 507.

239 *Id.*

have the time nor the resources required to conduct a laptop search of every international traveler, but what happens when the technology advances to a state where it is quick to search a laptop and customs does have the resources to conduct a laptop search on every passenger?[240] The number of computers that the government searches at the border does not affect the constitutionality of the search,[241] but the implication is that privacy concerns regarding laptops will become more of a regularity and that the courts should evaluate how it wants to handle the precedent courts have established for suspicionless laptop searches at the border. Some have also suggested that if customs officials are able to search laptops more quickly and easily as technology advances, then this "may encourage the police to use border search authority to look for evidence of other types of crimes stored inside the suspect's machine."[242]

Laptop searches also have implications for business travelers who travel with laptops that contain confidential information, or at one point in time did contain confidential information. If the business traveler accessed the information recently on his computer, "the laptop may have created temporary files of the information, which can be recovered through forensic examination," and "[d]eleted images or files can also be recovered by forensic analysis."[243] Professionals who have confidential information on their computers cannot risk confidential material being recovered through a forensic examination, so they may have a duty to leave their laptops at home.[244] Businesses will now have to analyze how they will conduct international travels and decide if they want to risk confidential information being searched or if they will need to come up with other options for employees to conduct business while traveling abroad. Companies are now enacting new policies to limit the amount and type of information that employees can carry on their laptops while traveling internationally.[245] For example, if an employee was carrying a laptop which contained personnel information, and his laptop was searched at the border, then a number of privacy

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240 Brief for the Amici Curiae, *supra* note 7, at 20.

241 *Id.*

242 *Id.* at 21.

243 Alzahabi, *supra* note 5, at 185.

244 *Id.*

245 Jaikumar Vijayan, *Travel Group Warns: Corporate Data at Risk From Laptop Searches at Border*, COMPUTERWORLD, Apr. 30, 2008, http://www.computerworld.com/action/article.do?command=ViewArticleBasic&articleId=9081358.

violations could be brought against the employee's company.[246] The law today on border searches of laptops is unclear for many businesses.[247] If the courts continue to have jurisprudence that does not fully explain what is limited and what is not in laptop searches, then companies may be enacting policies that they had no need of, or may enact a policy that does not cover as many things as it should and could eventually get them into trouble if confidential information was downloaded from an employee computer during a border search.

Some businesses have already enacted policies to deal with border searches, such as a company whose owner had her laptop containing company information confiscated at the border for no reason, and never returned.[248] Her company then enacted a policy that employees could only travel with laptops that contained no company information, and then they can access company information remotely.[249] Other companies have instructed their employees to travel with "blank laptops" and then to access company information via the internet.[250] These policies can put a strain on businesses and interfere with their ability to conduct business efficiently, with no corresponding benefit to protect the country. The information contained on a laptop can easily enter the border through the internet, so businesses should not be forced to enact policies that hinder their business for the chance that the government will catch contraband entering the United States through a suspicionless search. The decision to require some level of suspicion at the border for laptop searches would provide businesses with the opportunity to carry laptops containing all of the business information they need, while at the same time still protecting the citizens of the United States.

IV. CONCLUSION

Modern courts need to change along with modern times and changing technology. When the border search exception to the Fourth Amendment was created, it is doubtful that anyone thought that we would be dealing with massive amounts of personal and confidential information being carried across the bor-

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246 *Id.*

247 *Id.*

248 Ellen Nakashima, *Clarity Sought on Electronics Searches: U.S. Agents Seize Travelers' Devices*, WASH. POST, Feb. 7, 2008, at A01.

249 *Id.*

250 *Id.*

ders on electronic storage devices and laptops. The Supreme Court has previously recognized that constitutional protections need to "evolve" with changing technology, and the Court should apply this same reasoning in order to change the law regarding laptop computers and suspicionless border searches.[251] The courts can no longer simply analogize a laptop to a closed container because it happens to hold things. Instead, courts should recognize that laptops contain much more information than a normal closed container can hold, and the type of information that it usually contains has great implications for privacy concerns.[252]

Courts have also refused to impose a particularized suspicion standard for border searches even though there could be a First Amendment justification for requiring particularized suspicion.[253] If courts refuse to imply a particularized suspicion because they have analogized a computer to a closed container, they would have another justification for particularized suspicion due to the protection of expressive material which is often contained on laptops.[254] If nothing else, the Supreme Court should decide that First Amendment protections are warranted in border laptop searches, and customs officials should be required to have a particularized suspicion before they begin to open files on a traveler's laptop.

Courts have declined to break from precedent and have determined that laptop searches at the border do not require reasonable suspicion.[255] Courts have declined to apply the reasonable suspicion requirement, but there are still great privacy issues that are implicated, indicating that there should be some standard of suspicion required. Since courts have declined to enact a standard of reasonable suspicion, a new standard should be created in order to protect the privacy of citizens traveling with laptops and other electronic storage devices. A new standard can be created that will protect the government's interest in keeping citizens safe while, at the same time, protecting the privacy of international travelers. Businesses are currently confused by the law regarding laptop searches at the

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[251] Brief for the Amici Curiae, *supra* note 7, at 24.

[252] United States v. Arnold, 454 F. Supp. 2d 999, 1000 (C.D. Cal. 2006), *overruled*, 533 F.3d 1003 (9th Cir. 2008).

[253] Brief for the Amici Curiae, *supra* note 7, at 22.

[254] *Id.* at 23.

[255] *See generally* United States v. Arnold, 533 F.3d 1003 (9th Cir. 2008).

border and are seeking clarification.[256] A new standard should be created quickly so that travelers will be able to determine whether they can bring confidential information stored on their laptops on international trips. The Supreme Court should take on the issue of suspicionless laptop searches and create a new standard of particularized suspicion to protect the constitutional rights of travelers, while at the same time providing for protection of United States citizens.

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[256] Vijayan, *supra* note 245.


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