UIC Law Review

Volume 52 | Issue 4 Article 5

2019

“Border”line Outrageous: How Riley Has Set the Circuits at War Over Border Search Exception, 53 UIC J. MARSHALL L. REV. 1057 (2019)

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"BORDER"LINE OUTRAGEOUS: HOW RILEY HAS SET THE CIRCUITS AT WAR OVER BORDER SEARCH EXCEPTION

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Abstract

It is undisputed that the United States Government has a paramount interest in maintaining national security, ensuring the nation's territorial integrity, and protecting the American people. The border search exception to the Fourth Amendment warrant requirement is an example of power that the Government has in order to serve those interests. The border search exception is very old, enacted by the First Congress in 1789. Although it is not a well-known exception, it has serious implications on both personal and data privacy. Data privacy in the twenty-first century is a growing concern for the American people. Technology becomes more intricately interwoven into our most personal lives, seemingly, every day. Forensic searches of electronic devices at the international border are per se reasonable under the border search exception. However, some courts have taken issue with the privacy concerns involved with forensic searches of electronic devices and have held that forensic searches of electronics are not per se reasonable. This Comment explores the trajectory of the border search exception and the Fourth Amendment, how courts have

wielded the Fourth Amendment in order to address privacy concerns, and how judicial interpretation and Congressional inaction has led to inconsistent applications of the border search exception as applied to forensic searches of electronics.

I. INTRODUCTION

A. When Coming Home is Much Harder Than Leaving

People travel internationally for a myriad of reasons: family, business, pleasure. More than 379 million travelers passed through United States Customs and Border Control Protection in 2017.[1] For many Americans, international travel is routine. For others, re-entering the country at our international border turns into a nightmare.[2]

Imagine you have just been abroad on vacation. After long hours of travel, your flight lands back in the United States and you make your way to customs, expecting everything to run smoothly. Instead, you are unexpectedly selected for a random search. You are exhausted from the flight home and now you are nervous. You are seated in a room with a customs agent and the agent asks you multiple questions about where you work, what you were doing abroad, and what your business is.

Abruptly, the agent asks for your phone. You are startled, but you hand it over. Then, the agent asks for your passcode so he can unlock your phone. Something about this does not feel right to you. You ask why they need to search your phone. Instead of answering, the agent hands you a form that describes the border patrol agents right to access and copy the contents of an electronic device.[3] The form also states that refusal to cooperate could lead to seizure of the

1. *CBP Releases Updated Border Search of Electronic Device Directive and FY17 Statistics*, CUST. B. & DEC. (Jan. 5, 2018), www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and [hereinafter *CBP FY17 Statistics*].

2. *See* Complaint for Injunctive and Declaratory Relief, Alasaad v. McAleenan, No. 1:17-cv-11730-DJC (D. Mass. Sept. 13, 2017) [hereinafter Alasaad Complaint] (outlining the complaints alleged by the American Civil Liberties Union of Massachusetts against the Department of Homeland Security on behalf of eleven travelers whose electronic devices were searched without warrants at the United States international border). In November 2019 the Massachusetts District Court held that reasonable suspicion is required for forensic electronic searches at the international border, but probable cause and a warrant is not. Alasaad v. Nielsen, No. 17-cv-11730-DJC, 2019 U.S. Dist. LEXIS 195556, at *59 (D. Mass. Nov. 12, 2019).

3. *See* Jason McGahan, *Meet the NASA Engineer Suing the Government for Searching His Smartphone*, LA WEEKLY (Sept. 19, 2017), www.laweekly.com/news/nasa-engineer-sidd-bikkannavar-is-suing-the-government-for-searching-his-smartphone-8662896 (discussing the details of Sidd Bikkannavar's experience before and during his electronic border search at George Bush Intercontinental Airport in Houston, Texas).

device and detention of the traveler.[4] This scares you, so you tell the agent your passcode and then he disappears, taking your phone with him. You sit in that room, not knowing what is happening or why. The agent eventually comes back, returns your phone, and giving no explanation about what he was doing or what he did with your phone, tells you that you can go.

For the 30,200 international travelers entering or leaving the United States in 2017, that was the best case scenario they experienced.[5] Some travelers were detained for mere minutes while others were detained for hours while their electronics were searched without explanation.[6] Some travelers had their devices confiscated and returned weeks or months later while they were forced to leave without their belongings.[7] Many who have been searched have filed complaints with the Department of Homeland Security and the American Civil Liberties Union, describing feeling humiliated, disturbed, and made to feel like a criminal or a terrorist.[8]

B. What About My Right to Privacy?

Existing privacy laws in the United States developed as need arose.[9] This created a makeshift structure of statutes and common law jurisprudence that is woefully inadequate in addressing current digital privacy concerns.[10] In 2019, cell phones are ubiquitous with an astounding 96% of Americans owning a cellphone of some kind.[11] The percentage of American smartphone users has increased significantly from just 35% in 2011 to 81% in 2019.[12] As technological capabilities and consumer use grows, oftentimes important issues fall outside the scope of specific laws and remain

4. *Id.*

5. *CBP FY17 Statistics*, *supra* note 1 (detailing how in the fiscal year 2017, U.S. Customs and Border Protection conducted 30,200 border searches of electronic devices of international travelers both entering and leaving the country).

6. Charlie Savage & Ron Nixon, *Privacy Complaints Mount Over Phone Searches at U.S. Border Since 2011*, N.Y. TIMES (Dec. 22, 2017), www.nytimes.com/2017/12/22/us/politics/us-border-privacy-phone-searches.html (detailing multiple individuals' accounts of their detentions during their electronic search at the border).

7. *Id.*

8. *Id. See, e.g.*, Alasaad Complaint, *supra* note 2.

9. Cameron F. Kerry, *Filling the Gaps in U.S. Data Privacy Laws*, BROOKINGS (July 12, 2018), www.brookings.edu/blog/techtank/2018/07/12/filling-the-gaps-in-u-s-data-privacy-laws/ (discussing the mismatch between the advancement and creation of data and digital information and the laws that govern and protect that data and privacy).

10. *Id*.

11. *Mobile Fact Sheet*, PEW RES. CTR., INTERNET & TECH. (June 12, 2019), www.pewinternet.org/fact-sheet/mobile/ (discussing mobile phone ownership and dependency over time).

12. *Id.*

unaddressed.[13]

Digital privacy at the international border is one of those issues that remains unaddressed in a meaningful way.[14] Without guidance from Congress, the judiciary is left scrambling to piece together exactly what digital privacy at the border should look like.[15] In turn, a growing number of judges find it difficult to apply the rulings of pre-digital cases to the invasive searches of digital data.[16]

C. What Happens Next (In This Comment)?

As this Comment will illustrate, the Fourth Amendment's exception to searches conducted at the international border is well established.[17] As technology has altered and advanced, so has the

13. Kerry, *supra* note 9.

14. *Protecting Data at the Border Act*, S. 823, 115th Cong. (2017). This Act was introduced to "ensure the digital contents of electronic equipment and online accounts belonging to or in the possession of United States persons entering or exiting the United States are adequately protected at the border, and for other purposes." *Id.* This Act would allow a government entity to access the digital contents of any electronic equipment belonging to or in the possession of a United States person at the border only with a warrant supported by probable cause. *Id.* This Act has not been voted on nor confirmed. *Id.* Supporters of this act believe that it will protect digital privacy at the border in a significant way. Matthew Guariglia, *Congress Should Pass the Protecting Data at the Border Act*, EFF (June 14, 2019), www.eff.org/deeplinks/2019/06/congress-should-pass-protecting-data-border-act. Those who oppose the Act argue that "searches of digital devices are necessary to protect national security and…supporters' fears of pervasiveness are overblown." *Protecting Data at the Border Act Would Prevent Customs Officials From Seizing Your Laptop or Phone and Downloading the Contents*, GOVTRACK INSIDER, www.govtrackinsider.com/protecting-data-at-the-border-act-would-prevent-customs-officials-from-seizing-your-laptop-or-phone-f918dd9ce96c (last visited Dec. 14, 2019).

