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**LAPTOP SEARCHES AT THE BORDER AND *UNITED STATES V. COTTERMAN***

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INTRODUCTION

Every year, customs officers conduct electronic media searches of approximately five thousand people entering the United States at one of its borders, be it a geographic border or an airport.<sup>1</sup> Given the prevalence of

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<sup>1</sup> Susan Stellin, *The Border Is a Backdoor for U.S. Device Searches*, N.Y. TIMES, Sept. 10, 2013, at B1, archived at <http://perma.cc/65AB-98X4> (reporting that the Department of

laptops, smartphones, and tablets in contemporary society, it is difficult to comprehend the amount of data that crosses the border daily. While the number of these searches alone may not seem like cause for concern, the lack of procedural protections from these searches is. Customs officials are free under current law to search electronic devices, like laptops, without any individualized suspicion of the owner's wrongdoing.

In March 2013, the United States Court of Appeals for the Ninth Circuit drastically changed the state of Fourth Amendment law in *United States v. Cotterman*.<sup>2</sup> The Ninth Circuit held that before conducting forensic computer searches at the U.S. border, customs officers must first have a reasonable suspicion that the stopped individual is engaging in criminal activity.<sup>3</sup> The decision may appear unremarkable on its face: the Supreme Court has never stated a clear definition of reasonable suspicion – it has only held that reasonable suspicion is a lesser standard under the Fourth Amendment than probable cause<sup>4</sup> – so the application of some undefined intermediate standard to these searches seems like much ado about nothing. But what makes the *Cotterman* decision particularly noteworthy is that it comes in the context of the U.S. border. Courts have long viewed the Fourth Amendment differently at the border than in other contexts, striking the balance “much more favorably to the Government.”<sup>5</sup> The Supreme Court has only once required customs officials to establish reasonable suspicion before a search at the border, and that was in the case of a highly intrusive search of a person.<sup>6</sup> Moreover, the Ninth Circuit has had a history of conflict with the Supreme Court over the scope of border searches, wherein the Ninth Circuit has tried to narrow the border search exception and the Supreme Court has thwarted its efforts.<sup>7</sup> But

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Homeland Security conducted 4,957 media searches between October 1, 2012, and August 31, 2013).

<sup>2</sup> 709 F.3d 952, 952 (9th Cir. 2013) (en banc).

<sup>3</sup> *Id.* at 968 (“Reasonable suspicion is defined as ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’” (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981))).

<sup>4</sup> *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (neglecting to define *reasonable suspicion*, but making clear that it is a less demanding standard than probable cause).

<sup>5</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 540 (1985).

<sup>6</sup> *See id.* (holding that customs officials must have reasonable suspicion that a traveler is smuggling contraband in his or her alimentary canal before they detain that traveler and perform a cavity search).

<sup>7</sup> *See United States v. Flores-Montano*, No. 02-50306, 2003 WL 22410705 (9th Cir. Mar. 14, 2003) (affirming the district court's holding that a search of a car's gas tank was non-routine and, therefore, required reasonable suspicion), *rev'd*, 541 U.S. 149, 155-56 (2004); *United States v. Montoya de Hernandez*, 731 F.2d 1369, 1373 (9th Cir. 1984) (asserting that a prolonged detention at the border violated the Fourth Amendment), *rev'd*, 473 U.S. at 540 (1985). In *Montoya de Hernandez*, the Supreme Court reversed the Ninth Circuit and held that only a reasonable suspicion was necessary for the prolonged detention. *Montoya de Hernandez*, 473 U.S. at 533. In *Flores-Montano*, the Supreme Court again reversed the

even if *Cotterman* only turns out to be the Ninth Circuit's latest failed attempt to curtail the border search exception, the decision highlights a growing problem in an increasingly globalized society in which electronic devices have become ubiquitous.

While the Supreme Court will soon need to address new technologies such as computers, smartphones, tablets, and cloud computing, this Note argues that the context of the border makes the decision in *Cotterman* particularly ill-suited for an innovative approach because of the longstanding border search exception. Part I traces the development of the border search exception and describes the exception as it stands today. Part II examines the lead-up to *Cotterman*, including the facts and the procedural history of the case, and the decision itself. Part III discusses the *Cotterman* court's analysis, and how it is both inconsistent with precedent and unpersuasive. Part IV considers alternative judicial remedies, beyond those put forth in *Cotterman*, and argues that because of the well-established border search exception and the long list of precedents supporting it, the Supreme Court will almost certainly continue to allow suspicionless forensic computer searches at the border. Therefore, this Note argues in Part V that any reliance on a judicial remedy is misplaced, and a legislative solution will be necessary if the suspicionless searches of electronic devices at the border are going to be brought to an end. Given the recent revelations about rampant government spying and data collection,<sup>8</sup> the possibility of a legislative solution to curb suspicionless computer searches is more likely now than it has ever been. Increased concerns about privacy, government overreach, and executive abuse of power have combined to provide an opportunity for legislators to put an immediate end to the practice of suspicionless computer searches at the border.

## I. THE BORDER AND THE FOURTH AMENDMENT

### A. *The Fourth Amendment*

The Fourth Amendment primarily protects the right of the people to be free from unreasonable government searches and seizures in their "persons, houses, papers, and effects."<sup>9</sup> The Fourth Amendment, thus, is not a "general constitutional 'right to privacy,'" but instead protects against "certain kinds of governmental intrusion."<sup>10</sup> The Amendment protects people, not places, and

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Ninth Circuit and rejected the routine/non-routine distinction with respect to cars. *Flores-Montano*, 541 U.S. at 155-56.

<sup>8</sup> See, e.g., Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN, June 5, 2013, at A1.

<sup>9</sup> 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.").

<sup>10</sup> *Katz v. United States*, 389 U.S. 347, 350 (1967).

“[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”<sup>11</sup> From these principles, the Supreme Court has developed a two-prong inquiry to determine whether a person has a constitutional right to privacy in property: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>12</sup>

When a person has such a constitutional right to privacy, the general rule is that police must first obtain a warrant before a search is considered reasonable under the Fourth Amendment.<sup>13</sup> However, because “the Fourth Amendment’s ultimate touchstone is ‘reasonableness,’”<sup>14</sup> the Supreme Court has recognized various exceptions to the warrant requirement for certain situations in which exigent circumstances render obtaining the warrant impractical.<sup>15</sup>

When a warrant is not required for a search or seizure, police traditionally must still have probable cause of criminal activity.<sup>16</sup> The Supreme Court has defined probable cause as a “fluid concept” that is not “readily, or even usefully reduced to a neat set of legal rules.”<sup>17</sup> As a result, the Court has prescribed a totality-of-the-circumstances inquiry to determine whether probable cause existed in any particular case.<sup>18</sup> This inquiry must be

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<sup>11</sup> *Id.* at 351.

<sup>12</sup> *Id.* at 361 (Harlan, J., concurring) (establishing the “expectation of privacy” test for evaluating the legality of searches).

<sup>13</sup> *See, e.g., id.* at 357 (majority opinion) (“Searches conducted without warrants have been held unlawful ‘notwithstanding facts unquestionably showing probable cause,’ for the Constitution requires ‘that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . .’” (citations omitted) (quoting *Wong Sun v. United States*, 371 U.S. 471, 481 (1963); *Agnello v. United States*, 269 U.S. 20, 31 (1925))).

<sup>14</sup> *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

<sup>15</sup> *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (“Thus the most basic constitutional rule in this area is 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.’ The exceptions are ‘jealously and carefully drawn,’ and there must be ‘a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.’” (footnotes omitted) (quoting *Katz*, 389 U.S. at 357; *Jones v. United States*, 357 U.S. 493, 499 (1958); *McDonald v. United States*, 335 U.S. 451, 456 (1948))).

<sup>16</sup> *See United States v. Watson*, 423 U.S. 411, 417 (1976) (“[T]he lawfulness of the arrest without warrant, in turn, must be based upon probable cause . . . .” (quoting *Ker v. California*, 374 U.S. 23, 34-35 (1963))).

<sup>17</sup> *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (attempting to define probable cause and providing some guidelines to determine whether it exists in a given case).

