On What Authority: Customs and Border Protection's Unwarranted War on Private Aviation

Heather McKinney

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ON WHAT AUTHORITY?: CUSTOMS AND BORDER PROTECTION'S UNWARRANTED WAR ON PRIVATE AVIATION

HEATHER MCKINNEY*

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* J.D. Candidate, SMU Dedman School of Law, 2015; B.A., English, University of Illinois at Chicago, 2010. This comment is dedicated to Omar E. Roa, Nancy & Phil McKinney, and Shannon & Aaron Aguilar for their love, support, and encouragement. To Loreta Peebles, Kay Shurtleff, and Linda Muhl—thank you for lessons taught long ago and still applied today. Special thanks to Allyson Gault for her support as an editor and friend and Timothy Painter, CFI, for his valuable input as both a pilot and mentor.

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"UNCONTROLLED SEARCH and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."  

Although passengers flying on commercial airlines expect to be searched thoroughly at TSA checkpoints, most domestic private pilots have become accustomed to a fairly hands-off flying experience. Americans pilot and fly in private planes in a field of travel called "general aviation," which encompasses 57% of all civilian aviation activity in the United States and "[c]ontributes more than $150 billion to the U.S. economy annually." Aside from ramp checks performed by Federal Aviation Administration (FAA) officials, where a pilot is asked to show a few pertinent documents without much incident, general aviation pilots are usually left alone. That used to be the norm until a spike in warrantless searches began occurring over the course of 2012 and 2013. Suddenly, pilots flying domestic routes to places like Iowa and Oklahoma were being detained by local law enforcement and subjected to invasive searches by men in tan jump-suits, later identified as agents from the Customs and Border Protection (CBP), a sub-agency of the Department of Homeland Security.  

The CBP has the authority to conduct warrantless searches of private airplanes via a doctrine known as the "border search exception." Developed in 1866 and refined through case law, the
border search exception has become the CBP's main source for searching private aircraft. However, the border search exception has limitations; chief among those is that the search must be conducted at the border or its "functional equivalent." Under 8 U.S.C. § 1357(a)(3), warrantless searches are allowed at the border or a "reasonable distance" from it. The Attorney General has prescribed 100 air miles as a "reasonable distance." This recent rash of searches has caused an outcry from general aviation pilots because none of the planes were on international flights nor within 100 miles of the border.

This comment will explore the development of the border search exception and how it pertains to general aviation aircraft. Part II will provide a timeline of the CBP's recent actions and interactions with pilots, trade associations, and Congress because the factual background of this recent trend of domestic general aviation aircraft searches is important to understanding the recent searches in a legal context. Part III will explore the agencies with the authority to search a private aircraft and sources of that authority. Part IV will outline the border search exception and its development. Finally, Part V will apply the various factors of other valid searches by the CBP to the recent searches, using pilots Gabriel Silverstein and Larry Gaines as examples. By applying the various border search exception tests to Mr. Silverstein's and Mr. Gaines's examples, this comment will demonstrate that the authority under which the CBP purports to operate is not supported by law.

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II. RECENT ACTIONS BY CUSTOMS AND BORDER PROTECTION

A. STOP AND SEARCH OF GABRIEL SILVERSTEIN

Two recent and controversial searches by the CPB involved general aviation pilots Gabriel Silverstein and Larry Gaines. Gabriel Silverstein was flying back to New Jersey from California in a Cirrus SR22, a very popular single-engine aircraft. After landing in Iowa City for fuel and taxiing to the ramp, Mr. Silverstein and his partner entered the fixed-base operator (FBO). Looking out from the FBO, Mr. Silverstein saw not only Iowa City police officers and their canine unit surrounding his aircraft but also men in tan jumpsuits. He was then informed, without being asked permission, that they would be conducting a search with the canine unit that was already circling his plane. The men in tan jumpsuits gave Mr. Silverstein three choices: (1) stand quietly near his aircraft while his belongings were strewn about the runway, (2) wait inside the FBO, or (3) spend the afternoon in handcuffs. Partway through the search, an officer “advised him to confess to possessing a little personal-use dope [so that] it’ll be all over and easy.” The officer commiserated with Mr. Silverstein (who has long hair and a chest-length beard), stating that he did not think marijuana should be illegal and that he was just doing his job. Unbeknownst to the officer, Mr. Silverstein is a teetotaler, so he had neither drugs nor alcohol on board. After a two-hour ordeal, which included officers removing and rifling through all of Mr. Silverstein’s and his partner’s belongings, the officials told Mr. Silverstein he was free to go.

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14 Moore, Pilot Detained, supra note 6.
15 See Gen. Aviation Mfrs. Ass’n, supra note 3, at 18.
16 An FBO is “an airport-based business which parks, services, fuels and may repair aircraft; [and] often rents aircraft and provides flight training. The term was coined to differentiate FBOs from businesses or individuals without an established place of business on the airport.” ABCs of Aviation, AOPA, http://www.aopa.org/Pilot-Resources/Safety-and-Technique/Operations/ABCs-of-Aviation.aspx (last visited June 1, 2014); Moore, Pilot Detained, supra note 6.
17 Id.
18 Id.
19 Id.
20 Patch, supra note 5.
21 Moore, Pilot Detained, supra note 6.
22 Id.
23 Id.
his things. Later, Mr. Silverstein saw a picture of the CBP’s logo and recognized it as the same logo that appeared on the chests of the officers who had ransacked his aircraft.

B. STOP AND SEARCH OF LARRY GAINES

Like Gabriel Silverstein, Larry Gaines was flying west-to-east in his J35 Bonanza, a single-engine aircraft. He was flying with this transponder on “1200 squawk,” a code indicating to the towers on the ground that the pilot is flying under visual flight rules (VFR). Mr. Gaines flew approximately seven hours from Calaveras, California, avoiding a restricted airspace in Nevada on his way, and landed in Cordell, Oklahoma, where he was meeting a friend for dinner.

When Mr. Gaines dropped his eyeglasses case on the ramp, he did not know that when retrieving it he would be met by a county sheriff, the first of twenty local and federal law enforcement officers who would keep Mr. Gaines on the tarmac for about two hours. The sheriff told Mr. Gaines that the DHS had requested a sheriff’s deputy to verify the location of Mr. Gaines’s airplane as his flight fit “a certain profile.”

The deputy told Mr. Gaines that the DHS wanted to speak with him, so Mr. Gaines asked for its number. Instead of giving him the number, “the deputy said he was supposed to ‘check [Mr. Gaines’s] documents’” and have Mr. Gaines wait until the DHS arrived by airplane. Then Mr. Gaines had to show the deputy how to perform a ramp check.