15. *Id.*

16. Nathan Freed Wessler & Esha Bhandari, *Another Federal Court Rules the Fourth Amendment Applies at the Border*, ACLU (May 9, 2018), www.aclu.org/blog/privacy-technology/privacy-borders-and-checkpoints/another-federal-court-rules-fourth-amendment (discussing the Fourth Circuit Court of Appeals' decision in *United States v. Kolsuz* and other cases that courts have heard regarding forensic digital searches conducted at the border and how those courts have ruled).

17. *See* Carroll v. United States, 267 U.S. 132, 162 (1925) (holding that travelers may be stopped when crossing the international boundary because of national self-protection); United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 376 (1971) (stating that a person's right to be let alone does not prevent the search of his luggage during a border search); United States v. Ramsey, 431 U.S. 606, 622 (1977) (reiterating longstanding recognition that border searches are reasonable without probable cause or a warrant); United States v. Vega-Barvo, 729 F.2d 1341, 1350 (11th Cir. 1984) (holding no articulable suspicion is required for border searches); United States v. Montoya De Hernandez, 473 U.S. 531, 538 (1985) (commenting that the Fourth Amendment's balance of reasonableness is qualitatively different at the international border); United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (stating that the Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border);

need for privacy protection.[18] But so far, our laws have not kept up.[19] The lack of clear guidance regarding whether additional reasonable suspicion is required in a forensic electronic border search is currently left to judicial interpretation and as a consequence, has led to a federal circuit split.[20] For now, whether border agents need reasonable suspicion in order to forensically search electronic devices depends entirely on where a person enters the country.[21] This Comment will explore the trajectory of the border search exception and the Fourth Amendment, how courts have wielded the Fourth Amendment in order to address privacy concerns, and how judicial interpretation has led to inconsistent application of Americans' fundamental rights.

II. BACKGROUND

Before delving into the complex issue that is digital privacy at the international border, one must understand how and why this issue is so very important to the American people. Accordingly, this Comment will first provide an overview of the Fourth Amendment and its interplay with privacy. This section will then turn its focus to the border search exception, one of the exceptions to the Fourth Amendment warrant requirement. Finally, this section provides a brief history of the border search exception and how it has been manipulated through time and technology.

Denson v. United States, 574 F.3d 1318, 1339 (11th Cir. 2009) (holding the Fourth Amendment's protections wane in limited context, one of those at the international border where the government's interests reach its zenith); United States v. Alfaro-Moncada, 607 F.3d 720, 728 (11th Cir. 2010) (reiterating that the Fourth Amendment is relaxed at the international border because of the strong policy of national self-protection).

18. Kerry, *supra* note 9.

19. *Id.*

20. *Compare* United States v. Cotterman, 709 F.3d 952, 961 (9th Cir. 2013) (en banc) (holding that the uniquely sensitive data on electronic devices carried with it a significant expectation of privacy…and the forensic examination of Cotterman's computer required a showing of reasonable suspicion), *and* United States v. Kolsuz, 890 F.3d 133, 137 (4th Cir. 2018) (contending that *Riley v. California* made it clear that a forensic search of a digital phone requires some level of individualized suspicion), *with* United States v. Touset, 890 F.3d 1227, 1234 (11th Cir. 2018) (stating that reasonable suspicion is not required to perform a forensic search of an electronic device at the border; distinguishing *Riley* as applicable only in search incident to arrest situations and not applicable at the border).

21. Ayako Hobbs & Thomas Zeno, *Circuits Split About Border Search of Electronic Devices*, ANTICORRUPTION BLOG (June 19, 2018), www.anticorruptionblog.com/data-protection-privacy/circuits-split-about-border-search-of-electronic-devices/ (analyzing the circuit split between the Fourth and Ninth circuits and the Eleventh circuit).

A. The Fourth Amendment

The Fourth Amendment of the United States Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[22] By its very nature, this obligates any search conducted by a government official to be reasonable.[23] Although there is no explicit language of privacy in the Fourth Amendment,[24] established case law has created a practical right of privacy from the Bill of Rights.[25]

Justice Brandeis' dissent in *Olmstead v. United States* was the pioneer position regarding implicit privacy interests in the Fourth Amendment.[26] Chief Justice Taft, writing for the majority, wrote that the Fourth Amendment was applicable only to *physical* search and seizure and the Amendment did not forbid wiretapping.[27] In his dissent, Justice Brandeis famously defended "the right to be let alone," calling it "the most comprehensive of rights, and the right most valued by civilized men."[28] He vigorously argued that the reach of the Fourth Amendment (and other similar clauses guaranteeing individual protection against specific abuses of power) must have the capacity to adapt to a changing world.[29] Justice Brandeis recognized that the world was changing and developing in ways that the Founding Fathers never could have anticipated.[30] He advocated for the protection of Americans' privacy and argued that every unjustifiable intrusion by the Government, by whatever means employed, must be a violation of the Fourth Amendment.[31]

The right of privacy officially embedded itself in Fourth Amendment analysis because of Justice Harlan's concurrence in *Katz v. United States*.[32] The majority held that the Fourth

22. U.S. CONST. amend. IV. "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." *Id.*

23. *Id.*

24. *Id.*

25. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (holding that a right to privacy can be inferred from several amendments in the Bill of Rights). *See also* Katz v. United States, 389 U.S. 347, 352 (1967) (holding that the Fourth Amendment protects people, not places, in the case of a man wiretapped on a public payphone).

26. Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting), *overruled by Katz*, 389 U.S. at 353 (rejecting the Court's holding that the government does not need a warrant to wiretap phones).

27. *Olmstead*, 277 U.S. at 464-465.

28. *Id.* at 478 (Brandeis, J., dissenting).

29. *Id.* at 472 (Brandeis, J., dissenting).

30. *Id.*

31. *Id.* at 478 (Brandeis, J., dissenting).

32. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (reasoning that an enclosed

Amendment protects people, not places, and therefore its reach cannot depend upon the presence or absence of physical intrusion into any given enclosure, effectively overruling *Olmstead*.[33] Justice Harlan's concurrence went a step further and created a test to determine when Fourth Amendment protection applies.[34] The test is composed of two parts: (1) the individual must have an actual expectation of privacy, and (2) the expectation must be one society recognizes as reasonable.[35] However, Justice Harlan did not specify the methods used to determine whether a reasonable expectation of privacy had been established or how to determine if society would recognize the expectation as reasonable.[36] Additionally, the *Katz* test for invasion of privacy is only applicable when the individual who claims protection of the Fourth Amendment has a legitimate, actual expectation of privacy in the invaded space.[37]

Despite these protections, custom and border agents have virtually unlimited authority to search an individual and their property, and detain persons entering the United States from a foreign country through the border search exception as granted by Congress.[38]

B. The Border Search Exception

One exception to the Fourth Amendment warrant requirement exists for searches done at the international border.[39] In 1789 the First Congress enacted the border search exception which states that a border search requires neither a warrant, probable cause, nor any degree of suspicion.[40] Reasonable suspicion is said to exist

telephone booth is more like a home than a field and a person has a constitutionally protected reasonable expectation of privacy regarding his conversations in such a place and the invasion of a constitutionally protected place without a warrant is presumptively unreasonable).