<sup>18</sup> *See id.* at 231.

approached from the viewpoint of the “reasonable and prudent man” as opposed to that of a “legal technician.”<sup>19</sup>

However, the Supreme Court held in *Terry v. Ohio*<sup>20</sup> that, in some cases, neither a warrant nor probable cause is required.<sup>21</sup> *Terry* purported to create a narrow and limited exception to the warrant and probable cause requirements to conduct a brief stop-and-frisk to search for weapons in order to protect officer safety.<sup>22</sup> Nonetheless, its reasoning has since been extended to a variety of contexts, resulting in a new standard, “reasonable suspicion.”<sup>23</sup> To determine whether police had reasonable suspicion to search in a particular case, courts balance the relevant governmental interests against the personal privacy interest at stake.<sup>24</sup> The government must be able to “point to specific and articulable facts” to substantiate any relevant governmental interest.<sup>25</sup> Though the reasonable suspicion standard is clearly less than probable cause, in *Ornelas v. United States*,<sup>26</sup> the Court expressly refused to define probable cause or reasonable suspicion.<sup>27</sup> The Supreme Court has said that reasonable suspicion is less than probable cause, but more than an “inchoate hunch,” which must be determined from the totality of the circumstances.<sup>28</sup> The standard has also been defined as a “particularized and objective basis for suspecting the particular person stopped of criminal activity.”<sup>29</sup>

The unclear and flexible nature of reasonable suspicion has caused some to criticize the standard, including Justice Thurgood Marshall.<sup>30</sup> In *United States*

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<sup>19</sup> *Id.*

<sup>20</sup> 392 U.S. 1 (1968).

<sup>21</sup> *Id.* at 21-22, 24 (creating an exception to the probable cause requirement for brief police stop-and-frisks conducted to protect officer safety); *see also, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (holding neither probable cause nor a warrant is appropriate in the context of school searches).

<sup>22</sup> *Terry*, 392 U.S. at 27 (“Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer . . .”).

<sup>23</sup> *See, e.g.*, Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 431-34 (2006) (providing a comprehensive discussion of *Terry*’s legacy and the development of the reasonable suspicion standard).

<sup>24</sup> *See, e.g.*, *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 536-37 (1967) (“[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”).

<sup>25</sup> *Terry*, 392 U.S. at 27.

<sup>26</sup> 517 U.S. 690 (1996).

<sup>27</sup> *Id.* at 695 (“Articulating precisely what ‘reasonable suspicion’ and ‘probable cause’ mean is not possible. They are commonsense, nontechnical conceptions that deal with ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983))).

<sup>28</sup> *Terry*, 392 U.S. at 27.

<sup>29</sup> *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

<sup>30</sup> *United States v. Sokolow*, 490 U.S. 1, 13-14 (1989) (Marshall, J., dissenting) (“In my

*v. Sokolow*,<sup>31</sup> Justice Marshall pointed out that courts had found reasonable suspicion based at least in part on whether a suspect: was first to deplane,<sup>32</sup> was last to deplane,<sup>33</sup> deplaned in the middle,<sup>34</sup> had one-way tickets,<sup>35</sup> had round-trip tickets,<sup>36</sup> had no luggage,<sup>37</sup> had a gym bag,<sup>38</sup> had new suitcases,<sup>39</sup> was traveling alone,<sup>40</sup> was traveling with a companion,<sup>41</sup> acted nervously,<sup>42</sup> or acted too calmly.<sup>43</sup>

In addition to conducting this balancing inquiry, courts require searches pursuant to reasonable suspicion to be “strictly tied to and justified by” the circumstances that rendered the search permissible in the first place.<sup>44</sup> Courts determine the reasonableness of a search under the Fourth Amendment based on the facts that were available to officers before the search was conducted.<sup>45</sup> A search cannot be rationalized after the fact on the basis that it did, in fact, discover illegal activity.<sup>46</sup> However, because police are often engaged in dynamic and changing situations, judges are often hesitant to second-guess officers’ decisions and find that the scope of a search exceeded the

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view, a law enforcement officer’s mechanistic application of a formula of personal and behavioral traits in deciding whom to detain can only dull the officer’s ability and determination to make sensitive and fact-specific inferences “in light of his experience,” particularly in ambiguous or borderline cases.” (internal citation omitted) (quoting *Terry*, 392 U.S. at 27)); see, e.g., E. Martin Estrada, *Criminalizing Silence: Hiibel and the Continuing Expansion of the Terry Doctrine*, 49 ST. LOUIS U. L.J. 279, 289 (2005) (“[I]t is clear that the reasonable suspicion standard lends itself to broad applicability. What we are left with, then, is a haphazard, yet one-directional, broadening of police authority during a Terry stop.”).

<sup>31</sup> *Id.*

<sup>32</sup> *United States v. Moore*, 675 F.2d 802, 802 (6th Cir. 1982).

<sup>33</sup> *United States v. Mendenhall*, 446 U.S. 544, 564 (1980).

<sup>34</sup> *United States v. Buenaventura-Ariza*, 615 F.2d 29, 31 (2d Cir. 1980).

<sup>35</sup> *United States v. Sullivan*, 625 F.2d 9, 12 (4th Cir. 1980).

<sup>36</sup> *United States v. Craemer*, 555 F.2d 594, 595 (6th Cir. 1977).

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

<sup>38</sup> *United States v. Sanford*, 658 F.2d 342, 343 (5th Cir. 1981).

<sup>39</sup> *Sullivan*, 625 F.2d at 12.

<sup>40</sup> *United States v. Smith*, 574 F.2d 882, 883 (6th Cir. 1978).

<sup>41</sup> *United States v. Fry*, 622 F.2d 1218, 1219 (5th Cir. 1980).

<sup>42</sup> *United States v. Andrews*, 600 F.2d 563, 566 (6th Cir. 1979).

<sup>43</sup> *United States v. Himmelwright*, 551 F.2d 991, 992 (5th Cir. 1977).

<sup>44</sup> See, e.g., *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (Fortas, J., concurring) (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)).

<sup>45</sup> *Florida v. J.L.*, 529 U.S. 266, 271 (2000) (“The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.”).

<sup>46</sup> See *id.* (“That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting [the defendant] of engaging in unlawful conduct.”).

circumstances in which it took place.<sup>47</sup> Accordingly, officers conducting a search do not have to use the least restrictive means of search possible.<sup>48</sup>

The Supreme Court has clarified that an officer's subjective intent is irrelevant in a normal Fourth Amendment search because an officer is required to have a warrant, probable cause, or reasonable suspicion before conducting a search.<sup>49</sup> Where those safeguards are absent and the search is being conducted without individualized suspicion, subjective intent may be relevant.<sup>50</sup> The Court specified in *City of Indianapolis v. Edmond*<sup>51</sup> that the subjective intent inquiry looks to the general, *programmatic* purpose for a challenged action, such as setting up a sobriety checkpoint in order to combat drunk driving, or searching a car incident to impounding in order to protect property.<sup>52</sup> Thus, this subjective inquiry looks to the reason for a program as a whole instead of to the motivations of an individual officer performing a search.<sup>53</sup>

Whether in the form of probable cause or reasonable suspicion, individualized suspicion is usually required before a search will be deemed constitutional; however, in some rare circumstances, individualized suspicion is not constitutionally mandated, and neither reasonable suspicion nor probable

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<sup>47</sup> See *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985) (“A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.” (citation omitted)).

<sup>48</sup> *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (“The fact that the protection of the public might, in the abstract, have been accomplished by ‘less intrusive’ means does not, itself, render the search unreasonable.”).

<sup>49</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 45-46 (2000) (“[W]hile ‘[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,’ programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion.” (citation omitted)).

<sup>50</sup> See *id.* (“By contrast, our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level.”).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (“[P]rogrammatic purposes may be relevant to the validity of Fourth Amendment intrusions pursuant to a general scheme without individualized suspicion.”); see, e.g., *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (authorizing the use of police checkpoints to combat drunk driving); *Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (concluding that inventory searches of impounded cars constitute a special circumstance that does not require reasonable suspicion or probable cause).