Between the pilot-guided ramp check and the arrival of federal agents, Mr. Gaines took out his cell phone to call his mother and let her know that he had landed safely. In response to Mr. Gaines taking out his cell phone, the deputy “moved toward [Mr. Gaines] and made it very clear [he] was not

24 Id.
25 Id.
26 Fallows, supra note 13.
27 Id.; VFR stands for visual flight rules, a set of conditions under which a pilot may fly using visual cues to avoid collisions and obstacles. See, e.g., 14 C.F.R. § 91.159 (2014).
28 Id.
29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
to make any phone calls." In the end, the deputy did allow Mr. Gaines to call his mother but listened to the conversation.

After a total of eight automobiles and two federal aircraft arrived, the final head count was twenty federal and local law enforcement officers, seven of whom were dressed in full riot gear. When a border patrol official exited the government’s King Air aircraft, Mr. Gaines was able to ask for more details about his detention. The official told Mr. Gaines that his flight fit a “profile” of flying west-to-east from California. The official then asked Mr. Gaines whether he knew that his hometown was known for growing drugs. Mr. Gaines told the officer he had not heard that. In addition to asking for Mr. Gaines’s medical and airman certificates, a CBP agent asked him for his weight-and-balance measurement. When Mr. Gaines did not have that—he was not required to according to FAR Part 91—the agent said that they keep that regulation “in [their] back pocket for non-compliant suspects.”

An agent with the CBP then asked Mr. Gaines for consent to search his aircraft. Mr. Gaines refused. After conferring with other agents, the CBP official asked if they could take the drug-sniffing dog around Mr. Gaines’s plane. Mr. Gaines consented to that but did not allow the dog to climb onto the painted area of the wing, which could have caused costly damage to the plane’s exterior paint.

After the dog failed to alert its handler to the presence of any drugs, the agent told Mr. Gaines, “Yeah. You’re free to go.”

1 Id. 36 Id. 37 Id. 38 Id. 39 Id. 40 Id. 41 Id. 42 Id. 43 Id. 44 Id. 45 Id. 46 Id. 47 Id. 48 Id. 49 Id.

Although the FAA requires the aircraft’s standard weight and balance measurement to be onboard, the FAA does not require flight-specific weight and balance information to be onboard an aircraft. See FAA Order No. 8900.1, supra note 4, at 69-5(D).

Fallows, supra note 13.

Id. 46 Id. 47 Id. 48 Id. 49 Id.
Gaines asked if up until that point he had not been free to go. The agent did not answer, but instead only repeated that Mr. Gaines could leave.

C. INTERACTIONS WITH CONGRESS AND TRADE GROUPS

Mr. Silverstein and Mr. Gaines both reported their incidents to the Aircraft Owners and Pilots Association (AOPA). In response, the AOPA sought information on the searches of these and other pilots from the CBP via Freedom of Information Act (FOIA) requests. The AOPA considered the answer they received to be an “unsatisfactory” one. The CBP’s response on May 22, 2013, stated that:

[T]he Office of Air and Marine is charged with protecting the United States against threats in the air and sea environments primarily along the border and in the drug source and transit zones used by transnational smuggling organizations. Additionally, Air and Marine conducts other law enforcement and search and rescue efforts, such as responding to tips regarding suspicious activity in the air or marine environment to protect against threats to the American people and the nation’s infrastructure.

The CBP went on to refuse to provide any specific information on the stops of AOPA members, citing “the Privacy Act among other legal and policy considerations.”

Following that, AOPA sent an additional letter on June 19, 2013, that “question[ed] the authority under which CBP is conducting this monitoring, stop and search activity.” While waiting for a follow-up response, AOPA created a “kneeboard” reference guide for pilots to keep in the cockpit and use for

50 Id.
51 Id.
53 Id.
54 Id.
help in case of being searched by CBP. In a response to AOPA’s appeal of its FOIA denial, the CBP wrote a response letter stating that the agency was unable to find records pertaining to Mr. Silverstein’s stop at the Iowa airport despite conducting “comprehensive” searches of its internal systems. According to Craig Spence, AOPA’s Vice President of Operations and International Affairs, AOPA submitted a FOIA request to local law enforcement that revealed that the local police had approached Mr. Silverstein’s aircraft in response to a call from another agency.

Acting Commissioner Thomas S. Winkowski of the CBP responded to AOPA in a letter dated August 12, 2013, stating: “In the course of conducting a pilot certificate inspection, facts may arise meriting further investigation or search to the extent authorized under the Constitution and consistent with federal law.”

U.S. Representative Sam Graves of Missouri wrote a letter to the Inspectors General of both the DHS and the Department of Transportation (DOT) on September 9, 2013. In his letter, Representative Graves pointed out that of the multiple requests made to DHS, CBP, the Drug Enforcement Agency, and others, no rationale was cited for any of the stops and searches. Representative Graves requested a response by November 1, 2013. As of January 23, 2014, he has only received information that DHS “doesn’t have the capacity to start a review now but will do so when resources become available.” As far as the DOT, Representative Graves “has thus far received no formal, written response,” although “his office has been in touch to see if the

58 Id.
60 Id.
63 Id.
64 Id.
[Inspector General of the DOT] will launch an investigation in light of DHS’s refusal.⁶⁶

In what was seen by some as “suspicious” timing, approximately two weeks after Representative Graves’s letter and the increased requests for information,⁶⁷ the DHS issued a Notice of Proposed Rulemaking in the Federal Register “to exempt [the Air and Marine Operations Surveillance System (AMOSS)] records from certain provisions of the Privacy Act.”⁶⁸ AMOSS is used by CBP “to collect and maintain records on publicly available aircraft and airport data provided by the [FAA] as well as “requests from law enforcement about suspects, tips from the public, and recordings of event and operations data in a watch log or event tracking log.”⁶⁹ Effective on October 18, 2013, the rule put AMOSS records out of reach of information requests.⁷⁰

On October 30, 2013, eight U.S. senators wrote a letter asking for a list of all general aviation pilots stopped since 2009, “reasonable suspicion” that led to their being stopped, and the “probable cause” that allowed officers to search the aircraft.⁷¹ The senators expressed concern that “CBP may be violating our citizens’ Fourth Amendment rights.”⁷² Although the senators requested a response by November 15, they received nothing.⁷³ Two of the senators then wrote a follow-up letter on December 3, 2013.⁷⁴ That letter reiterated their request and requested an answer by December 16, 2013.⁷⁵

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⁶⁶ Id.
⁶⁷ Id.
⁶⁹ Id.
⁷⁰ Id.
⁷³ See id.; Tennyson, Senators Demand Answers, supra note 71.
⁷⁵ Id.
On December 23, 2013, CBP issued a sixty-day notice and request for comments for extending the existing collection of information pursuant to 19 C.F.R. § 122.27, which requires a pilot entering the United States to present certain documents including a pilot’s certificate and certificate of registration. Requests for extensions of an existing collection of information are required under the Paperwork Reduction Act. Although routine, this request reiterates CBP’s intention to continue checking the registration and certificates of aircraft entering the United States.