33. *Id.* at 353.

34. *Id.* at 361 (Harlan, J., concurring).

35. *Id.*

36. *Id.* at 360-61 (Harlan, J., concurring).

37. Rakas v. Illinois, 439 U.S. 128, 143 (1978).

38. 19 U.S.C. § 1582 (2018). "The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations." *Id. See Vega-Barvo*, 729 F.2d at 1344 (explaining the authority given to customs inspectors by Congress).

39. *See generally Ramsey*, 431 U.S. at 624-25 (sustaining the search of incoming mail). "Border searches [are] not subject to the warrant provisions of the Fourth Amendment and [are] 'reasonable' within the meaning of [the Fourth] Amendment." *Id.* at 617.

40. An Act to regulate the Collection of Duties imposed by law on the tonnage of ships or vessels, and on good, wares and merchandises imported to the United States, ch. 5, §§ 23, 24, 1 Stat. 4 (1789); 19 U.S.C. § 507 (2018). *See Ramsey*, 431 U.S. at 616 (discussing how the First Congress granted full power and authority

simply by virtue of the person or item crossing the international border.[41] The international border means not only the border itself but also its functional equivalent, e.g., an airport.[42] The border search exception also extends to the waters in and surrounding the United States.[43] The exception allows a customs official to board any vessel, at any time, in any place in the United States and search any part of it.[44]

The border search exception applies not only to persons and property entering the United States, but to those leaving it as well.[45] Although there is debate over the validity of the exception as applied to those leaving the nation, that discussion is outside the scope of this Comment.

The root of the Fourth Amendment border search exception lies in the Government's right as sovereign to protect the international border and the occupants inside the nation.[46] The United States has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.[47] Courts have historically acknowledged that the Fourth Amendment reasonableness test

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to customs officials to search incoming goods and wares).

41. *Id.* "That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, *are reasonable simply by virtue of the fact that they occur at the border*, should, by now, require no extended demonstration." *Id* (emphasis added).

42. *See Denson*, 574 F.3d at 1339 (expounding upon the way Fourth Amendment protections wane at the international border, which includes functional equivalents, such as an airport).

43. 19 U.S.C. § 1581 (2018).

44. *Id.*

45. *See e.g.*, United States v. Oriakhi, 57 F.3d 1290, 1296 (4th Cir. 1995) (explaining the rationale for exempting border searches from the Fourth Amendment's probable cause and warrant requirements rests on fundamental principles of national sovereignty, which apply equally to exit and entry searches); Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 63 (1974) (agreeing in dicta that "those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment"); United States v. Udofot, 711 F.2d 831, 839 (8th Cir. 1983) (stating that "although courts traditionally have employed the border search exception to uphold warrantless searches of persons or objects entering the United States, the rationale behind this exception applies with equal force to persons or objects leaving the country: the Government has an interest in protecting some interest of United States' citizens, the individual is on notice that his privacy may be invaded when he crosses the border").

46. *See Montoya De Hernandez*, 473 U.S. at 544 (holding that customs officials are charged with more than an investigative role, they are also charged with protecting the nation from entrants who may bring anything harmful into the country); *Flores-Montano*, 541 U.S. at 152 (declaring that the government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border); *Alfaro-Moncada*, 607 F.3d at 727 (affirming that the United States' paramount interest in conducting searches at its borders is national self-protection).

47. *Flores-Montano*, 541 U.S. at 153.

balances individual privacy and the interests of the Government.[48] However, it is also acknowledged that the balance of reasonableness is qualitatively different at the international border than in the interior.[49] That distinction weighs heavily in the Government's favor when the search is conducted at the international border.[50]

C. The Effect of Time and Technology on the Border Search Exception

While the border search exception has remained generally untouched since its inception, the scope of the exception has expanded substantially.[51] What began as a regulation of import duties has transformed over centuries to combat new threats to the border.[52] Over the past century, the border search exception has expanded to cover: prohibition;[53] opening international mail;[54] detaining a woman suspected of smuggling drugs;[55] removing, disassembling, and searching a vehicle's gas tank;[56] and seizing child pornography.[57] Through all of these analyses, one thing remained constant: the preeminence of the Government's authority

48. *See Montoya De Hernandez*, 473 U.S. at 540 (explaining how "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is struck much more favorably to the Government at the border").

49. *Id.* at 538.

50. *See Denson*, 574 F.3d at 1339 (asserting that the government's interest in preventing persons and effects from entering the nation rises to its zenith at the international border).

51. *See* Victoria Wilson, *Laptops and The Border Search Exception To The Fourth Amendment: Protecting The United States Borders From Bombs, Drugs, And The Pictures From Your Vacation*, 65 U. MIAMI L. REV. 999, 1003-05 (2001) (discussing the history of the border exception and how the justification for the border exception has grown as the nation faces new problems and technologies).

52. *Id.*

53. *Carroll*, 267 U.S. at 154 (sustaining that it is reasonable for travelers to be stopped when crossing an international boundary and be required to identify themselves because of national self-protection which allowed the officers in this instance to stop and search the vehicle carrying illegal alcohol).

54. *Ramsey*, 431 U.S. at 625 (holding customs agents who opened eight envelopes from Thailand and found heroin inside were within their rights under the border exception to do so and they did not need a warrant).

55. *Montoya De Hernandez*, 473 U.S. 544 (holding that because Montoya de Hernandez's detention occurred at the international border and the border agents had reason to suspect her of smuggling narcotics in her alimentary canal, her detention of over sixteen hours was reasonable).

56. *Flores-Montano*, 541 U.S. 149 (holding the Fourth Amendment does not require custom agents at the international border to have reasonable suspicion to inspect a vehicle's fuel tank and the interference is justified by the Government's paramount interest in protecting the border).

57 *Alfaro-Moncada*, 607 F.3d at 732 (finding that a suspicion-less search of a cabin on a foreign cargo ship that was docked three miles up the Miami River that turned up child pornography was not in violation of the Fourth Amendment because there are no inspection-free zones on a foreign cargo ship at the border).

and interest in preventing the entry of unwanted persons and effects at the international border.

The scope of the border search exception includes persons and their belongings,[58] but a person and property are necessarily treated differently.[59] No articulable suspicion is necessary for basic, non-invasive border searches of a person.[60] This means that a pat-down or frisk can be conducted on nothing more than the choice of the customs agent because reasonable suspicion is said to exist simply because the person is crossing the international border.[61]

The suspicion required for a more intrusive search of a person hinges upon the level of insult to personal privacy impressed upon the victim of a search.[62] In *United States v. Vega-Barvo*, the United States Court of Appeals for the Eleventh Circuit analyzed and set forth three factors which contribute to the personal indignity suffered by the person searched: (1) physical contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force.[63]

However, this sliding scale to determine intrusiveness has been rejected in the context of property.[64] Property does not carry with it the indelible right of dignity, and property cannot be personally offended nor can it suffer emotionally from a search.[65] Precedent holds that searches of closed containers and their contents require no particularized suspicion.[66] The concept of closed

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58. U.S. CONST. amend. IV.

59. *See Flores-Montano*, 541 U.S. at 152 (stating "but the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person--dignity and privacy interests of the person being searched--simply do not carry over to vehicles").

60. *Vega-Barvo*, 729 F.2d at 1345.