<sup>53</sup> See *Edmond*, 531 U.S. at 47 (“While reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.”).

cause of criminal wrongdoing is a prerequisite.<sup>54</sup> Those categories of suspicionless searches, known as “special needs” searches or administrative searches, require that the government have an interest beyond the standard interest in law enforcement – that is, preventing and discovering evidence of crimes.<sup>55</sup> The Court has recognized a variety of instances where the special-needs exception applies and no warrant, probable cause, or reasonable suspicion is necessary before a limited search or seizure.<sup>56</sup> Border searches are one such exception.<sup>57</sup>

B. *The Border Search Exception*

The same Fourth Amendment standard for searches does not apply at the border, where searches are considered reasonable “simply by virtue of the fact that they occur at the border.”<sup>58</sup> Indeed, the Supreme Court has stated that “[i]t is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.”<sup>59</sup> The exception for border searches holds true at both physical border crossings and at their “functional equivalents,” such as airports.<sup>60</sup>

The border search exception’s historical justifications come from the fact that the First Congress, which ratified the Fourth Amendment, also enacted the first customs statute, granting customs officials plenary power at the border that was distinct from the typical governmental power to search or seize.<sup>61</sup> The rule is further justified on the basis that the U.S. government has a significant interest at the border in ensuring that both the persons and things that enter the

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<sup>54</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976) (“The defendants note correctly that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion.” (citation omitted)).

<sup>55</sup> *Maryland v. King*, 133 S. Ct. 1958, 1981 (2013) (“[T]here is a ‘closely guarded category of constitutionally permissible suspicionless searches,’ that has never included searches designed to serve ‘the normal need for law enforcement.’” (citation omitted)).

<sup>56</sup> *See, e.g., Sitz*, 496 U.S. at 455; *Bertine*, 479 U.S. at 371; *United States v. Ramsey*, 431 U.S. 606, 617 (1977) (justifying the border search exception on the significant governmental interest in protecting the border); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 536-37 (1967) (holding a lesser standard is required for administrative searches because officials will not be able to obtain probable cause practically in such instances).

<sup>57</sup> *Ramsey*, 431 U.S. at 619 (“There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless ‘reasonable’ has a history as old as the Fourth Amendment itself.”).

<sup>58</sup> *Id.* at 616.

<sup>59</sup> *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004).

<sup>60</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973).

<sup>61</sup> *See Ramsey*, 431 U.S. at 616-17 (describing the plenary grant of authority to customs officials at the border under the first customs statute).

country are lawful.<sup>62</sup> This includes the interest in preventing both illegal contraband and unwanted persons.<sup>63</sup> Also, following 9/11, the government has argued that the threat of terrorism provides a strong justification for allowing customs officers to conduct searches unfettered by the usual requirements of the Fourth Amendment – though the Supreme Court has yet to address this argument explicitly.<sup>64</sup> Therefore, proponents of the border search exception argue that it plays a key role in protecting governmental interests in customs, immigration, and national security.<sup>65</sup>

While the exact contours of the border search exception remain somewhat fuzzy, the Supreme Court has made it clear that “the 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.<sup>66</sup> Additionally, expectations of privacy at the border are less than in normal searches within the United States’ interior.<sup>67</sup> In contemporary society, people can be reasonably expected to know that crossing the U.S. border may potentially lead to a search of their person or effects.<sup>68</sup> Therefore, there are no requirements of reasonable suspicion or probable cause and no warrant requirements for routine searches of persons or their effects at the border.<sup>69</sup> The Supreme Court clarified in *Flores-Montano* that the term “routine” applies chiefly to exclude more intrusive searches of the person such as strip, body-cavity, or involuntary x-ray searches, all of which implicate the searched individual’s interests in

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<sup>62</sup> See *Carroll v. United States*, 267 U.S. 132, 154 (1925) (“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.”).

<sup>63</sup> *Flores-Montano*, 541 U.S. at 152 (“The Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.”).

<sup>64</sup> See, e.g., *Cotterman v. United States*, 709 F.3d 952, 966 (9th Cir. 2013) (“The Government’s authority to protect the nation from contraband is well established and may be ‘heightened’ by ‘national cris[is]’ such as the smuggling of illicit narcotics, the current threat of international terrorism and future threats yet to take shape.” (citation omitted)); Government’s Reply Brief at 24, *United States v. Arnold*, 533 F.3d 1003 (2008) (No. 06-50581), 2007 WL 2434085.

<sup>65</sup> Government’s Reply Brief, *supra* note 64, at 24.

<sup>66</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 540 (1985).

<sup>67</sup> *Id.* at 539 (“[T]he expectation of privacy [is] less at the border than in the interior . . .”).

<sup>68</sup> See *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (“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.”).

<sup>69</sup> *Montoya de Hernandez*, 473 U.S. at 538 (“Routine searches of the persons and effects of entrants are not subject to any requirements of reasonable suspicion, probable cause, or warrant . . .”).

dignity and privacy.<sup>70</sup> The Court explained that the concerns regarding personal dignity and privacy that arise from invasive searches were not present in the search of a car.<sup>71</sup> Further, the Court condemned the Ninth Circuit's approach to the subject car search, which differentiated between "routine" searches and those that were more invasive, because it unjustifiably undercut the robust border search exception.<sup>72</sup>

Nonetheless, the Supreme Court has suggested that some searches at the border may require some level of suspicion at the outset.<sup>73</sup> But the Court has only imposed the reasonable suspicion standard once and has never required probable cause for a border search.<sup>74</sup> The Court imposed the reasonable suspicion standard in *United States v. Montoya de Hernandez*,<sup>75</sup> and the facts of that case are worth briefly mentioning. In 1983, customs officials detained the respondent after she alighted from a flight at Los Angeles International Airport.<sup>76</sup> Those officials had reasonable suspicion, but not probable cause, to believe that the respondent was smuggling drugs in her alimentary canal.<sup>77</sup> They detained her for sixteen hours before seeking a warrant, and for nearly

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<sup>70</sup> *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

<sup>71</sup> *Id.* ("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.").

<sup>72</sup> *Id.* ("Complex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles. The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."). In particular, the Supreme Court took issue with the Ninth Circuit's approach to border searches in *United States v. Molina-Tarazon*, 279 F.3d 709, 711-13 (2002), where the Ninth Circuit "fashioned a new balancing test" around the routineness and invasiveness of the subject search. *Flores-Montano*, 541 U.S. at 152.

<sup>73</sup> See *Montoya de Hernandez*, 473 U.S. at 541 ("The 'reasonable suspicion' standard has been applied in a number of contexts and effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause. It thus fits well into the situations involving alimentary canal smuggling at the border . . .").

<sup>74</sup> *United States v. Cotterman*, 709 F.3d 952, 971 (9th Cir. 2013) (Callahan, J., concurring) ("In the long time that the Court has recognized the border search doctrine, the Court has found just *one* search at the border that required reasonable suspicion.").

<sup>75</sup> *Montoya de Hernandez*, 473 U.S. at 541 (imposing a reasonable suspicion standard in certain searches of the person).

<sup>76</sup> *Id.* at 533.

<sup>77</sup> See *id.* at 542 ("The facts, and their rational inferences, known to customs inspectors in this case clearly supported a reasonable suspicion that respondent was an alimentary canal smuggler."). The facts supporting the customs officials' reasonable suspicion included that the respondent spoke no English, knew no one in the United States, had no hotel reservations, and did not know how her ticket was booked. *Id.* at 533. The respondent claimed that she was purchasing goods for her husband's store in Colombia, and she carried \$5,000 in cash. *Id.* Customs officers also noted that Bogotá, Colombia, is a known "source city." *Id.*

twenty-four hours before finally obtaining a warrant, despite the fact that the respondent repeatedly asked to make phone calls and was visibly suffering.<sup>78</sup> Though the Supreme Court explicitly declined to decide the level of suspicion necessary for x-ray or strip searches in *Montoya de Hernandez*, customs officials did in fact conduct multiple strip searches while the respondent was in custody.<sup>79</sup>

Outside of the comprehensive and invasive search of Ms. Montoya de Hernandez's person, the Supreme Court has never imposed any individualized suspicion in any other context at the border.<sup>80</sup> The Court has indicated three possible types of border searches where reasonable suspicion or probable cause *may* be required: highly intrusive searches of the person (as in *Montoya de Hernandez*), destructive searches of property,<sup>81</sup> and searches conducted in a "particularly offensive manner."<sup>82</sup> The Supreme Court has never found that a search was particularly destructive or conducted in a particularly offensive manner; it has only suggested these examples in dicta.<sup>83</sup> Therefore, this line of cases remains somewhat unclear.