AOPA obtained an internal CBP memo that revealed the agency is calling stops of pilots like Larry Gaines and Gabriel Silverstein “zero-suspicion seizures.” When pressed for the authority under which it is operating, the CBP cited 14 C.F.R. §§ 61.3(1) and 91.203. The first of those regulations requires that a pilot present his airman and medical certificates when asked by law enforcement, and the second requires the pilot to carry an airman certificate. Neither of those regulations provides the authority for the CBP to conduct searches without warrants or suspicion.

The only place where the CBP can conduct warrantless searches without suspicion is, not surprisingly, at the border. The concept of what the “border” is, especially since the advent of airplane travel, has proven to be a nebulous concept. Courts have struggled to define what the border is, where it starts and stops, and in what situations one could be said to have crossed it.

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77 The Paperwork Reduction Act and Informations Collections Policy, Off. Chief Info. Officer, Department Com., http://ocio.os.doc.gov/ITPolicyandPrograms/Information_Collection/dev01_003742 (last visited June 1, 2014).
78 See id.
79 Tennyson, Freedom, supra note 65.
80 Id.
81 14 C.F.R. § 61.3(1) (2014).
82 14 C.F.R. § 91.203.
83 See 14 C.F.R. §§ 61.3(1), 91.203.
84 United States v. Garcia, 672 F.2d 1349, 1353-54 (11th Cir. 1982).
85 Id. at 1358-65 (summarizing the various types of border searches and their development throughout the circuits).
III. AUTHORITY TO INSPECT AIRCRAFTS

A. FEDERAL AVIATION ADMINISTRATION

U.S. citizens have the right to travel through navigable airspace. To that end, the Administrator of the FAA is required to "develop plans and policy for the use" of that airspace by promulgating regulations "necessary to ensure the safety of aircraft and the efficient use of airspace." Some of the requirements include obtaining airman and medical certificates and providing those documents to FAA inspectors and law enforcement (both local and federal) upon request.

The Administrator of the FAA is also empowered to have inspectors conduct "ramp checks." The objective of this task is to determine that an airman . . . and/or aircraft is in continuing compliance with Title 14 of the Code of Federal Regulations . . . . During this ramp check, the FAA inspectors "must always have their [FAA] credentials available" to produce to the airman whose aircraft they are inspecting. Section 6-101 of the FAA Order describing ramp checks provides a list of procedures. The ramp check begins with the inspection of airman certificates and medical certificates, their genuineness and legibility, and any special certificates required based on the type of aircraft or flight conditions.

The FAA Inspector may also inspect the aircraft for its "general airworthiness," paying attention to whether there are "cracks, damage, and loose or missing fasteners, or other deficiencies that may affect the safety of the flight." Inside the aircraft, the inspector is to "[i]nspect seats and safety belts for proper installation and condition."

87 Id. § 40103(b)(1).
88 14 C.F.R. § 61.3(a)–(c).
89 49 U.S.C. § 44103(d).
90 FAA Order No. 8900.1, supra note 4, at 6-89(B).
92 FAA Order No. 8900.1, supra note 4, at 6-89(B).
93 Id. at 6-101.
94 Id. at 6-101(D).
95 Id. at 6-101(G)(1).
96 Id. at 6-101(G)(2).
After completing the ramp check, the FAA inspector is supposed to fill out forms that report any deficiencies or noncompliance with Title 14. If there is evidence of noncompliance, the inspector will report that evidence, and the pilot may face suspension of his certificates.

B. LOCAL AUTHORITIES

The use of navigable airspace is under the purview of the federal government. However, local law enforcement has been empowered by the federal government to inspect airman certificates and medical certificates. Local governments can also make laws that make certain actions in the operation of an aircraft a crime under local law (e.g., landing an aircraft on a public street outside of an emergency situation). Texas, for instance, makes it a state crime to operate an aircraft without an airman certificate, thus giving local law enforcement authority beyond that granted to them by the FAA to inspect a pilot’s documents. State law may also require the pilot to present his airman certificate to local law enforcement, his passengers, or those in charge of a local airport. The Texas Transportation Code gives a peace officer the right to inspect an aircraft located on public property if that aircraft fails to have its identification numbers on clear display. Aside from a pilot committing a crime, local law enforcement has limited authority over general aviation pilots.

C. DEPARTMENT OF HOMELAND SECURITY AND CUSTOMS AND BORDER PROTECTION

Since the creation of the Department of the Treasury in 1789, the U.S. government has controlled the persons and items en-

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97 Id. at 6-102.
100 14 C.F.R. § 61.3(l)(3) (2014).
102 Id. § 24.003.
103 Id. § 24.004.
104 Id. § 24.012(b).
105 See 8 U.S.C. § 1357 (2012) (giving officers under the Department of Homeland Security, including the CBP, power to conduct searches within a reasonable distance from the border); 19 U.S.C. § 482 (2012) (giving custom officers the power to search vehicles and persons); 19 U.S.C. § 1582 (giving the Secretary of the Treasury power to create regulations for the search of persons and baggage).
tering the country to varying degrees. The U.S. Customs Border Patrol was established in 1853 when the Treasury Secretary "authorized the Collectors of Customs to hire Customs Mounted Inspectors" to patrol the borders. Sixty years later, the Department of Labor created the Bureau of Immigration and the Bureau of Naturalization. The two bureaus were merged in 1933.

On November 25, 2002, President George W. Bush signed a bill creating the DHS. In March 2003, the U.S. Customs and Border Protection (CBP) was created as part of the DHS. The creation of the CBP resulted in several bureaus, including the Customs Service and the Border Patrol as well as the inspection function of the Immigration and Naturalization Service, being merged under the CBP umbrella. In 2006, the CBP established the Office of Air and Marine, billed by the CBP as "the world's largest aviation and maritime law enforcement organization."

Customs' authority to search vessels at the border was first introduced in the Act of July 18, 1866. Since the invention of the aircraft, the CBP's authority to inspect aircraft comes from several places. First, under 14 C.F.R. §§ 61.3(1) and 91.203, a pilot is required to have and show his airman and medical certificates when asked by local or federal law enforcement. Beyond that, all aircraft arriving in the United States are subject to search by the CBP. Any aircraft arriving in the United States is required to present its documents, including a pilot certificate and certificate of registration. Aircraft arriving from foreign destinations must also comply with all "advance notification, arrival reporting, and landing requirements" as may be required

107 Id.
108 Id.
109 Id.
110 Id.
111 Id.
112 Id.
117 19 C.F.R. § 122.27.
by regulation. The CBP undoubtedly has the authority to inspect vessels, vehicles, and aircraft coming into the country over the border.