61. *Id.*

62. *Id.* at 1346. "[T]he personal indignity suffered by the individual searched controls the level of suspicion required to make the search reasonable." *Id.*

63. *Id.*

64. *See* United States v. Arnold, 533 F.3d 1003, 1008 (9th Cir. 2008) (stating that applying the sliding intrusiveness scale to determine when reasonable suspicion is needed to search property at the border is misplaced). *See also Flores-Montano*, 541 U.S. at 152 (stating that the Supreme Court's analysis determining what protection to give a vehicle was not based on the unique characteristics of vehicles with respect to other property, but was based on the fact that a vehicle, as a piece of property, simply does not implicate the same "dignity and privacy" concerns as "highly intrusive searches of the person").

65. *Flores-Montano*, 541 U.S. at 152. While it is true that property cannot suffer indignity, one can easily imagine circumstances where the exposure of sensitive information can lead to a person suffering embarrassment or emotional harm.

66. *See Arnold*, 533 F.3d at 1010 (reversing the District Court's grant of a motion to suppress child pornography found during a border search of Arnold's laptop); *Ramsey*, 431 U.S. at 620 (determining that mode of entry does not limit the border search exception and there is no additional requirement of probable cause in order for a border search to be reasonable); *Vega-Barvo*, 729 F.2d at 1345 ("A person's decision to cross our national boundary is justification enough for…a search.").

containers has encompassed luggage, gas tanks, and laptops.[67] This precedent has been questioned and challenged over time, to no distinct resolution.[68] How the treatment of property applies to the searches of electronic devices has created serious privacy concerns regarding digital data.[69]

In this digital age, Americans' awareness and concern over issues of privacy are heightened.[70] As dependency on technology grows,[71] so does the conundrum of how to ensure personal privacy while also maintaining safety and national security.[72] It is difficult to find a balance between guaranteeing individual privacy and protecting national security. The U.S. Customs and Border Protection is not unaware of these challenges and maintains that electronic device searches help to identify, investigate, and prosecute individuals who use technology to commit crimes.[73]

While Congress and the Supreme Court have remained relatively silent regarding digital privacy at the international border,[74] recently, substantial strides have been made towards protecting user data and privacy outside the scope of border searches.[75] As recently as June 2018, the Supreme Court held in

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67. *See Ramsey*, 431 U.S. at 620 (stating that customs officials can search, without probable cause and without a warrant, luggage); *Flores-Montano*, 541 U.S. at 155-56 (holding that searching a gas tank and taking apart an engine was justified); *Arnold*, 533 F.3d at 1008 (holding that border search of a laptop should not have been suppressed).

68. *Flores-Montano*, 541 U.S. at 155 (holding that "while it may be true that some searches of property are so destructive as to require a different result, this was not one of them").

69. *See* Deeva Shah, *Electronics at the Border: An Exception to the Border Search Doctrine?*, MICH. TELECOMMS. & TECH. L. REV (Nov. 2015), www.mttlr.org/2015/11/12/electronics-at-the-border-an-exception-to-the-border-search-doctrine/ (detailing concerns surrounding privacy that have arisen from border searches of sensitive information via electronics).

70. *The State of Privacy in Post-Snowden America*, PEW RES. CTR. (Sept. 21, 2016), www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/ (providing a report regarding privacy concerns of Americans and how their data is getting treated and used by the companies that collect it).

71. *Mobile Fact Sheet*, *supra* note 11.

72. *See* Anja Kaspersen, *Can You Have Both Security and Privacy in the Internet Age?*, WORLD ECON. F. (July 21, 2015), www.weforum.org/agenda/2015/07/can-you-have-both-security-and-privacy-in-the-internet-age/ (discussing the reach of government agencies, the effect on users, the need for transparency, and the need for safety).

73. *CBP FY17 Statistics*, *supra* note 1 (considering the need for border searches of electronic devices as part of their mission to protect the American people and enforce the nation's law in the digital age).

74. Matthew Feeney, *Privacy Still at Risk Despite New CBP Search Rules*, CATO INST. (Jan. 8, 2018), www.cato.org/blog/privacy-still-risk-despite-new-cbp-search-rules (explaining that without legislation or Supreme Court action, privacy at the border will be dependent on Customs and Border Patrol Policies).

75. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018) (holding that a warrant is required for police to access cell site location from a cell phone company); Riley v. California, 573 U.S. 373, 403 (2014) (holding that the police officers generally could not, without a warrant, search digital

Carpenter v. United States that a warrant is generally required for police to access cell site location information from a cell phone company.[76] This ruling was a big win for advocates of digital privacy.

While *Carpenter* is a narrow ruling, it may have far reaching implications for the kind of data that is held by third parties, such as browsing data, text messages, emails, and bank records.[77] While this holding does indicate that the Supreme Court could be moving towards more protection of digital privacy in the form of warrants, any analysis of *Carpenter* itself and the future implications of this holding are beyond the scope of this Comment.

In 2014, the Supreme Court decided in *Riley v. California* that "what the police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."[78] In a unanimous decision, the Court held that the search incident to arrest exception to the warrant requirement of the Fourth Amendment is not applicable in the circumstances of a forensic search of a cell phone.[79] The Court acknowledged that this does not mean that data on a cell phone is not searchable, it just means that officers must get a warrant before they forensically search the device.[80] The Court also acknowledged that the well-recognized "exigencies of the situation" exception would still apply and other case-specific exceptions may still justify a warrantless search of a particular phone.[81]

The problem with the holding in *Riley* is that it applies only to searches incident to arrest—a warrant exception that has no bearing on border searches.[82] Although both the search incident to arrest exception and the border search exception are exempt from

information on the cell phones seized from the defendants as incident to the defendants' arrests).

76. *Carpenter*, 138 S. Ct. at 2221. The Court stressed that this case is about "a detailed chronicle of a person's physical presence compiled every day, every moment, over several years." *Id.* at 2220. This level of inquiry raises serious privacy concerns that cannot be ignored and does not overcome Fourth Amendment protection.

77. *See* Louise Matsakis, *The Supreme Court Just Greatly Strengthened Digital Privacy*, WIRED (June 12, 2018), www.wired.com/story/carpenter-v-united-states-supreme-court-digital-privacy/ (discussing the ruling in *Carpenter v. United States*, including the history of the case and the future implications).

78. *Riley*, 573 U.S. at 403.

79. *Id.*

80. *Id.* at 401.

81. *Id.* at 402.

82. *Id.* at 386. *Compare Ramsey*, 431 U.S. at 620 ("The border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country.") *with Carroll*, 267 U.S. at 158 ("When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.").

the warrant protection provided by the Fourth Amendment, they are not related in any other fashion.[83]

Despite clear situational differences between the search incident to arrest in *Riley* and a border search, some courts have found the Court's reasoning and analysis of the privacy implications instructive in dealing with privacy concerns during forensic searches of electronic devices during a border search.[84]

III. ANALYSIS

This section explores the Federal Circuit split that has arisen due to judicial interpretation of the border search exception and the issue of digital privacy in forensic searches of electronics in border searches. Part A begins by exploring the balance between Americans' expectation of privacy and what we are willing to give up in the name of national security.[85] Part B illustrates how that balance has shifted because of the advancement and continued reliance on technology.[86] Part C explains how searches at the international border are constitutionally and situationally different from those not at the international border.[87] Part D will analyze the circuit split regarding forensic electronic border searches.[88] Part E will explain how that circuit split creates a fundamental issue regarding how the rights of people vary depending upon where they cross the international border.[89]

A. How Much of Our Privacy Do We Trade for Security?

The practice of trading pieces of individual freedoms for safety and social order is not a new concept. The theory of the social contract has existed for hundreds of years and was a decidedly large ideological part of the American Revolution.[90] The theory of the social contract is predicated upon citizens relinquishing some natural rights in exchange for a government or state which protects the remaining rights.[91] The concept written into the Declaration of

83. *Infra* Section III, C.