### C. *The Extended Border Search Doctrine*

Federal circuit courts have created a different, yet related, doctrine for cases wherein officials have reason to believe that someone recently crossed the border, but the search does not actually take place at a physical border crossing or its functional equivalent.<sup>84</sup> This separate exception is known as the extended border search doctrine.<sup>85</sup> The doctrine allows for searches conducted on less than probable cause and without a warrant – like those at the actual border – but requires a reasonable suspicion that the person searched is engaged in some kind of criminal wrongdoing *and* a reasonable certainty that the suspect has

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<sup>78</sup> *Id.* at 546-48 (Brennan, J., dissenting).

<sup>79</sup> *Id.* at 547 ("[S]he already had been stripped and searched and probed, the customs officers decided about halfway through her ordeal to repeat that process . . .").

<sup>80</sup> *See supra* note 74 and accompanying text.

<sup>81</sup> *Flores-Montano*, 541 U.S. at 155-56 ("[I]t may be true that some searches of property are so destructive as to require [some level of individualized suspicion] . . .").

<sup>82</sup> *United States v. Ramsey*, 431 U.S. 606, 618 n.13 (1977) ("We do not decide whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out.").

<sup>83</sup> *See United States v. Cotterman*, 709 F.3d 952, 980 (9th Cir. 2013) (Callahan, J., concurring).

<sup>84</sup> *See United States v. Villasenor*, 608 F.3d 467, 471 (9th Cir. 2010); *see also* *United States v. Stewart*, 729 F.3d 517, 525 (6th Cir. 2013); *United States v. Yang*, 286 F.3d 940, 945 (7th Cir. 2002); *United States v. Hyde*, 37 F.3d 116, 120 (3d Cir. 1994); *United States v. Santiago*, 837 F.2d 1545, 1548 (11th Cir. 1988); *United States v. Gaviria*, 805 F.2d 1108, 1112 (2d Cir. 1986); *United States v. Niver*, 689 F.2d 520, 526 (5th Cir. 1982); *United States v. Bilir*, 592 F.2d 735, 739 (4th Cir. 1979).

<sup>85</sup> *Villasenor*, 608 F.3d at 471 ("Extended border searches usually occur near the border but after the border has already been crossed.").

recently crossed the border.<sup>86</sup> The reasonable certainty standard is a higher burden of proof than probable cause but a lower standard than beyond a reasonable doubt.<sup>87</sup> In order to determine whether there was a reasonable certainty that a recent border crossing has occurred, courts must consider the totality of the circumstances, especially the time since the border crossing and the distance from the actual border crossing.<sup>88</sup> The requirement of reasonable suspicion, as opposed to the border search exception for which no suspicion is necessary, exists because suspects regain some expectation of privacy after they cross the actual border, even if only momentarily.<sup>89</sup>

Like the border search exception, the extended border search doctrine is justified by the significant governmental interests specific to the border context, including the prevention of drug smuggling, human trafficking, and terrorism.<sup>90</sup> An added justification for the extended border search doctrine is the logistical difficulty of policing the border effectively.<sup>91</sup> Essentially, the extended border search doctrine provides customs officials with a degree of leeway that allows them to police the country's borders more effectively.

#### D. *Computer Searches Under the Fourth Amendment*

The Supreme Court has never addressed computer searches, or what degree of privacy they require, in the context of the Fourth Amendment.<sup>92</sup> Federal circuit courts that have addressed computer searches and seizures have experienced some difficulty in attempting to classify them properly.<sup>93</sup> Generally, courts have come to the conclusion that, despite the quantity of data that computers may contain, the protections afforded computers are most analogous to those for luggage, briefcases, and file cabinets.<sup>94</sup> A common

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<sup>86</sup> *Santiago*, 837 F.2d at 1548 (enumerating the factors to determine whether an extended border search is legitimate).

<sup>87</sup> *Niver*, 689 F.2d at 526.

<sup>88</sup> *Villasenor*, 608 F.3d at 471-72.

<sup>89</sup> *See Niver*, 689 F.2d at 526 (“Since extended border searches entail a greater intrusion on legitimate expectations of privacy, they are permitted only if supported by reasonable suspicion.”).

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

<sup>91</sup> *United States v. Bilir*, 592 F.2d 735, 740 (4th Cir. 1979) (“The many difficulties that attend the attempt to intercept contraband and to apprehend increasingly mobile and sophisticated smugglers at the very borders of the country have of course given birth to the doctrine.”).

<sup>92</sup> *United States v. Burgess*, 576 F.3d 1078, 1088 (10th Cir. 2009).

<sup>93</sup> *Id.* at 1087-90 (struggling, in dicta, with the best way to define computers under Fourth Amendment analysis).

<sup>94</sup> *See, e.g., United States v. Richards*, 659 F.3d 527, 538 (6th Cir. 2011) (analogizing searches of computers to searches of file cabinets); *United States v. Williams*, 592 F.3d 511, 523 (4th Cir. 2010) (“[T]he sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents.”); *Burgess*, 576 F.3d at 1088-90 (discussing

rationale for this comparison is that computers and these other containers often contain large numbers of documents, sometimes highly private, and that they can contain criminal wrongdoing or evidence thereof.<sup>95</sup>

The Supreme Court's recent decision in *Riley v. California*<sup>96</sup> seems to indicate that the Court is finally ready to bring Fourth Amendment jurisprudence into the twenty-first century.<sup>97</sup> There, the Court held that police officers must obtain a warrant before searching a cell phone seized incident to arrest.<sup>98</sup> The Court completely and adamantly rejected the government's argument that searching a cell phone was "materially indistinguishable from searching a physical container such as a bag or wallet."<sup>99</sup>

Nonetheless, the Supreme Court has remained silent on computer searches, in particular. Courts that have examined computer searches at the border have noted that even if they do not impose any requirement of reasonable suspicion, customs officers practically cannot search every laptop entering the country, and will still likely do so only in those instances when they have reasonable suspicion.<sup>100</sup> The first assertion seems overly naïve: it at least seems plausible that as computer technology becomes more advanced, it would be possible to quickly and easily mine data from a computer that could be searched later at the government's convenience, either on-site or remotely.

Further, courts have not developed any legal distinction between cursory computer searches and forensic searches.<sup>101</sup> In a forensic computer search, the

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potential similarities between computers, briefcases, and file cabinets); *United States v. Giberson*, 527 F.3d 882, 888 (9th Cir. 2008) ("There is no reason why material stored digitally on a computer should not also be searchable. . . . The format of a record or document should not be dispositive to a Fourth Amendment inquiry."); *but see* *United States v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013) (distinguishing the amount of information that can be contained in a suitcase or car from the amount of information typically stored on a computer).

<sup>95</sup> *See, e.g.*, cases cited *supra* note 94.

<sup>96</sup> 134 S. Ct. 2473, 2488-89 (2014).

<sup>97</sup> *Id.* at 2849 (acknowledging the unique qualitative and quantitative capacities of cell phones).

<sup>98</sup> *Id.* at 2485 ("We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.").

<sup>99</sup> *Id.* at 2488-89.

<sup>100</sup> *See, e.g.*, *United States v. Cotterman*, 709 F.3d 952, 978 (9th Cir. 2013) (Callahan, J., concurring) ("All the evidence in this case suggests that the government does not have the resources—time, personnel, facilities, or technology—to exhaustively search every (or even a majority) of the electronic devices that cross our borders."); *United States v. Ickes*, 393 F.3d 501, 507 (4th Cir. 2005) ("As a practical matter, computer searches are most likely to occur where—as here—the traveler's conduct or the presence of other items in his possession suggest the need to search further.").

<sup>101</sup> *Cotterman*, 709 F.3d at 978 (Callahan, J., concurring) ("Even if the majority means to require reasonable suspicion for *any* type of digital forensic border search, no court has ever

police can search and copy the entirety of a hard drive, including any files that have been deleted but not yet copied over and files saved automatically to the computer.<sup>102</sup> These searches can, and often do, allow the person conducting the search to discover files that the average computer user cannot access, and that the computer's owner may not even know are present on the computer.<sup>103</sup> Yet, because of the vast number of procedures available for conducting comprehensive searches on computers, thus far there is no clear definition of what exactly a forensic computer search is.<sup>104</sup> One imagines that a definition is even more difficult to craft because technology, particularly computer technology, develops so rapidly that it can completely change the focus of the inquiry.