The common thread of these regulations and laws is the CBP's authority to search at the border. However, there are times when searching a vehicle at the immediate crossing of the border is impractical or impossible: "For . . . example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search." Regulations also allow searches in the "external boundary" located a "reasonable distance" from the border, which is defined as 100 air miles. Searches beyond that distance are not reasonable unless "unusual circumstances" would permit an agent to search beyond that. If an agent conducts such a search, he or she is required to "forward a complete report" to the Commissioner of the CBP who "may, if he determines that such action is justified, declare such distance to be reasonable." Beyond a "reasonable distance" from the border, case law has developed several other tests to determine the "reasonableness" of a search at the border.

IV. DEVELOPMENT OF THE BORDER SEARCH EXCEPTION

A. FOURTH AMENDMENT AND EXCEPTIONS

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

121 8 C.F.R. § 287.1(a) (2014).
122 Id. § 287.1(b).
123 Id.
125 U.S. CONST. amend. IV (emphasis added).
The Fourth Amendment does not prevent citizens from being searched; it prevents them from being searched unreasonably.\textsuperscript{126} The Supreme Court has held "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."\textsuperscript{127}

There are several scenarios where a warrantless search will be considered "reasonable": (1) the subject of the search has granted his or her consent;\textsuperscript{128} (2) the search of a vehicle where there is probable cause;\textsuperscript{129} (3) exigent circumstances, such as someone is in imminent danger, evidence may be destroyed, or the subject may evade officers;\textsuperscript{130} (4) incriminating objects are in plain-view;\textsuperscript{131} and (5) the border search exception.\textsuperscript{132}

\section*{B. Border Search Exception}

The border search exception is not a new concept, but it has gained exposure in recent months.\textsuperscript{133} Since as early as the 1970s, courts have been sharpening the border search exception concept.\textsuperscript{134} "Congress has always 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."\textsuperscript{135} Because of the need to control what comes into the country, under the border search doctrine "a governmental officer at the international border may conduct routine stops and searches without a warrant or probable cause."\textsuperscript{136} Although courts or statutes may outline certain scena-

\textsuperscript{126} Katz v. United States, 389 U.S. 347, 359 (1967) ("Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.") (emphasis added).

\textsuperscript{127} Id. at 357.


\textsuperscript{129} Carroll v. United States, 267 U.S. 132, 155-56 (1925).

\textsuperscript{130} United States v. McConney, 728 F. 2d 1195, 1199, 1205, 1206 (9th Cir. 1984).

\textsuperscript{131} Horton v. California, 496 U.S. 128, 133 (1990).


\textsuperscript{134} See, e.g., Ramsey, 431 U.S. at 618-19.

\textsuperscript{135} United States v. Flores-Montano, 541 U.S. 149, 124 (2004).

\textsuperscript{136} United States v. Cardenas, 9 F.3d 1139, 1147 (5th Cir. 1993).
rios where searches are permitted, they must all be “reasonable” under the Fourth Amendment.137

The Supreme Court addressed the concept of reasonableness as it pertains to the Fourth Amendment and border searches in *United States v. Ramsey.*138 Stressing the importance of border searches to control foreign vessels and persons, the Court held that “from before the adoption of the Fourth Amendment, [border searches] have been considered to be ‘reasonable’ by the single fact that the person or item in question had entered into our country from outside.”139 In addressing two seminal decisions, *Brignoni-Ponce* and *Almeida-Sanchez,* the Court explained that “plenary border-search authority” remained intact following those decisions even though the searches at issue in both were not upheld.140 The Court refused to uphold those searches on “the express premise . . . that the checkpoint or stop in question was not [at] the border or its ‘functional equivalent.’”141 These decisions emphasized the Court’s refusal to grant the CBP the ability to search vehicles regardless of their proximity to the border. By requiring that vessels, vehicles, and aircraft first cross the border or its functional equivalent, the Court has protected the Fourth Amendment and provided a check on the CBP’s authority.

Ultimately, *Ramsey* provided other courts with a balancing test to determine the reasonableness of border searches.142 In taking from other past Fourth Amendment cases, not solely border search cases, the *Ramsey* Court articulated a two-part test.143 First, the Court determined whether the search was authorized by statute.144 Second, the Court analyzed the reasonableness of the search under the Fourth Amendment.145 To determine the reasonableness of the search, the Court balanced the weight of the government’s interest in enforcing the statute against the privacy interest implicated by the search.146 For instance, in one case, the government’s interest in protecting the border out-

137 See U.S. Const. amend. IV.

138 Ramsey, 431 U.S. at 607–08.

139 Id. at 619.

140 Id. at 622.

141 Id. (citations omitted).


143 Id. at 727.


145 Id. at 611–16.

146 See id. at 615, 623 n.17.
weighed any privacy concern where a plane crossed the border without identifying itself and landed in the dark at an isolated airport.\footnote{United States v. Ivey, 546 F.2d 139, 143 (5th Cir. 1977).}

The Supreme Court determined the reasonableness of a search of a sea-going vessel in \textit{United States v. Villamonte-Marquez}.\footnote{462 U.S. 579, 580–81 (1983).} The chief issue was “whether the Fourth Amendment is offended when [c]ustoms officials, acting pursuant to [the] statute and without any suspicion of wrongdoing, board for inspection of documents a vessel that is located in waters providing ready access to the open sea.”\footnote{\textit{Id.} at 592–93.} Using the \textit{Ramsey} analysis, the Court determined that search of the vessel in the case at bar was reasonable considering the high government interest in enforcing documentation requirements of international trade and the limited intrusion resulting from the brief detention to check documents.\footnote{\textit{Id.} at 589, 590.} The Court held that because of the vessel’s easy access to the open water, the lack of ability to determine compliance without checking documents, and the “panoply of statutes and regulations” regulating maritime trade, the interest of the government was high in favor of being able to search the vessels.\footnote{\textit{Id.} at 592–93 (citations omitted).} However, “[r]andom stops without any articulable suspicion of vehicles away from the border are not permissible under the Fourth Amendment, but stops at fixed checkpoints or at roadblocks are.”\footnote{\textit{Id.}}

Border searches and seizures became increasingly important in the 1980s as “drugs primarily transited through the Caribbean into South Florida.”\footnote{CLARE RIBANDO SEELKE ET AL., CONG. RESEARCH SERV., R41215, LATIN AMERICA AND THE CARIBBEAN: ILLICIT DRUG TRAFFICKING AND U.S. COUNTERDRUG PROGRAMS 2 (2011).} Today, however, the primary pathway for drugs into the United States is the Central America–Mexico corridor.\footnote{\textit{Id.}} Cases addressing the search of private aircraft in the late 1970s and throughout the 1980s were primarily concentrated in the Eleventh and Fifth Circuits in Florida.\footnote{\textit{See, e.g.}, United States v. Brennan, 538 F.2d 711, 713 (5th Cir. 1976); United States v. Garcia, 672 F.2d 1349, 1352, 1354 (11th Cir. 1982).}
The facts in those cases involved searches of aircraft primarily in Florida but also in some other southern states.\textsuperscript{156}