84. *Kolsuz*, 890 F.3d at 146-47 ("After *Riley*, we think it is clear that a forensic search of a digital phone must be treated as a nonroutine border search, requiring some form of individualized suspicion.").

85. *Infra* Section III, A.

86. *Infra* Section III, B.

87. *Infra* Section III, C.

88. *Infra* Section III, D.

89. *Infra* Section III, E.

90. *See* Martin Kelly, *The Social Contract*, THOUGHTCO (Aug. 5, 2019), www.thoughtco.com/social-contract-in-politics-105424 (discussing how Thomas Hobbes, John Locke, and Jean Jacques Rousseau's philosophical and political stances on the social contract influenced the Founding Fathers, particularly Thomas Jefferson and James Madison).

91. Betsey Sue Casman, The Right to Privacy in Light of the Patriot Act and

Independence[92] and the United States Constitution (and any constitution for that matter) is a giant social contract written between People and their Government.[93]

The border search exception to the Fourth Amendment fits into this philosophy. The power of customs officials to search persons and property attempting to cross the international border—a freedom given up—was granted by Congress—as the people—as a way to ensure national security and safety.[94] But shouldn't there be limits on how much privacy can be intruded upon?

The Supreme Court, in *United States v. Montoya De Hernandez,* limited the types of searches that can be done on a *person* without distinct reasonable suspicion.[95] The concept of routine versus nonroutine searches was borne from *Montoya De Hernandez*.[96] Routine searches are not subject to any requirement of reasonable suspicion, probable cause, or a warrant.[97] The detention of a traveler beyond the scope of a routine customs search and inspection however, is justified only when supported by reasonable suspicion.[98] Yet, the holding of *Montoya De Hernandez* is limited, as the Court pointedly noted that the holding was not suggestive regarding whether any level of suspicion would be required for any other type of nonroutine border search.[99]

Since *Montoya De Hernandez*, the Court has declined to extend a heightened level of suspicion requirement for the search of property. In *United States v. Flores-Montano*, the Supreme Court

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Social Contract Theory (May 2011) (unpublished Ph.D. thesis, University of Nevada, Las Vegas) (on file with UNLV Theses, Dissertations, Professional Papers, and Capstones).

92. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.").

93. U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

94. 8 C.F.R. § 287.5 (2020).

95. *Montoya De Hernandez*, 473 U.S. at 531.

96. *Id.*

97. *Id.* at 538. Routine searches of travelers can include "questioning, patdowns, and thorough searches of their belongings." *Id*. at 551.

98. *Id.* at 541. ("We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.").

99. *Id*. at 541 n.4. ("[B]ecause the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches.").

reprimanded the Ninth Circuit Court of Appeals for creating a routine versus nonroutine balancing test and applying it to vehicles.[100] The Court in *Flores-Montano* clarified that the reasons that might support a requirement of additional levels of suspicion—dignity and privacy interests of the person being searched—simply do not carry over to vehicles.[101]

The Supreme Court has kept open the possibility that some searches of property may be so destructive as to require particularized suspicion, but has not elaborated on this.[102] Precedent illustrates that searches of luggage,[103] mail,[104] and vehicles[105] are all searches of property that do not require any particularized or additional suspicion.

B. The Technologically Rising Stakes Have Changed the Game

With the advent of the digital age, property now includes belongings such as laptops and cellphones. This has become an often litigated issue, as smartphones and other personal electronic devices contain vastly more private information than other containers that the border exception applies to.[106] However, courts are generally reluctant to grant defendants' motions to suppress evidence obtained from electronic border searches.[107] Some courts avoid answering the question of whether additional reasonable suspicion is required for forensic searches completely by simply stating that even if specific reasonable suspicion was necessary, it was there.[108]

What *is* a forensic search of an electronic device? A forensic

100. *See Flores-Montano*, 541 U.S. at 152 (stating that the complex balancing tests to determine the intrusiveness "of a search of a person have no place in the border searches of vehicles").

101. *Id.*

102. *Id.* at 155-56 (discussing that there may be a time in which a search of property is so destructive that it requires reasonable suspicion, but that this case is not one of those times).

103. *See Thirty-Seven Photographs (37)*, 402 U.S. at 376 (stating that "customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country").

104. *See Ramsey*, 431 U.S. at 620 (stating that it is the entry into the country that makes the resulting search of the mail reasonable).

105. 19 U.S.C. § 482 (2018).

106. Savage & Nixon, *supra* note 6.

107. Eunice Park, *The Elephant in the Room: What Is a "Nonroutine" Border Search, Anyway? Digital Device Searches Post-Riley*, 44 HASTINGS CONST. L.Q. 277, 283 (2017).

108. *Id.* The problem with not addressing whether additional reasonable suspicion is required is that courts are side-stepping the issue. There is no clear answer whether or not reasonable suspicion is required and that provides the American people with no guidance of what to do in these situations.

search typically begins with the creation of a copy or "image" of the original storage device saved as a "read only" file.[109] Then, customs or law enforcement agents use software which allows them to analyze the data on the imaged hard drive and provides the agent with access to password protected, hidden, encrypted, or deleted files.[110] It is an exhaustive search of everything the electronic device can show evidence of; it is "essentially a computer strip search."[111]

While codified law stays unchanged by Congress, judicially created law surrounding electronics is in flux.[112] In *United States v. Cotterman*, the Ninth Circuit Court of Appeals rejected the idea that all property is the same under the border search exception and held that reasonable suspicion is required for forensic searches of electronics at the border.[113] The Ninth Circuit Court stated that the exposure of confidential and personal information has permanence that cannot be undone, unlike the physical search of other property.[114] That kind of sweeping search into the most intimate details of a person's life is a significant intrusion upon personal privacy and dignity.[115] The very nature of the data held on personal electronic devices is different from that of other property.[116] Electronic devices in the twenty-first century act as diaries, planners, record keepers of financial and medical information, and the preferred method of personal and professional communication.[117]

However, the *Cotterman* holding has not had a far-reaching influence beyond the Ninth Circuit and courts under its jurisdiction. The real change came when the Supreme Court held in *Riley v. California* that police officers must obtain a warrant before forensically searching a cell phone seized incident to an arrest.[118]

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109. *See* United States v. Saboonchi, 990 F. Supp. 2d 536, 547 (D. Md. 2014) (describing what a border search entails and applying the border search exception to a forensic search of cell phones done several hundred miles from the border crossing).

110. *See Cotterman*, 709 F.3d at 963 n.9 (explaining the kind of software that Agent Owen used, called EnCase, while forensically searching Cotterman's laptop).

111. *Id.* at 966. "An exhaustive forensic search of a copied laptop hard drive intrudes upon privacy and dignity interests to a far greater degree than a cursory search at the border." *Id.*

112. Savage & Nixon, *supra* note 6.

113. *Cotterman*, 709 F.3d at 968.

114. *Id.* at 966 (stating that unlike searches involving a reassembled gas tank, there is no way to fix or undo what was done in the release of that personal information).

115. *Id.*

116. *Id.* at 964.

117. *Id.* These most intimate details of a person's life are deserving of protection and should require reasonable suspicion in order to access.

118. *See Riley*, 573 U.S. at 403 (holding that the forensic search of defendants' cell phones and evidence obtained from the cell phones that used to charge the defendants with additional charges was a violation of the Fourth Amendment and required a warrant).