## II. *UNITED STATES V. COTTERMAN*

### A. *The Facts*

On April 6, 2007, Howard Cotterman attempted to return to the United States after a trip to Mexico with his wife.<sup>105</sup> At the Lukeville, Arizona, border crossing, customs officials stopped Cotterman and his wife and asked them to undergo a more extensive screening process because of a hit in the Treasury Enforcement System ("TECS") for Cotterman.<sup>106</sup> Cotterman had been convicted in 1992 for two counts of use of a minor in sexual conduct, two counts of lewd and lascivious conduct upon a child, and three counts of child molestation, but customs officials testified that at the time of the stop they mistakenly believed that Cotterman had been convicted for involvement with child pornography.<sup>107</sup> The agents were further suspicious of Cotterman because his passport revealed that he frequently traveled out of the country; he was returning from Mexico (said to be a known destination for sex tourism); he had a variety of electronic devices (two laptops and three digital cameras); and he had password-protected files on his computer.<sup>108</sup>

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erected so categorical a rule, based on so general a type of search or category of property, and the Supreme Court has rightly slapped down anything remotely similar.").

<sup>102</sup> *Id.* at 962-63 & n.9.

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

<sup>104</sup> Darrin J. Behr, *Anti-Forensics: What It Is, What It Does, and Why You Need to Know*, N.J. LAW. MAG., Dec. 2008, at 9-10 ("Due to the fact that there are hundreds of digital forensic investigation procedures developed all over the world, digital forensics has yet to be defined.").

<sup>105</sup> *Cotterman*, 709 F.3d at 957.

<sup>106</sup> *Id.* The TECS database automatically returns hits on all sex offenders who travel frequently. *Id.* at 991 (Smith, J., dissenting) ("Depending on how many of them travel frequently, a TECS hit could affect tens of thousands of Californians—many with decades-old convictions.").

<sup>107</sup> *Id.* at 958 (majority opinion).

<sup>108</sup> *Id.* at 969 (stating that all of the circumstances, "taken collectively, gave rise to

Customs officials soon began searching Cotterman's personal electronic devices.<sup>109</sup> The officers encountered nothing indicating illegal activity on his computer, but did find certain files that were password-protected.<sup>110</sup> Cotterman offered to assist the officers in accessing the information on his computer, but the officers declined due to concerns that Cotterman might have been able to delete the files or that the laptop might have been "booby-trapped."<sup>111</sup> Because the officers could not gain access to the locked files, they decided to keep the laptops and one camera to conduct a forensic examination, while allowing the Cottermans to continue into the United States.<sup>112</sup> The electronic devices were transported to Tucson, Arizona – 170 miles away – where a forensic examination revealed images of child pornography on Cotterman's computer.<sup>113</sup> The forensic examination uncovered the initial images after roughly 48 hours, but investigators were still discovering new images months later.<sup>114</sup> After discovering the initial images, investigators asked Cotterman to assist them in gaining access to the locked files, but Cotterman immediately fled the country.<sup>115</sup>

#### B. *The Procedural History*

Thereafter, the federal government filed multiple child pornography charges against Cotterman in the United States District Court for the District of Arizona.<sup>116</sup> Following his extradition and indictment, Cotterman filed a motion to suppress the evidence uncovered during the forensic search of his computers on a number of grounds: that the search was non-routine and closer to a cavity search in light of the private information contained on a laptop; that customs officials exceeded their statutory authority; that customs officials should have obtained a search warrant before conducting the search; and that the search implicated First Amendment issues because of the nature of the information contained on the laptop.<sup>117</sup> Magistrate Judge Charles R. Pyle held a

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reasonable suspicion of criminal activity").

<sup>109</sup> *Id.* at 958.

<sup>110</sup> *Id.* There is some debate on the *Cotterman* record as to whether Cotterman's computer contained multiple password-protected files or only one such file. *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* ("[An Immigration and Customs Enforcement ("ICE") agent in Tucson] found seventy-five images of child pornography within the unallocated space of Cotterman's laptop.").

<sup>114</sup> *Id.* at 958-59.

<sup>115</sup> *Id.* ("Cotterman agreed to provide the assistance the following day, but never showed up. . . . The agents had no further contact with Cotterman, who boarded a flight to Mexico from Tucson the next day, April 9, and then flew onward to Sydney, Australia.").

<sup>116</sup> *United States v. Cotterman*, 637 F.3d 1068, 1073 (9th Cir. 2011).

<sup>117</sup> *United States v. Cotterman*, No. CR 07-1207-TUC-RCC, 2009 WL 465028, at \*1, \*3 (D. Ariz. Feb. 24, 2009).

suppression hearing on August 27, 2008, and filed a Report and Recommendation regarding the motion on September 12, 2008.<sup>118</sup>

In ruling on Cotterman's motion to suppress, Judge Pyle found it decisive that the search was removed in time and space from the border.<sup>119</sup> Judge Pyle rejected the argument that the conduct of customs officials at the border was analogous to the intrusive search of a person; however, because the computer was physically taken from the border to Tucson and the search was executed days later, Judge Pyle applied the extended border search doctrine to the case.<sup>120</sup>

Judge Pyle then moved on to determine whether customs officials had reasonable suspicion to search Cotterman's laptop, ultimately determining that they did not.<sup>121</sup> Judge Pyle found only two factors that could lead to reasonable suspicion: the TECS hit and the password-protected files.<sup>122</sup> But Judge Pyle found that neither the TECS hit nor the password-protected files established reasonable suspicion in light of the specific facts of the case.<sup>123</sup> Judge Pyle provided four reasons for the latter finding. First, individuals might password-protect their computer files for either legitimate or illicit purposes.<sup>124</sup> Second, Cotterman offered to open the files for the officers.<sup>125</sup> Third, customs officials had determined to take the laptops into custody before encountering the password-protected files.<sup>126</sup> Finally, officials also seized Cotterman's wife's laptop, which did not have any password-protected files.<sup>127</sup> District Court Judge Raner Collins adopted Judge Pyle's recommendations and granted Cotterman's motion to suppress on February 23, 2009.<sup>128</sup>

On March 19, 2009, the government filed an interlocutory appeal challenging the district court's grant of Cotterman's motion. Judge Tallman

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<sup>118</sup> *Cotterman*, 637 F.3d at 1073; *Cotterman*, 2009 WL 465028, at \*1.

<sup>119</sup> *See Cotterman*, 2009 WL 465028, at \*4 ("Under those circumstances, the law requires the Government to have reasonable suspicion before extending the search in both distance and time away from the border.").

<sup>120</sup> *Id.* at \*5 ("Under certain circumstances, searches that take place away from the border or remote in time from the initial inspection can still be considered border searches.").

<sup>121</sup> *Id.* at \*8 ("In this case there is no evidence to support a determination of reasonable suspicion to seize any equipment.").

<sup>122</sup> *Id.* at \*7 ("In this case, there are only two circumstances that support any suspicion; the TECS hit reflecting Howard Cotterman's 1992 conviction for child molestation and the existence of password protected files on his laptop computer.").

<sup>123</sup> *Id.* ("It is clear that the TECS hit alone does not establish reasonable suspicion. . . . [T]he additional fact of password protected files on Howard Cotterman's computer does not amount to reasonable suspicion . . .").

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at \*1.

issued the panel opinion for the Ninth Circuit on March 30, 2011.<sup>129</sup> He disagreed with Judge Pyle's application of the extended border search doctrine, instead finding that the duration of the forensic search and the search's distance from the location of the seizure were relevant only to the magnitude of the expectation of privacy that the search implicated.<sup>130</sup> Here, the extended border search doctrine did not apply because customs officials communicated to Cotterman that his possessions had not cleared customs – thus, changes in time and space did not affect his expectation of privacy.<sup>131</sup>

Judge Tallman subsequently applied the border search exception. In doing so, he considered the aforementioned three circumstances for which the Supreme Court has required more than the application of the border search exception: highly intrusive searches of persons, particularly destructive searches of property, and particularly offensive searches.<sup>132</sup> Judge Tallman found that no such circumstances existed here.<sup>133</sup>

Judge Fletcher dissented from the panel's decision, arguing that customs officials seized and searched Cotterman's property without any suspicion whatsoever.<sup>134</sup> First, Judge Fletcher distinguished between expectations of searches and expectations of seizure. While travelers at the border have an expectation that customs officials might search their property, they do not expect customs officials to seize it.<sup>135</sup> Second, Judge Fletcher argued that the

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<sup>129</sup> *United States v. Cotterman*, 637 F.3d 1068, 1073 (9th Cir. 2011).