In 1973, the Supreme Court outlined the border search exception in \textit{United States v. Almeida-Sanchez}.\textsuperscript{157} In this case, a Mexican citizen holding a valid work permit was stopped without probable cause twenty-five air miles north of the Mexican border.\textsuperscript{158} The road ran east-to-west, but "nowhere [did] the road reach the Mexican border."\textsuperscript{159} The court recognized the "three types of surveillance" utilized by the Border Patrol: (1) permanent checkpoints; (2) temporary checkpoints; and (3) roving patrols (the type used in this case).\textsuperscript{160} The government argued that because of the Immigration and Nationality Act, which provides for a warrantless search of automobiles "within a reasonable distance from" the border, its search of the petitioner's car was authorized.\textsuperscript{161}

The \textit{Almeida-Sanchez} Court then discussed \textit{Carroll}, its 1925 decision regarding searches of automobiles.\textsuperscript{162} It clarified the \textit{Carroll} doctrine, stating that it "does not declare a field day for the police in searching automobiles."\textsuperscript{163} Most pointedly, it stated: "Automobile or no automobile, there must be probable cause for the search."\textsuperscript{164} Although laws and regulations may outline certain scenarios where agencies may proclaim they are performing reasonable searches, "the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."\textsuperscript{165}

In \textit{Camara v. Municipal Court}, a 1967 Supreme Court decision involving the inspection of buildings with potential health hazards, the Court required a warrant, probable cause, or consent of the landowner before the administrative agency could enter.\textsuperscript{166} The search in the \textit{Almeida-Sanchez} case, the Court

\textsuperscript{156} See, e.g., United States v. Nigro, 727 F.2d 100, 101 (6th Cir. 1984) (involving an airplane landing in Memphis); \textit{Garcia}, 672 F.2d at 1352 (involving an airplane landing on Rock Harbor Key in the south of Florida).
\textsuperscript{157} 413 U.S. 266, 272–73 (1973).
\textsuperscript{158} \textit{Id.} at 266.
\textsuperscript{159} \textit{Id.} at 267.
\textsuperscript{160} \textit{Id.} at 268.
\textsuperscript{161} \textit{Id.} (citing 8 U.S.C. § 1357(a)(3) (2012)).
\textsuperscript{162} \textit{Id.} at 269.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} at 270 (citing Chambers v. Maroney, 399 U.S. 42, 51 (1970)).
\textsuperscript{166} \textit{Id.} at 270, 282–83 (citing \textit{Camara v. Mun. Court}, 387 U.S. 523, 534–36 (1967)).
warned, “was conducted in the unfettered discretion of the members of Border Patrol” and “thus embodied precisely the evil the Court saw in [Camara].”167 Despite the Immigration and Nationality Act, the Court reiterated that “no Act of Congress can authorize a violation of the Constitution.”168

To determine the reasonableness of the search, the Court weighed the government’s interest against the “constitutionally protected interest of the private citizen.”169 In weighing the interest of the citizen against the government, the Court found that the searches at issue were conducted in “areas where the concentration of illegally present aliens is high,” and the searches were of automobiles, not “persons or buildings,” which it held to be “far less intrusive” than a search of a person or building.170 In his concurrence, Justice Powell concluded that “there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas.”171

The most lasting idea from the Almeida-Sanchez case is the so-called “functional equivalent” concept of the border.172 The Court gave two examples of what “might be functional equivalents of border searches”: (1) “searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border,” or (2) “a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City.”173 The Court did not elaborate on the concept beyond those two examples, stating only that the search in this case was not a “functional equivalent” search.174

The Court clarified Border Patrol’s authority to question individuals about their immigration status in United States v. Brignoni-Ponce.175 Immigration officers stopped three people based solely on the fact that they appeared to be of Mexican descent.176 Relying on the same statute as in Almeida-Sanchez, the government argued in Brignoni-Ponce that it had the authority to conduct war-

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167 Id. at 270.
168 Id. at 272.
169 Id. at 289 (White, J., dissenting).
170 Id. at 279 (Powell, J., concurring).
171 Id.
172 Id. at 272–73.
173 Id. at 273.
174 Id.
175 422 U.S. 873, 874 (1975).
176 Id. at 875.
rantless searches absent probable cause because the public interest outweighed the potential threat to privacy.\textsuperscript{177} Reiterating their reasoning in \textit{Almeida-Sanchez}, the Court maintained that no statute could legislate a violation of the Constitution, and that “the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government.”\textsuperscript{178}

Like in \textit{Almeida-Sanchez}, the Court in \textit{Brignoni-Ponce} again weighed the interests of the public against the need for the government to enforce its borders as compared to the invasiveness of the search.\textsuperscript{179} The government assured the Court that the intrusion in a roving patrol search was minimal, and based on this minimal invasiveness, the Court held that “stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest.”\textsuperscript{180} Weighing all the factors, including the “importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border,” the Court held that an officer with reasonable suspicion of an alien in a vehicle may “stop the car briefly and investigate the circumstances that provoke suspicion.”\textsuperscript{181} The Court stated that an officer could detain a car to “question the [occupants] about their citizenship and immigration status” and give them an opportunity to explain any “suspicious circumstances,” but limited further detention to situations where the officer has obtained consent or where probable cause is present.\textsuperscript{182}

Perhaps because the Supreme Court did not elaborate on the “functional equivalent” concept in \textit{Almeida-Sanchez}, several circuit courts attempted to tackle this idea in the years following the decision. In \textit{United States v. Brennan}, the Fifth Circuit explored the authority of Customs Agents following a warrantless search of an airplane at a Florida airport.\textsuperscript{183} The court did not explore the search in \textit{Brennan} as a border search but instead weighed factors of whether the search occurred at a “functional equivalent of the border.”\textsuperscript{184} The factors considered were: (1) the presence of “a high degree of probability that a border

\textsuperscript{177} See id. at 876–78.
\textsuperscript{178} Id. at 882.
\textsuperscript{179} Id. at 879.
\textsuperscript{180} Id. at 880.
\textsuperscript{181} Id. at 881.
\textsuperscript{182} Id. at 882.
\textsuperscript{183} See United States v. Brennan, 538 F.2d 711, 713 (5th Cir. 1976).
\textsuperscript{184} United States v. Garcia, 672 F.2d 1349, 1360 (11th Cir. 1982).
crossing took place' and (2) 'an attendant likelihood that nothing about the object of the search has changed since the crossing.' Law enforcement in that case received a tip from a co-conspirator that the airplane was smuggling drugs from Colombia and observed marijuana packages through the aircraft windows. The aircraft had made several flights to Colombia during the reign of Pablo Escobar, and the pilot had been jailed in Colombia on drug charges, although he was later released.