The Court delved deep into the privacy implications of a forensic cell phone search, recognizing the wealth of information that becomes available during a forensic search.[119] The Court also refused to treat cell phones as just another form of a container, noting that cell phones are different in both qualitative and quantitative senses from typical containers, such as wallets or bags.[120] Modern cell phones are more than just a technological convenience; for many Americans they hold the most private details of their life.[121] The Court focused on the protection of information provided by the Fourth Amendment and concluded that simply because the advancement of technology allows for such information to be held on a cell phone does not make that information any less worthy of protection.[122] It must be considered that before the digital era, people did not walk around carrying a cache of sensitive personal information on them when they went about their day.[123]

The Court stressed the importance of the modern cell phone's immense storage capacity and mused that the digital capacity for storage would only grow with time.[124] When the Supreme Court decided *Riley* in 2014, the top-selling phone had a standard storage capacity of 16 gigabytes with an option to upgrade to 64 gigabytes.[125] In the first quarter of 2018, the top selling phone[126] had a standard storage capacity of 64 gigabytes and the option of upgrading to 256 gigabytes.[127] In just four years, the standard storage capacity has increased exponentially.

While the *Riley* Court eliminated the ability to immediately forensically search cellphones under the search incident to arrest exception to the warrant requirement, the Court limited its holding by stating that there still may be case-specific exceptions where a warrantless search of a phone may be justified.[128] However, the dissection of those possibilities and the implications for future

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119. *Id.* at 393-94.

120. *Id.* at 391-92.

121. *Id.* at 403.

122. *Id.*

123. *See id.* at 394 (concluding that there is an element of pervasiveness that characterizes cell phones but not physical records). Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. *Id.*

124. *Id.* "[Cell phones] are in fact minicomputers that also happen to have the capacity to be used as a telephone." *Id.* at 393.

125. *Id.* at 394.

126. Justin Jaffe & Eric Franklin, *iPhone X was the Best-Selling Smartphone in Early 2018*, CNET (May 5, 2018), www.cnet.com/news/iphone-x-was-best-selling-smartphone-in-early-2018/.

127. *Compare iPhone Models*, APPLE, www.apple.com/iphone/compare (last visited Oct. 26, 2018).

128. *Riley*, 573 U.S. at 402 (quoting Kentucky v. King, 563 U.S. 452, 460 (2011)) (noting that "one well-recognized exception applies when the 'exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.").

searches incident to arrest are beyond the scope of this Comment.

C. Where and How a Search Takes Place Matters

United States citizens have certain inalienable rights and the right to interstate travel is one of those fundamental rights.[129] Interstate travel at its most basic definition refers to the travel from one state to another.[130] When it comes to a search done during interstate travel, citizens have a right to be free of interruption or search unless there is probable cause for a stop.[131] The Fourth Amendment protects people against unreasonable search and seizure and this usually translates to the need for probable cause or a warrant.[132]

But, as previously discussed, border searches are not subject to the warrant provisions of the Fourth Amendment and are per se reasonable within the meaning of that Amendment under the border search exception.[133] There is also no fundamental or protected right to international travel.[134] Therefore, international travelers may be stopped while crossing the international border and may be required to identify and subject themselves and their belongings to a search.[135] The fact that a person or item is crossing the international border coupled with the government's paramount interest in preventing unwanted persons and effects from entering the country makes searches at the border reasonable.[136]

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129. *See* Kathryn E. Wilhelm, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B. U. L. REV. 2461, 2465 (2010) (discussing the fundamental right to interstate travel). "The Supreme Court has consistently applied strict scrutiny to restrictions on the right to interstate travel." *Id.* The fundamental nature of the right to interstate travel is undisputed and the roots of this fundamental right are hinged in a multitude of constitutional provisions and concepts. *Id.* at 2466.

130. *Id.* at 2464.

131. *Carroll*, 267 U.S. at 154. "But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*

132. *See Riley*, 573 U.S. at 381 (discussing Fourth Amendment jurisprudence as being ruled by reasonableness and reasonableness generally requires the obtaining of a judicial warrant).

133. *See supra* Part II, Section B (discussing the border search exception).

134. *See* United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 125 (1973) (observing that "import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations").

135. *Carroll*, 267 U.S. at 154. "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Id.*

136. *See Ramsey*, 431 U.S. at 619 (holding that border searches are reasonable by the single fact that a person or item has entered the country and

The distinction between interstate and international travel for the purposes of searches under the Fourth Amendment is essential to understanding where and what can and cannot be done during each respective search.[137]

A search incident to arrest can take place anywhere an arrest occurs and has historically been recognized as its own Fourth Amendment exception to the warrant requirement.[138] The search incident to arrest doctrine is valid everywhere in the United States and is rooted in concern for officer safety and the preservation of evidence.[139]

Conversely, border searches necessarily happen at the international border or at its functional equivalent.[140] The international border for purposes of border search authority means within 100 air miles from any external boundary of the United States.[141] The border search exception is rooted in the Government's principal interest of national security and securing the border.[142]

The difference between these two exceptions is one reason courts have disagreed on whether the Supreme Court's holding in Riley is applicable to border searches—border searches at the international border are situationally and constitutionally different than searches incident to arrests which necessarily happen in the

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there is no additional requirement of probable cause); *see also Flores-Montano*, 541 U.S. at 152 (stating that "the government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border").

137. *See generally Ramsey*, 431 U.S. at 616 (noting the difference between searches at the international border and those done in the interior). "Section 24 of [the first customs statute] granted customs officials full power and authority to enter and search any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed. This acknowledgment of plenary customs power was differentiated from the more limited power to enter and search any particular dwelling-house, store, building, or other place where a warrant upon cause to suspect was required." *Id* (internal quotation marks omitted).

138. *See Riley*, 573 U.S. at 381 (discussing the existence of the warrant exception for search incident to arrest). "In 1914, this Court first acknowledged in dictum 'the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.'" Weeks v. United States, 232 U.S. 383, 392 (1964). Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement." *Id.* at 382.

139. *Riley*, 573 U.S. at 381-85.

140. *See Denson*, 574 F.3d at 1339 (reaffirming the border search's application at the international border and its functional counterparts, like an airport).

141. 8 C.F.R. § 287.1(a)(2) (2020) ("The term reasonable distance, as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the chief patrol agent for CBP, or the special agent in charge for ICE, or, so far as the power to board and search aircraft is concerned any distance fixed pursuant to paragraph (b) of this section.").

142. *See generally Ramsey*, 431 U.S. 606 (analyzing the history of the border search exception and finding it well-founded).

country.[143]

D. Where the Circuits Do Not Agree

The Ninth Circuit Court of Appeals was ahead of the curve (and ahead of the Supreme Court's holding in *Riley*) in *Cotterman* with its holding that particularized reasonable suspicion must be present before a forensic search of electronic devices could be conducted.[144] This precedent has bound the Ninth Circuit and its jurisdictional under-courts to this standard.

The Fourth Circuit Court of Appeals decided *United States v. Kolsuz* on May 9, 2018 and held that after *Riley*, "a forensic border search of a phone must be treated as nonroutine, permissible only on a showing of individualized suspicion."[145] The Fourth Circuit latched onto the reasoning in *Riley* that cell phones are unlike other containers and contain vast amounts of information, making a search of such devices extremely invasive.[146] The fact that so much information is kept on a digital device and the pervasiveness of the devices in modern society makes it both unreasonable and unrealistic for a traveler to leave their digital devices at home when traveling internationally.[147] The Fourth Circuit Court in *Kolsuz* concluded that because of the Supreme Court's ruling in *Riley* and the supporting decision from *Cotterman* regarding digital privacy, there cannot be another interpretation of what the requirements should be regarding forensic searches of electronics at the border.[148]

The Eleventh Circuit Court of Appeals in *United States v. Touset* was decided just fourteen days after *Kolsuz* on May 23, 2018 and held: "we see no reason why the Fourth Amendment would require suspicion for a forensic search of an electronic device when it imposes no such requirement for a search of other personal property."[149] The Eleventh Circuit Court rejected the argument that electronic devices should receive special treatment because they are inescapable in modern society or can store vast amounts of data.[150] The role of border agents remains the same, despite the advancement of technology: to prevent the unwanted entry of

143. *See generally Riley*, 573 U.S. 373 (discussing the traditional reasons for the existing search incident to arrest warrant exception: danger to officer safety and the preservation of evidence during an arrest); *see also Ramsey*, 431 U.S. 606 (stating the reason for the border search exception: "the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country"). *Id.* at 616.