<sup>130</sup> *Id.* at 1076 (“The touchstone for particularized suspicion is therefore not simply the occurrence of a search or seizure at a location other than the border; rather, it is the greater Fourth Amendment intrusion that occurs when an individual is detained and searched at a *location beyond the border where he had a normal expectation of privacy in the object searched.*”).

<sup>131</sup> *See id.* at 1078-79 (“So long as property has not been cleared for entry into the United States and remains in the control of the Government, any further search is simply a continuation of the original border search – the entirety of which is justified by the Government's border search power.”).

<sup>132</sup> *Id.* at 1079-81 (quoting *United States v. Flores-Montano*, 541 U.S. 149, 152, 154 n.2, 155-56 (2004); *United States v. Montoya de Hernandez*, 473 U.S. 531, 531 (1985); *United States v. Ramsey*, 431 U.S. 606, 618 n.13 (1977)).

<sup>133</sup> *Id.* at 1081-82 (“[T]here is no claim that the search was destructive. . . . [The devices'] relocation was by no means so offensive as to render the Government's conduct unreasonable.”).

<sup>134</sup> *See Cotterman*, 637 F.3d at 1084 (Fletcher, J., dissenting) (“The real issue, as this case is framed by the government and the majority, is whether the Government has authority to *seize* an individual's property in order to conduct an exhaustive search that takes days, weeks, or even months, with *no reason* to suspect that the property contains contraband.”).

<sup>135</sup> *Id.* (“The Supreme Court has recognized that a traveler has a Fourth Amendment interest in maintaining possession of his personal property. . . . While a traveler cannot have a reasonable expectation that his property will not be searched at the border, I submit that a traveler does have a reasonable expectation that his property will not be searched in a manner that requires it to be taken away from him for weeks or months, unless there is some basis for the Government to believe that the property contains contraband.” (internal

manner of the search – a forensic computer search – was “particularly offensive” and, therefore, fit into one of the categories the Supreme Court mentioned in *United States v. Ramsey*<sup>136</sup> as possible exceptions to the border search doctrine.<sup>137</sup>

On March 19, 2012, the Ninth Circuit ordered a rehearing of the case en banc.<sup>138</sup>

C. *Judge McKeown’s Cotterman Majority*

For the opinion of the court en banc, Judge McKeown’s analysis in *Cotterman* begins by recognizing the border search exception and the attendant heightened governmental interests.<sup>139</sup> However, the court was quick to limit the border search exception, stating that the sovereign’s interests still must be balanced against individual privacy rights and considered within the totality of the circumstances.<sup>140</sup> In *United States v. Arnold*,<sup>141</sup> the Ninth Circuit held a suspicionless laptop search at the border to be constitutional, requiring neither probable cause nor reasonable suspicion.<sup>142</sup> The *Cotterman* court recognized that it had previously approved of “quick looks” and “unintrusive” laptop searches at the border in *Arnold*<sup>143</sup> but distinguished those searches from the more comprehensive forensic search that took place here.<sup>144</sup> In light of the fact that the court did not issue the *Arnold* decision en banc, the *Cotterman* court,

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citations and footnote omitted)).

<sup>136</sup> 431 U.S. 606, 618 n.13 (1977) (“We do not decide whether, and under what circumstances, a border search might be deemed ‘unreasonable’ because of the particularly offensive manner in which it is carried out.”).

<sup>137</sup> *Cotterman*, 637 F.3d at 1086 (Fletcher, J., dissenting) (“Given the exhaustive nature of computer forensic searches, I would hold that such searches are ‘conducted in a particularly offensive manner’ unless they are guided by an officer’s reasonable suspicion that the computer contains evidence of a *particular* crime.”).

<sup>138</sup> *United States v. Cotterman*, 673 F.3d 1206, 1206 (9th Cir. 2012).

<sup>139</sup> *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013) (en banc) (“The broad contours of the scope of searches at our international borders are rooted in ‘the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country.’” (quoting *Ramsey*, 431 U.S. at 616)).

<sup>140</sup> *Id.* (“This does not mean, however, that at the border ‘anything goes.’ Even at the border, individual privacy rights are not abandoned but ‘[b]alanced against the sovereign’s interests.’” (internal citations omitted) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985))).

<sup>141</sup> 533 F.3d 1003, 1009 (9th Cir. 2008).

<sup>142</sup> *Id.* (“*Arnold* has failed to distinguish how the search of his laptop and its electronic contents is logically any different from the suspicionless border searches of travelers’ luggage that the Supreme Court and we have allowed.”).

<sup>143</sup> *Id.*

<sup>144</sup> *See Cotterman*, 709 F.3d at 960 (“But the search here transformed into something far different.” (citing *Arnold*, 533 F. 3d at 1009)).

sitting en banc, limited the *Arnold* holding to only those “quick looks,” and not to forensic searches.<sup>145</sup>

After differentiating *Arnold* and “cursory” computer searches from *Cotterman* and forensic computer searches, the court next considered, and ultimately rejected, the extended border search doctrine as grounds for its decision. The court declined to apply the extended border search doctrine because “[t]he key feature of an extended border search is that an individual can be assumed to have cleared the border and thus regained an expectation of privacy in accompanying belongings.”<sup>146</sup> Though *Cotterman*’s computer had been transported away from the physical border, it had never cleared customs and been returned to him. Therefore, *Cotterman* had never regained his expectation of privacy in the laptop, and the extended border search doctrine did not apply.<sup>147</sup>

The Ninth Circuit then imposed a reasonable suspicion standard to the search at hand. To justify this requirement in the case of a forensic laptop search, the Ninth Circuit referred to the three types of searches that the Supreme Court has identified in dicta as possibly requiring either reasonable suspicion or probable cause: highly intrusive searches of persons, particularly destructive searches of property, and particularly offensive searches.<sup>148</sup> Despite paying lip service to these proposed exceptions, the court eventually rested its analysis simply on the reasonableness of the search, and not the border search exception.<sup>149</sup>

Most central to the analysis in *Cotterman* is the Ninth Circuit’s conception of the reasonable expectation of privacy in personal electronic devices. Though not explicitly articulated in *Cotterman*, the sum of the majority’s argument is essentially that because of the supposed unique nature of personal electronic devices, a comprehensive forensic search of Howard *Cotterman*’s computer affects personal dignity and privacy interests in a way that is more on par with the detention and strip searches involved in *Montoya de Hernandez* and less like the search of a car at issue in *Flores-Montano*. In determining that personal electronic devices are unique, the court first noted the massive amount of information that personal electronic devices are capable of

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<sup>145</sup> See *id.* at 961 n.6 (“The dissent’s extensive reliance on *Arnold* is misplaced in the en banc environment.”).

<sup>146</sup> *Id.* at 961.

<sup>147</sup> *Id.* at 962 (“As to the extended border search doctrine, we believe it is best confined to cases in which, after an apparent border crossing or functional entry, an attenuation in the time or the location of conducting a search reflects that the subject has regained an expectation of privacy.”).

<sup>148</sup> See *supra* notes 80-82 and accompanying text.