Despite those seemingly damning facts, the court held that "[c]ustoms agents possess no authority to search on less than probable cause at points removed from the border or its functional equivalent." An international flight "brings the border with it" when it lands in the United States, but there was no indication here that the flight was from an international destination. Following the Supreme Court's decision in Almeida-Sanchez, the court in Brennan held that "neither agents of the Border Patrol nor of the Customs Service may conduct a search on less than probable cause at a point other than the border or its functional equivalent." Despite applying the same law to an aircraft search as to a vehicle search, the Brennan court declined to hold "that an airplane is the legal equivalent of an automobile for purposes of search and seizure."

The Fifth Circuit tackled a similar set of facts in United States v. Ivey but held that the officers had acted reasonably considering there was a "high degree of probability that a border crossing took place." The searched aircraft had been in a foreign country, was spotted by officials in that country, and had filed a flight plan to Caicos just hours before it had landed for refueling in Florida in complete darkness. In light of these facts, customs agents expected the aircraft to either have obtained

185 Id. at 1360 (quoting Brennan, 538 F.2d at 713).
186 See Brennan, 538 F.2d at 713, 714.
188 Brennan, 538 F.2d at 713.
189 Id. at 718 (citing Almeida-Sanchez v. United States, 413 U.S. 266 (1973)).
190 Id. at 715.
191 Id. at 716.
192 Id. at 721.
193 546 F.2d 139, 140-41 (5th Cir. 1977).
194 Id. at 140, 142.
195 Id. at 140-41.
special customs clearance or have proof of clearing customs prior to landing; this plane had neither.\textsuperscript{196} Citing Brennan, the court held that a high degree of probability of a border crossing, as found in this case, must be present before a border-type search of an aircraft takes place.\textsuperscript{197} Although no actual observation of a border crossing is required and officials are able to draw reasonable inferences, the officers must be "'reasonably certain' that the object of the search has just entered from a foreign country."\textsuperscript{198}

Just four years later in United States v. Stone, the Fifth Circuit clarified its interpretation of the border search exception when it upheld a border search where factors that indicated smuggling were present.\textsuperscript{199} The aircraft at issue in Stone came to the attention of law enforcement after a report of a near-collision in air and a report from a pilot that he was nearly hit by the aircraft over the Bahamas.\textsuperscript{200} The aircraft was also spotted on radar passing over the Andros Islands.\textsuperscript{201} Most notably, the aircraft was not operating with its transponder.\textsuperscript{202} The aircraft was flying at night toward the United States from a southeasterly direction, a route commonly taken by drug traffickers, and had failed to file a flight plan.\textsuperscript{203} The court in Stone distinguished a search requiring probable cause from a functional equivalent border search where an aircraft has "br[ought] the border with it":

Where an airplane . . . has been sighted over foreign land, air or water and has been monitored continuously thereafter as it crosses the boundary of this country, its inspection by Customs at the first point it touches land is fully valid as a border search. Neither probable cause nor reasonable suspicion of criminal activity is necessary to validate such a search.\textsuperscript{204}

In United States v. Morales-Zamora, the Tenth Circuit held that when officers use dogs to sniff a vehicle that has actually crossed

\textsuperscript{196} Id. at 142.
\textsuperscript{197} Id.
\textsuperscript{198} Id. (citations omitted).
\textsuperscript{199} United States v. Stone, 659 F.2d 569, 570, 571 (5th Cir. 1981).
\textsuperscript{200} Id. at 570.
\textsuperscript{201} Id. at 570–71.
\textsuperscript{202} Id. at 571. "[A] transponder is a combined radio transmitter and receiver which operates automatically relaying data between aircraft and Air Traffic Control (ATC) on the ground." Tony Bailey, All About Mode S Transponders, AVIONICS News, Apr. 2005, at 44, available at https://www.aea.net/AvionicsNews/ANArchives/April05ModeS.pdf.
\textsuperscript{203} Stone, 659 F.2d at 571.
\textsuperscript{204} Id. at 572.
the border it is not a "search" under the Fourth Amendment. Further, it held that there was no requirement for reasonable suspicion because the vehicle was lawfully detained at the border for a search.

A thorough exploration of the border search exception and all of its variations is found in United States v. Garcia. The Eleventh Circuit outlined past decisions and determined there were three basic border scenarios where warrantless searches by the government are allowed: (1) a limited stop by a permanent facility located relatively near the border "where practically necessary to control the flow of persons and objects into this country"; (2) occasions where there is a "reasonable certainty that the object or person searched has just crossed the border"; and (3) "searches conducted within the border even after the first practicable detention point where supported by reasonable suspicion." The next section will discuss the differences and the authority underlying each.

C. THE THREE BASES FOR A VALID BORDER SEARCH EXCEPTION

The first scenario outlined in Garcia is the limited stop by a permanent facility relatively near the border where practically necessary to control the flow of persons and objects into the country. Contrary to the other border search exceptions, this does not require a "showing that the vehicle or item detained actually crossed the border," assuming, of course, "the location of the detention and its scope are such as to ensure that it is necessary for controlling traffic across the border," and "its intrusion on the privacy of those lawfully in the country is limited." The Garcia court gleaned this exception from United States v. Martinez-Fuerte, a 1976 Supreme Court case involving the transportation of illegal aliens and searches at fixed points on the border. The Court in Martinez-Fuerte emphasized a balancing test: determining that "whether reasonable suspicion is a prerequisite to a valid stop" is "to be resolved by balancing the interests at stake." The Court distinguished a checkpoint stop

205 United States v. Morales-Zamora, 914 F.2d 200, 201 (10th Cir. 1990).
206 Id. at 202.
207 United States v. Garcia, 672 F.2d 1349, 1354 (11th Cir. 1982).
208 Id. at 1362-64.
209 Id. at 1362-63.
210 Id.
212 Id. at 556.
from that of private residences and buildings, like the searches in *Camara*.213 "[S]tops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant."214 Because of the close proximity to the border, the Court required less for the search to be considered reasonable than it would have in a domestic building, vehicle, or aircraft.215

Justice Brennan wrote a dissenting opinion in *Martinez-Fuerte* and stated that this decision marked the "continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures" by the Court.216 Throughout his dissent, Justice Brennan disagreed with the majority's ruling as being out of line with *Almeida-Sanchez* and *Brignoni-Ponce*.217 He argued that check points "just as much require some principled restraint on law enforcement conduct" as those roving patrol stops in prior cases.218 To be in accordance with *Brignoni-Ponce*, Justice Brennan argued that the majority should "require that Border Patrol officers act upon at least reasonable suspicion in making checkpoint stops."219

Justice Brennan found the majority's reasoning especially unpersuasive because it left the enforcement of "reasonable suspicion" up to individual border agents.220 Leaving the decision to search to be "based merely on whatever may pique the curiosity of a particular officer is the antithesis of the objective standards requisite to reasonable conduct and to avoiding abuse and harassment."221 Although his vigorous dissent conveyed important concerns, it has not had an effect on officers who conduct searches at the border.