144. *Cotterman*, 709 F.3d at 963.

145 *Kolsuz*, 890 F.3d at 144.

146. *Id.* at 145-46.

147. *Id.* at 145.

148. *See id.* at 144-47 (analyzing the privacy implications regarding the scale and nature of data stored on a cell phone).

149. *Touset*, 890 F.3d at 1233.

150. *Id.*

persons and contraband at the international border.[151] The *Touset* court also rejected the analogy of a forensic electronic search to that of a strip search, relying on the Eleventh Circuit precedent that the factors by which a search is judged regarding personal indignity are "irrelevant to searches of electronic devices."[152]

The *Touset* Court addressed the holdings in *Cotterman* and *Kolsuz*, but remained unpersuaded by their reasoning.[153] The application of *Riley* to border searches was resoundingly rejected, stating that *Riley* is limited to the search incident to arrest exception related to cell phones and does not apply to border searches.[154] The *Touset* court further stated that a traveler's privacy should not be given preference over the interest of the government in securing and protecting its territorial integrity and rejected the idea that international travelers have no practical options to protect their privacy while traveling abroad.[155] The Eleventh Circuit noted that there is no guarantee to travel without inconvenience and suggested that any property a person does not want searched can be left at home.[156] The main holding that no additional reasonable suspicion is required for forensic electronic searches is contrary to the holdings from both the Ninth and the Fourth circuits.[157]

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151. *See id.* (analogizing the responsibility and right of border agents to searching a recreational vehicle filled with personal effects or a tractor-trailer filled with boxes of documents).

152. *Id.* at 1234. "A forensic search of an electronic device is not like a strip search or an x-ray; it does not require border agents to touch a traveler's body, to expose intimate body parts, or to use any physical force against him. Although it may intrude on the privacy of the owner, a forensic search of an electronic device is a search of property." *Id.*

153. *See Cotterman*, 709 F.3d at 952 (equating a forensic electronic search to a strip search and finding that kind of search a substantial intrusion upon personal privacy and dignity requiring a probable cause to search); *Kolsuz*, 890 F.3d at 146-47 (holding that the Supreme Court in *Riley* made it clear that a forensic search of a cell phone requires individualized suspicion).

154. *See Touset*, 890 F.3d at 1234 (stating that although the Supreme Court stressed the risk of intrusion into privacy by a forensic phone search, *Riley* applies to the search incident to arrest exception and does not apply to searches at the border); United States v. Vergara, 884 F.3d 1309, 1312 (2018) (stating that in *Riley*, "the Supreme Court expressly limited its holding to the search-incident-to-arrest exception").

155. *Touset*, 890 F.3d at 1235. The Ninth and Fourth Circuits stressed the impracticality of removing or deleting files before traveling and argued that it is unreasonable for travelers to leave their devices at home while traveling. *Id.* The Eleventh Circuit rejected this idea, reminding everyone that a traveler's expectation of privacy is less at the border. *Id.*

156. *Id.* The court in *Touset* contrasted the capability of leaving property at home to the inability to leave your person at home—a rationalization for why there is a test for the searches of people and why that test does not apply to property. *Id.*

157. *Id.* at 1237. The Eleventh Circuit added a now familiar alternative holding stating that even if reasonable suspicion is required, there was reasonable suspicion. *Id.*

E. The Problem That A Circuit Split Creates

The issue that this circuit split creates is clear: *where* an individual crosses the international border defines how their Fourth Amendment rights are handled.[158] This situation runs contrary to a central theme of American ideology—that every person be treated equally. In this case, that means an individual's Fourth Amendment rights are the same regardless of where they cross the international border. Without guidance from Congress, the judiciary is forced to rule on issues of modern digital privacy using outdated stare decisis.[159] Not all judges are pleased with creating precedent this way, some even writing in concurring[160] opinions that they believe the responsibility to determine this issue lies with Congress, not the judiciary.[161]

IV. PROPOSAL

In order to protect the Fourth Amendment rights of the American people, this circuit split needs to be resolved. The circuit split is problematic because of the inconsistencies in the method and determination of forensic searches of electronics and the treatment of the American people and their property depending upon where they cross the international border. Any solution to the issue of forensic border searches of electronics must strike a balance between an individual's expectation and right of privacy and the Government's paramount interest in national security and securing the international border.[162]

This Comment advocates for a solution which would immediately resolve the circuit split. The Supreme Court first should grant *certiorari* to a case where the central concern is the level of suspicion required for forensic searches of electronics at the international border. In its decision, the Supreme Court should hold

158. Hobbs & Zeno, *supra* note 21.

159. Wessler & Bhandari, *supra* note 16.

160. *See Riley*, 573 U.S. at 404-08 (agreeing with the holding of the court but stating that the legislature is in a better position to assess and respond to the changes that have occurred or will in the future). "In light of these developments, it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment." *Id.* at 456.

161. *See Kolsuz*, 890 F.3d at 148-53 (agreeing with the majority but arguing that the majority opinion is created law that is better left up to the legislative and executive branches). "If individualized suspicion is to be required in order to conduct what the majority asserts is a "nonroutine border search," then Congress must say so." *Id.* at 148.

162. *See Montoya De Hernandez*, 473 U.S. at 540 (explaining how the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is "struck much more favorably to the Government at the border").

that under the current written law, forensic electronic searches conducted at the international border do not require any additional or individualized suspicion as they are per se reasonable.[163] It is imperative to the balance of the government and for the needs of the American people that if significant alterations are made to the border search exception to the Fourth Amendment, Congress needs to be the branch of government to decide what the standard should be.

A. Why the Supreme Court Needs to Step In, But Not Take Charge

The uniform interpretation of federal law is central to the idea of the structure and function of the federal court system.[164] The Supreme Court has both original and appellate jurisdiction, the power of judicial review, and the power to grant or to deny *certiorari*.[165] What is missing from that substantial list of powers? The power to write the laws that govern the American people. That power lies within the legislative branch: the two bodies of Congress.[166] It is the responsibility of Congress to create legislation that reflects the values of the American people and sets policy for the nation; courts only borrow the lawmaking powers of Congress in situations where ambiguous statutes call for interpretation or clarification.[167]

With the border search exception to the Fourth Amendment warrant requirement, there is no ambiguity: a search done at the border is per se reasonable.[168] Despite the interpretation of *Riley* by the Fourth Circuit Court of Appeals, the Supreme Court has given no indication that forensic electronic searches at the border require any additional or individualized suspicion. In the last border search case where the Supreme Court granted *certiorari*, the Court held that "the reasons that might support a requirement of some level of

163. An Act to regulate the Collection of Duties imposed by law on the tonnage of ships or vessels, and on good, wares and merchandises imported to the United States, §§ 23, 24. *See* 19 U.S.C. § 507 (2018).

164. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1568 (2008) (discussing the federal courts' job of ensuring uniformity of the law and providing greater consistency in the interpretation of law).

165. U.S. CONST. art. III; Marbury v. Madison, 5 U.S. 137 (1803) (granting the Supreme Court the power to declare legislative or executive action in violation of the Constitution); 28 U.S.C.S. § 1254 (2018) ("Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.").