<sup>149</sup> *Cotterman*, 709 F.3d at 964 (“We rest our analysis on the reasonableness of this search, paying particular heed to the nature of the electronic devices and the attendant expectation of privacy.”).

storing.<sup>150</sup> Next, the court cited the highly private nature of the information contained on laptops and other personal electronic devices.<sup>151</sup> Finally, Judge McKeown considered the way that data is stored on personal electronic devices and the difficulty in effectively shielding that data from law enforcement.<sup>152</sup> Judge McKeown particularly emphasized that information is often stored on computers even after owners have attempted to delete it, without their knowledge.<sup>153</sup> Therefore, unlike luggage or other containers carried across the border, users are often unable to choose what they bring with them and what they leave at home.<sup>154</sup> All of these factors led the *Cotterman* majority to conclude that forensic computer searches are akin to the highly intrusive search conducted in *Montoya de Hernandez* and that they therefore require reasonable suspicion.<sup>155</sup>

Though the court discussed at length the “unique nature” of computer searches, the decision also stressed that the subject of the search alone was not decisive, but instead was only one factor in a totality-of-the-circumstances test.<sup>156</sup> Ultimately, the court conducted a reasonableness analysis in which the border search exception and the unique nature of computers were simply factors to consider.<sup>157</sup>

Despite the considerable work the *Cotterman* majority did in curbing the border search exception and changing the standard of computer searches at the border, the opinion flips the script in Part IV, finding that customs officials did have reasonable suspicion for the search of Cotterman’s electronic devices.<sup>158</sup>

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<sup>150</sup> *Id.* (“Electronic devices are capable of storing warehouses full of information.”).

<sup>151</sup> *Id.* at 965 (“Electronic devices often retain sensitive and confidential information far beyond the perceived point of erasure, notably in the form of browsing histories and records of deleted files.”).

<sup>152</sup> *Id.* (“Agents found incriminating files in the unallocated space of Cotterman’s laptop, the space where the computer stores files that the user ostensibly deleted and maintains other ‘deleted’ files retrieved from web sites the user has visited.”).

<sup>153</sup> *See id.* (“Electronic devices often retain sensitive and confidential information far beyond the perceived point of erasure, notably in the form of browsing histories and records of deleted files.”).

<sup>154</sup> *See id.* (“This quality makes it impractical, if not impossible, for individuals to make meaningful decisions regarding what digital content to expose to the scrutiny that accompanies international travel.”).

<sup>155</sup> *See id.* at 968 (“Such a thorough and detailed search of the most intimate details of one’s life is a substantial intrusion upon personal privacy and dignity. We therefore hold that the forensic examination of Cotterman’s computer required a showing of reasonable suspicion, a modest requirement in light of the Fourth Amendment.”).

<sup>156</sup> *Id.* at 970 (“Unlike the dissent, we credit the agents’ observations and experience in acting upon significant myriad factors that support reasonable suspicion. It is not our province to nitpick the factors in isolation but instead to view them in the totality of the circumstances.”).

<sup>157</sup> *See id.*

<sup>158</sup> *See id.* (“[W]e conclude that the examination of Cotterman’s electronic devices was

This finding came *even though the government had originally conceded on appeal that it could not establish reasonable suspicion*.<sup>159</sup> The Ninth Circuit deemed that the parties could revisit the issue in supplemental briefs after oral argument.<sup>160</sup> To support its finding that officers had reasonable suspicion to conduct the search, the court cited a TECS hit that revealed Cotterman had previous convictions (which officers mistakenly believed were for child pornography), Cotterman's frequent travel outside the country, the fact that Cotterman was returning from Mexico (characterized as a "country associated with sex tourism"), Cotterman and his wife's "collection of electronic equipment" (two laptops and three digital cameras), and the existence of password-protected files discovered during the cursory search of Cotterman's computer.<sup>161</sup> Taken together, the Ninth Circuit claimed that these facts added up to reasonable suspicion.<sup>162</sup> The list from Justice Marshall's *Sokolow* dissent grows.<sup>163</sup>

D. *Judge Callahan Concurring in Part, Dissenting in Part, and Concurring in the Judgment*

Judge Callahan filed a separate opinion in *United States v. Cotterman*, concurring in all but Part III of the majority's opinion, in which the majority changed the standard for forensic computer searches at the border to require reasonable suspicion.<sup>164</sup> Judge Callahan concurred that there was reasonable suspicion to conduct the search of Cotterman's electronic devices and concurred in the judgment.<sup>165</sup>

Judge Callahan's opinion begins by emphasizing the long line of precedent establishing the border search exception as well as the fact that the Court has only found one search requiring reasonable suspicion – in *Montoya de Hernandez*.<sup>166</sup> Judge Callahan noted the "broad terms" used in border search exception decisions, and the Supreme Court's rejection of attempts to cabin the exception.<sup>167</sup>

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supported by reasonable suspicion and that the scope and manner of the search were reasonable under the Fourth Amendment.").

<sup>159</sup> *United States v. Cotterman*, 637 F.3d 1068, 1074 (9th Cir. 2011) ("On appeal, the United States does not contest the district court's determination that there was insufficient evidence to establish reasonable particularized suspicion of criminal activity to support the search under the extended border search doctrine.").

<sup>160</sup> *Cotterman*, 709 F.3d at 988 (Smith, J., dissenting).

<sup>161</sup> *Id.* at 968-70 (majority opinion).

<sup>162</sup> *See supra* note 158.

<sup>163</sup> *See supra* notes 31-43 and accompanying text.

<sup>164</sup> *Cotterman*, 709 F.3d at 971 (Callahan, J., concurring).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 972 ("The Court also repeatedly has gone out of its way to explain that border searches generally are exempt from the limits it imposes on domestic searches.").

<sup>167</sup> *Id.* ("In the remaining cases, the Court consistently has described the government's

Judge Callahan's opinion next tries to make sense of the majority's reasoning. Judge Callahan agreed with the majority that neither the duration nor the location of the search made the search unconstitutional.<sup>168</sup> But Judge Callahan differed from the majority over how courts should treat searches of electronic devices. Judge Callahan rejected the majority's assertion that forensic computer searches are distinct from other border searches,<sup>169</sup> correctly pointing out that the Supreme Court "has [only] been willing to distinguish between border searches of persons and property, and not between different types of property."<sup>170</sup>

Judge Callahan raised practical objections to the majority's new rule governing forensic computer searches. Initially, Judge Callahan pointed out that the cost and time of conducting forensic computer searches will limit the number of searches conducted.<sup>171</sup> Judge Callahan also expressed concern that the *Cotterman* majority's decision will prevent customs officials from conducting random searches and will cause customs officials to worry over potential *Bivens*-action liability.<sup>172</sup>

#### E. Judge Smith's Dissent

As in Judge Callahan's opinion, Judge Smith's dissent begins its analysis by reiterating that the border search exception is well established and that the Supreme Court has refused to narrow the exception.<sup>173</sup> Also, like Judge Callahan's opinion, Judge Smith then moves on to practical concerns: the

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border search authority in very broad terms and overturned the lower courts' attempts to cabin that authority.").

<sup>168</sup> *Id.* at 974 ("Any suggestion that the government's search here was 'particularly offensive' due to the location and duration of the search runs counter to the Supreme Court's admonitions in *Johns* and *Montoya de Hernandez*.").

<sup>169</sup> *Id.* at 975 ("The majority's opinion turns primarily on the notion that electronic devices deserve special consideration because they are ubiquitous and can store vast quantities of personal information. That idea is fallacious and has no place in the border search context.").

<sup>170</sup> *Id.* at 975.

<sup>171</sup> *Id.* at 978 ("All the evidence in this case suggests that the government does not have the resources—time, personnel, facilities, or technology—to exhaustively search every (or even a majority) of the electronic devices that cross our borders.").

<sup>172</sup> *Id.* at 979-80 ("A checkpoint limited to searches that can be justified by articulable grounds for 'reasonable suspicion' is bound to be less effective. Second, courtesy of the majority's decision, criminals now know they can hide their child pornography or terrorist connections in the recesses of their electronic devices, while border agents, fearing Fourth Amendment or *Bivens* actions, will avoid conducting the searches that could find those illegal articles.").