The second type of search under the border search exception is the search conducted at the "functional equivalent of the border."222 A vessel or aircraft can be stopped after it has entered the country if the agents are "reasonabl[y] certain[ ] that the object or person searched has just crossed the border."223

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213 *Id.* at 564–65.
214 *Id.* at 566.
215 *Id.* at 552–53, 565–66.
216 *Id.* at 567 (Brennan, J., dissenting).
217 *Id.* at 568–69.
218 *Id.* at 570–71.
219 *Id.* at 574.
220 *Id.* at 569–70.
221 *Id.* at 577.
222 United States v. Cardenas, 9 F.3d 1139, 1147–48 (5th Cir. 1993).
223 United States v. Garcia, 672 F.2d 1349, 1363 (11th Cir. 1982).
search must be at the “earliest practicable point after the border [has been] crossed.”224 A “practicable” point to search an aircraft may not be immediately after it has crossed the border mid-air.225 There is a “practical impossibility” to searching aircraft in mid-air, so courts will allow this type of search as it is “in essence no different than a search conducted at the border.”226

The last scenario is the so-called “extended border search,” a search conducted within the border even after the first practicable detention point that is supported by reasonable suspicion.227 The key factors in this type of search are that a border crossing has actually occurred and that conditions have remained unchanged from crossing until the time of the search.228 Aircraft in these situations can be said to have “br[ought] the border” with them.229 Courts have reiterated that the critical factor is that a border crossing took place.230

Courts determine the legality of an extended border search through a totality of the circumstances test, “including the elapsed time and distance as well as the manner and extent of surveyance.”231 The ultimate outcome of the totality of the circumstances test should lead a factfinder to believe “that there has been no change of condition” of the searched vessel or vehicle “from the time [it was] loaded at the border until [it was] stopped, and that whatever was in the [vehicle] when [it was] searched was in [it] when [it] left the border.”232 If there is any belief that the conditions of the vessel, vehicle, or aircraft have changed, the search is unlikely to be found reasonable by a court.233

Although the court in Fogelman held that the search was a valid border search, it still required that “[i]n all instances where a search has been called a border search, a reasonable suspicion that the vehicle had crossed the border or had been in contact with those who have done so has been and is re-

224 Id. at 1364.
225 See Cardenas, 9 F.3d at 1147–48.
226 Garcia, 672 F.2d at 1364.
227 United States v. Fogelman, 586 F.2d 337, 343 (5th Cir. 1978).
228 United States v. Richards, 638 F.2d 765, 772 (5th Cir. 1974).
229 United States v. Brennan 538 F.2d 711, 715 (5th Cir. 1976).
231 Fogelman, 586 F.2d at 343.
232 Id.
233 See id.
quired." This echoed the prior year's Supreme Court decision in *Ramsey*, which held that the "critical fact" was that the items at issue crossed the border.

D. Recent Developments in Border Search Exception Cases

Aircraft and seafaring vessels aside, the media picked up on the border search doctrine once something more precious was at stake: our laptops. The Supreme Court denied certiorari in *United States v. Cotterman*, a Ninth Circuit case involving the forensic search of a man's laptop 170 miles away from the border. Cotterman, the defendant, was traveling from Mexico to the United States with his wife. Because of a prior conviction involving children and sex crimes, he was on a list of potential future predators who frequently traveled to foreign countries. His foreign travel put him on the radar of Operation Angel Watch, a program intended to detect and stop sex traffickers.

At the fixed checkpoint stop, Mr. Cotterman and his wife were asked inside the Customs Office. The agents onsite were able to boot up the laptop but not were able to perform a thorough search. Instead, an officer took it to a secondary search facility 170 miles inland from the border. During that search, the officers recovered child pornography, and Mr. Cotterman was charged.

The initial search of Cotterman's laptop was not in doubt. The court cited prior decisions involving border searches of laptops and packages where "cursory scan[s]" of packages, even

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234 *Id.; see also* United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1983) (holding that reasonable suspicion was the proper standard to apply at the border).
235 *Ramsey*, 431 U.S. at 620.
238 *Id.* at 956.
239 *Id.* at 957.
240 *Id.*
241 *Id.* at 957–58.
242 *Id.* at 957.
243 *Id.* at 957–58.
244 See *id.* at 958.
245 *Id.* at 958–59.
246 See *id.* at 960.
those requiring a traveler to boot up a computer, were unobtru-
sive enough to be reasonable.\textsuperscript{247} With regard to “functional
equivalent” searches, the court cited \textit{Almeida-Sanchez} for the pro-
position that the functional equivalent exception “effectively ex-
tends the border search doctrine to all ports of entry, including
airports.”\textsuperscript{248} The court distinguished the extended border
search from a regular border search based on location.\textsuperscript{249} An
extended border search requires reasonable suspicion and “is
best confined to cases in which, after an apparent border cross-
ing or functional entry, an attenuation in the time or the loca-
tion of conducting a search reflects that the subject has regained
an expectation of privacy.”\textsuperscript{250} The court concluded that the
search of Cotterman’s laptop at the border was not in question
but the search at the forensic laboratory required reasonable
suspicion, which these agents had.\textsuperscript{251}

V. APPLICATION OF THE BORDER SEARCH DOCTRINE
TO DOMESTIC GENERAL AVIATION AIRCRAFT

The searches of Larry Gaines and Gabriel Silverstein have one
fact in common with some of the cases referenced above. Like
the defendants in several of the cases, the subjects were flying
general aviation private aircraft.\textsuperscript{252} However, the similarities stop
there. Unlike some of the flights stopped in those cases, the pi-
lots both flew with their transponders on, flew marked aircraft,
and made radio contact directly to a tower or by squawking.\textsuperscript{253}
Most importantly, neither Mr. Silverstein nor Mr. Gaines were
coming from foreign destinations.\textsuperscript{254}

Absent a constitutionally compliant statute, the conduct of
the officers during the searches of these pilots would likely be
held unconstitutional if examined by a court. Acting Commiss-
ioner Winkowski of CBP claimed that when agents are checking