166. U.S. CONST. art. 1, § 1.

167. Frost, *supra* note 164, at 1607 (describing why Congress is the more appropriate branch of government to make decisions regarding the meaning of federal law and deciding policy).

168. *See supra* Part II, B.

suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles."[169] There, the Court drew a line between the treatment of people and property, and the dignity of a person simply cannot be compared to the dignity of an electronic device.[170]

The Court should reaffirm its prior holdings and dicta that at the international border, the Fourth Amendment's balance of reasonableness is qualitatively different than at the interior and an individual has a lesser expectation of privacy due to the government's paramount interest in protecting the nation.[171] A Supreme Court ruling would guarantee that international travelers' Fourth Amendment rights are treated the same across the nation and that travelers know exactly what to expect no matter where they crossed the border.

Moreover, this strict adherence to the law as it is written may be the only way to push Congress into drafting legislation that may be better suited to the digital world of today. The Supreme Court has denied *certiorari* to three cases regarding forensic electronic searches conducted at the border in the last ten years.[172] Those three cases arose from either the Ninth or the Eleventh circuits, one of those cases being the aforementioned *Cotterman*. The Supreme Court even had the opportunity in *United States v. Vergara* to address whether its decision and rationale in *Riley* could be applied to electronic searches at the border yet instead chose to spurn the opportunity.

These actions by the Supreme Court could arguably be interpreted as the Supreme Court trying not to be the deciding authority on forensic searches of electronics at the border.[173] By

169. *Flores-Montano*, 541 U.S. at 152.

170. *Id.*

171. *See generally Montoya De Hernandez*, 473 U.S. at 538 (holding that the Fourth Amendment reasonableness test is weighed differently at the border than the interior); *Flores-Montano*, 541 U.S. at 153 (discussing the United States' paramount interest in conducting searches at the border is national self-protection).

172. *See Arnold*, 533 F.3d 1003, *cert. denied*, 555 U.S. 1176 (2009) (denying *certiorari* when the Ninth Circuit reversed a motion to suppress information found on a laptop during a border search); *Cotterman*, 709 F.3d 952, *cert. denied*, 134 S. Ct. 899 (2014) (denying *certiorari* when the Ninth Circuit held (a) that reasonable suspicion is required for a forensic search of a laptop and (b) that border agents had reasonable suspicion to conduct the search); *Vergara*, 884 F.3d 1309, *cert. denied*, 139 S. Ct. 70 (2018) (denying *certiorari* when the Eleventh Circuit affirmed defendant's conviction and held that *Riley* does not apply to border searches).

173. It is interesting that the Supreme Court refused *certiorari* to recent forensic electronic border search cases yet granted *certiorari* to *Riley* and held the way it did. Considering the distinction the Court has previously drawn between persons and property in the context of border searches, some may interpret the silence of the Court as its desire not to intervene and disturb its own precedent.

affirming the law as it is written, the Supreme Court can ensure uniform application of the border search exception to the Fourth Amendment without having to make a sweeping promulgation on the balance to be struck between digital privacy and national security.

B. The Responsibility of Creating New Privacy Law Lies with Congress

Supreme Court Justice Samuel Alito said it best in his concurring opinion in *Riley*: "It would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment."[174] With the advancement and the role of technology in modern society, there is a wealth of information potentially available on electronic devices that has never been available during a search before. It is primarily because of this wealth of information that "searching their contents implicates very sensitive privacy interests that [the Supreme Court] is poorly positioned to understand and evaluate."[175] Justice Alito went as far as to say that he would reconsider the questions presented in *Riley* if either Congress or state legislature enacted legislation on the topic.[176]

The legislative branch is tasked with many responsibilities, but the most important of those is to improve the general welfare—to make law. Those laws should effectively solve problems and reflect the values of the American people it represents.[177] Justice Wilkinson in his concurring opinion in *Kolsuz* adamantly maintained that the standard of reasonableness for a border search should principally be a legislative question, not a judicial one.[178] Congress has the ability and the means to investigate, research, and hold hearings to try and resolve the tension between privacy and security interests at the border through a thorough examination of the issues.[179]

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174. *Riley*, 573 U.S. at 407-08. While Justice Alito ultimately agreed with the Court's holding, he was more concerned with the role the Court should play in regulating electronic surveillance. *Id.* Justice Alito contended that the legislatures are in a better position than the Supreme Court to respond and assess the changes in the privacy arena. *Id.*

175. *Id.* at 407.

176. *Id.*

177. Gregory Koger, *The Job of Congress: A Primer*, VOX (Apr. 17, 2018), www.vox.com/mischiefs-of-faction/2018/4/17/17235516/congress-job-primer (discussing what the American people should want and expect from the legislative branch of government).

178. *See Kolsuz*, 890 F.3d at 148 (arguing that the handling of the level of reasonableness in a border search calls for "the greatest caution and circumspection" and that the legislative and executive branches have much to offer in the determination).

179. *Id.* at 150 (articulating the types of questions that need to be asked

Despite the fact that the right of privacy has been judicially established, the standard of reasonableness and suspicion required for a forensic electronic search at the border is an issue that should not be formed in this way. This is a sensitive issue and the depths to which a forensic search can probe into an individual's personal life is disturbing. But the border search exception to the Fourth Amendment continues to serve its fundamental purpose of securing the international borders and protecting the people and the nation. As technology continues to advance and evolve, so must the law enforcement agencies that are duty-bound to identify, investigate, and prosecute those who would use these advancements for malign purposes.[180]

It would be a mistake for Congress to rely upon the U.S. Customs Border and Protection Agency's Directives to choose what level of suspicion is required in order to perform searches at the international border.[181] Although the latest directive requires reasonable suspicion for a forensic search, the problem is that the direction is coming from a federal agency and not from Congress. This is an issue that has implications far greater than just the search itself. Matters of national security and individual privacy rights are too important to allow anything less than the full effort of Congress to have a significant impact. Congress can use its considerable resources to investigate how to better balance the privacy needs of the American people and the nation's need for national security and use that information to subsequently decide whether additional reasonable suspicion is required.

V. CONCLUSION

The world in which the modern American lives is full of increasingly subtle dangers as everyday life becomes more and more intricately interwoven with digital devices. Growing in tandem with the convenience and ease of technology are the intrusions and inconveniences that necessarily accompany technological advancement. Regardless of the era of American society, the Government's right to perform a search at the international border is one such inconvenience that has always been necessary to achieve the goal of national security, and searches of electronic devices are merely an extension of the powers already granted via legislation and supported through hundreds of years of precedent.

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when looking at the tension between privacy and security interests at the border).

180. *See CBP FY17 Statistics*, *supra* note 1 (detailing why it is important for customs and border patrol agents to adapt to changing technology and why the searches of electronic devices are imperative to safety).

181. *Id.* (requiring, for "advanced searches," otherwise known as a forensic electronic search, that there be reasonable suspicion by the agent conducting the search or a national security concern).

This Comment's solution to the federal circuit split created by the question of suspicion required to forensically search an electronic device at the border suggests that the Supreme Court step in and affirm that the border search exception requires no additional reasonable suspicion. This affirmation is necessary in order to ensure uniform application of the law. If Congress believes that digital privacy at the border needs to be reassessed, they have the methods and the means to investigate and determine what the standard should be. The privacy concerns of the American people are many and the legislature, elected by the people, are in the best position to assess the legitimate needs of law enforcement and to respond to the growing privacy concerns surrounding forensic electronic searches. Until that day, forensic border searches of electronic devices at the international border should be per se reasonable.