\textsuperscript{247} \textit{Id.} (citing United States v. Arnold, 533 F.3d 1003, 1009 (9th Cir. 2008)).
\textsuperscript{248} \textit{Id.} at 961 (citing \textit{Almeida-Sanchez} v. United States, 413 U.S. 266, 273
(1973)).
\textsuperscript{249} \textit{Id.} at 961–62.
\textsuperscript{250} \textit{Id.} at 962.
\textsuperscript{251} \textit{Id.} at 966–67, 70.
\textsuperscript{252} See, e.g., United States v. Brennan 538 F.2d 711, 713 (5th Cir. 1976); United
States v. Ivey, 546 F.2d 139, 140 (5th Cir. 1977).
\textsuperscript{253} See, e.g., \textit{Ivey}, 546 F. 2d at 140–41; United States v. Stone, 659 F.2d 569, 571
(5th Cir. 1981); Cf. Fallows, \textit{supra} note 13 (noting Mr. Gaines had his transpon-
der on); Moore, \textit{Pilot Detained}, \textit{supra} note 6 (noting Mr. Silverstein filed a flight
plan and obtained clearance for each leg of his trip).
\textsuperscript{254} Fallows, \textit{supra} note 13.
documents or “conducting a pilot certificate inspection,” officers may need to conduct “further investigation or search to the extent authorized under the Constitution and consistent with federal law.”\footnote{255} However, neither the Constitution nor federal law authorized these types of searches. First, “neither agents of the Border Patrol nor of the Customs Service may conduct a search on less than probable cause at a point other than the border or its functional equivalent.”\footnote{256} Absent probable cause, the agents had no authority to perform a thorough search of either pilot.\footnote{257} Neither pilot was at a border, so a search by CBP would need to be the a result of a warrant or fall under another exception.

The regulations make it clear that the agents are permitted to inspect both the airmen and medical certificates.\footnote{258} In accordance with the Supreme Court’s decision in Brignoni-Ponce, officers at the border are limited to “question[ing] the occupants about their . . . immigration status” and giving them an opportunity to explain any “suspicious circumstances.”\footnote{259} Any further detention must be through consent or probable cause.\footnote{260}

In both cases, Mr. Silverstein and Mr. Gaines were later searched by drug dogs.\footnote{261} Mr. Gaines gave his consent to have a drug dog sniff his plane, whereas the agents in Iowa with Mr. Silverstein took it upon themselves to show up with the dog in tow.\footnote{262} Dog searches are not considered searches within the Fourth Amendment context.\footnote{263} Furthermore, since Mr. Gaines consented to the dog sniff, the officers were allowed to search using the dog even absent the border search exception.\footnote{264} The dog sniffing Mr. Silverstein’s aircraft in Iowa might have alerted the officers to something in a luggage case, giving the officers “probable cause” to search further, because they told Mr. Silverstein to open the cargo door as well.\footnote{265} The frequent misidentifi-
cation of contraband by canine units is noted, but beyond the scope of this article.266

Most startling of all is the lack of a border crossing in either case.267 Granted, no actual observation of a border crossing is necessary, but officers must be "reasonably certain" that the object of the search has just entered from a foreign country in order for their search to be a valid border search.268 Even if the CBP wanted to argue that the search of Mr. Silverstein was an extended border search, that argument would fail because Mr. Silverstein's plane stopped for refueling in Colorado prior to his landing in Iowa.269 In order for an extended border search to be valid, in addition to a reasonable certainty that the object has crossed the border, there must be an "attendant likelihood" that the object or vessel has not substantially changed since the crossing.270 Mr. Silverstein landed for refueling,271 which would have been enough time for the plane or its contents to have changed. Under the current state of border search exception law, CBP likely overstepped its authority in the searches of Mr. Silverstein, Mr. Gaines, and countless other pilots.

VI. CONCLUSION

"The Fourth Amendment's requirement that searches and seizures be reasonable enforces this fundamental understanding in erecting its buffer against the arbitrary treatment of citizens by government."272

The CBP and the DHS have refused to provide meaningful answers to any of the requests for information either by pilots, the trade association, or even senators and representatives.273 As such, the reasoning behind the searches is left to speculation. After one of the agents who surrounded Mr. Silverstein encouraged him to admit to possessing a little bit of recreational marijuana and another told him his flight fit a west-to-east flight

267 See Fallows, supra note 13.
268 United States v. Ivey, 546 F.2d 139, 142 (5th Cir. 1977) (citation omitted).
269 Moore, Pilot Detained, supra note 6.
270 United States v. Garcia, 672 F.2d 1349, 1360 (11th Cir. 1982) (quoting United States v. Brennan 538 F.2d 711, 713 (5th Cir. 1976)).
271 See Fallows, supra note 13.
273 See Tennyson, Freedom, supra note 65; Thornton, supra note 52.
one could speculate that these searches are a response to the legalization of marijuana in Colorado and California and an attempt by the CBP to stop those who would smuggle it from states where it is legal to states where it is still illegal. Even if that were the impetus, the enforcement of domestic drug trafficking would be better handled by the Drug Enforcement Agency.

Although the CBP has claimed authority under the Code of Federal Regulations allows it to inspect medical and airman certificates, the searches it performed were premeditated and went further than a simple inspection. Mr. Gaines returned for his glasses and was greeted all too quickly by twenty agents, two government aircraft, multiple vehicles, and a drug sniffing dog. A local sheriff greeted Mr. Silverstein in Iowa and told him the DHS wanted to speak with him. Neither of these searches began as simple certificate inspections that then evolved into something more based on reasonable suspicion.

The CBP cannot claim that it was performing ramp checks because (1) it is not authorized to do so under the FAA regulations and (2) it is not equipped with the skills to perform those checks properly.

There is a reason the CBP and the DHS are targeting general aviation pilots, but the agencies are not sharing that reason with either the pilots, whose time and patience they are wasting, or the American people, whose precious Homeland Security resources they are wasting by “calling out the dogs,” including government aircraft and agents, to perform these costly “certificate inspections.” Worst of all, these “zero suspicion searches” have yielded no arrests. Hopefully, if there is a legitimate homeland security interest in performing these invasive searches, the agencies will give pilots more information. If Congress passes a law that allows the agencies to promulgate official rules allowing these searches, pilots would be better equipped to comply. But a law allowing the CBP to search every general aviation plane fly-

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274 Moore, Pilot Detained, supra note 6.
276 Fallows, supra note 13.
277 Id.
278 See Moore, Pilot Detained, supra note 6.
279 See Hook, supra note 275.
ing west-to-east from California would run afoul of the Fourth Amendment.

These actions by the CBP have flown directly in opposition to the American people’s “public right of transit through the navigable airspace.” As an administrative agency, the CBP has disregarded both statutes and the Constitution to achieve a goal that it has yet to reveal to the American public. The government has separated the oversight of air travel between several agencies, so when one agency oversteps its authority, the whole system is undermined. What pilots and the public need are answers and reasons, but in the meantime being aware of the CBP’s authority, or lack thereof, may be the best defense.