<sup>173</sup> *Id.* at 981 (Smith, J., dissenting) (citing federal cases permitting suspicionless searches of electronic devices at the border, as well as the Supreme Court's previous reversal of an attempt to narrow the border exception in *Flores-Montano*).

burdens on law enforcement and the national safety concerns that will follow from hindering law enforcement agents' abilities to police the border.<sup>174</sup>

In contrast to the majority's argument regarding electronics, Judge Smith posits that computers are not distinguishable in the context of the border search exception and that the law only differentiates between people and property.<sup>175</sup>

Parts III and IV of Judge Smith's dissent differ most drastically from the other two opinions in *Cotterman*. In Part III, Judge Smith posits that because the search of Cotterman's computer took place 170 miles from the border and five days after the property crossed the border, the case should have been analyzed under the extended border search doctrine.<sup>176</sup> For Judge Smith, time and distance matter, while whether customs officials ever returned the items to Cotterman does not.<sup>177</sup>

Since the extended border search doctrine requires the government to establish reasonable suspicion before conducting a search, Judge Smith eventually arrives at the same standard as the majority, only by different means.<sup>178</sup> But Judge Smith further diverges from the majority, disputing whether customs officials had reasonable suspicion to conduct their search of Cotterman and his computer.<sup>179</sup> Judge Smith initially points out that the TECS system automatically flags sex offenders who travel frequently and, thus, could potentially subject a large class of people to searches without any individualized suspicion.<sup>180</sup> Then Judge Smith argues that the majority failed to look at the totality of the circumstances for reasonable suspicion because they did not consider factors that weighed against suspicion.<sup>181</sup> Specifically, customs officials had already interrogated Cotterman and his wife, conducted cursory searches of the electronics and found nothing, and discovered that Cotterman's conviction was over fifteen years old.<sup>182</sup> Cotterman also had offered to assist customs officials in conducting the search.<sup>183</sup> Given the already weak basis for suspicion, these mitigating factors led Judge Smith to

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<sup>174</sup> *Id.* at 984-86.

<sup>175</sup> *Id.* at 988 (emphasizing that *Flores-Montano* distinguished only between searches of property and searches of persons – not between searches of different types of property – and rejected novel balancing tests).

<sup>176</sup> *Id.* at 989 (“[T]he extended border search doctrine is aptly suited to address the privacy expectations at issue in this case.”).

<sup>177</sup> *See id.* at 989-90.

<sup>178</sup> *See id.* at 990 (opining that the extended border search doctrine – and thereby the reasonable suspicion standard – should apply to these facts).

<sup>179</sup> *Id.* at 990-94.

<sup>180</sup> *Id.* at 990-91 (suggesting that the majority's reliance solely on the TECS alert could allow entire groups of people to be searched without any suspicion individualized to a particular person).

<sup>181</sup> *Id.* at 993.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

the conclusion that customs officials did not have reasonable suspicion for their search of Cotterman and his computer.<sup>184</sup>

### III. THE INCOMPLETE ANALYSIS IN *UNITED STATES V. COTTERMAN*

#### A. *The Cotterman Court's Distinction Between Cursory and Forensic Computer Searches*

As previously discussed, Judge McKeown's majority opinion in *Cotterman* suggests that the initial suspicionless inspection of Cotterman's laptop, similar to the search conducted in *Arnold*, was likely permissible, but further asserts that the *Cotterman* facts present a suspicionless *forensic* laptop search.<sup>185</sup> In a footnote, Judge McKeown limits *Arnold* to its facts and distinguishes between cursory searches and forensic searches.<sup>186</sup> The reason for the distinction is the "comprehensive and intrusive nature of the forensic examination."<sup>187</sup> But this distinction is both unprecedented and potentially troublesome in practice. As noted above, it is not entirely clear what a forensic computer search is and, therefore, further clarification as to the difference between cursory searches and forensic searches will be necessary.<sup>188</sup> These differences will only become more difficult to identify over time, as improvements in technology will make forensic searches faster and easier – more like the cursory searches allowed under *Arnold*. Indeed, at some larger airports, forensic searches are already conducted on-site.<sup>189</sup>

#### B. *The Cotterman Court's Analysis of the Border Search Exception*

In classifying the border search exception as simply one factor in a totality-of-the-circumstances analysis, the Ninth Circuit badly misinterprets the border search exception doctrine and the current state of the law.

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<sup>184</sup> *Id.* at 994 (quoting *United States v. Manzo-Jurado*, 457 F.3d 928, 935 (9th Cir. 2006) ("The only hint of suspicion remaining at that point—after the initial border search and interrogations—was the single password-protected file, which I agree with the majority is insufficient, by itself, to sustain a finding of reasonable suspicion.")).

<sup>185</sup> *Id.* at 960-61 (majority opinion) (citing *United States v. Arnold*, 533 F.3d 1003, 1009 (9th Cir. 2008) ("Had the search of Cotterman's laptop ended with Officer Alvarado, we would be inclined to conclude it was reasonable even without particularized suspicion. But the search here transformed into something far different. The difficult question we confront is the reasonableness, without a warrant, of the forensic examination that comprehensively analyzed the hard drive of the computer." (citation omitted))).

<sup>186</sup> *Id.* at 960 n.6 ("We narrow *Arnold* to approve only the relatively simple search at issue in that case, not to countenance suspicionless forensic examinations.").

<sup>187</sup> *Id.* at 962.

<sup>188</sup> See *supra* notes 101-104 and accompanying text.

<sup>189</sup> See *Cotterman*, 709 F.3d at 978 n.11 (Callahan, J., concurring) (observing that customs officials at San Francisco International Airport conduct on-site forensic searches).

As the opinion in *Cotterman* notes multiple times, the border search exception does not mean “anything goes” at the border.<sup>190</sup> However, that is not to say that the border search exception can simply be ignored and the court can conduct a simple reasonableness inquiry. The point of the border search exception is that it provides a presumption that searches at the border are reasonable and, therefore, constitutional, except in a class of narrowly defined exceptions.<sup>191</sup> By reducing the border search exception to a single factor within a larger analysis, the Ninth Circuit plainly ignores numerous strongly worded Supreme Court precedents dating back to the 1970s (and first mentioned in dicta in the 1920s).<sup>192</sup> Indeed, in *Ramsey*, the Supreme Court thought it so obvious that searches conducted at the border were reasonable simply by virtue of the fact that they were occurring at the border that it “should, by now, require no extended demonstration.”<sup>193</sup> That was in 1977.

The only interim decision between *Ramsey* and *Cotterman* that may cast doubt on the continuing rigidity of the border search exception is *Montoya de Hernandez*. That remains the only case in which the Supreme Court has required any level of suspicion at the border.<sup>194</sup> As opposed to a comprehensive examination of a computer, that case involved an extended detention and multiple strip searches.<sup>195</sup> Though the Court explicitly based its holding in *Montoya de Hernandez* on the distinction between “routine” and

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<sup>190</sup> *Id.* at 957, 960 (citing *United States v. Seljan*, 547 F.3d 993, 1000 (9th Cir. 2008)).

<sup>191</sup> *See* *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (“That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.”).

<sup>192</sup> *See* *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (“The Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.”); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (“Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.”); *Ramsey*, 431 U.S. at 616 (“That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.”); *Carroll v. United States*, 267 U.S. 132, 154 (1925) (“Travellers 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.”).

<sup>193</sup> *Ramsey*, 431 U.S. at 616.

<sup>194</sup> *Cotterman*, 709 F.3d at 971 (Callahan, J., concurring) (“In the long time that the Court has recognized the border search doctrine, the Court has found just *one* search at the border that required reasonable suspicion.”).

<sup>195</sup> *Montoya de Hernandez*, 473 U.S. at 546-47 (Brennan, J., dissenting) (detailing the circumstances of de Hernandez’s detainment at the border).

“non-routine” searches, the Court clarified its rationale as recently as 2004 in *Flores-Montano*.<sup>196</sup> According to *Flores-Montano*, the rationale behind the decision in *Montoya de Hernandez* was that highly intrusive searches of persons involve serious dignity and privacy interests of the searched persons.<sup>197</sup> The Court made clear that, in the search of a car’s gas tank, those dignity and privacy interests were not implicated.<sup>198</sup> Thus, what was vital to the *Montoya de Hernandez* decision was that the disputed search was one of a person, not property. Moreover, the simple fact that in almost ninety years of border searches the Supreme Court has never imposed a requirement of individualized suspicion for any search of property is instructive.

C. *The Cotterman Court’s Analysis of Computers*

As mentioned, the Ninth Circuit rested much of its reasoning in *Cotterman* on the distinction between searches of electronic devices and other authorized border searches.<sup>199</sup> The Ninth Circuit determined that computers involved unique privacy concerns and, therefore, must be treated differently from other searches.<sup>200</sup>

Despite the differences the Ninth Circuit mentions between computers and more traditional luggage, they fail to note one similarity: like luggage and cars, personal electronic devices can contain evidence of criminal wrongdoing and contraband. Personal electronic devices contain addresses, communications, pictures, illegal technologies, and records. All of these things are relevant in protecting the border.

More important, the Ninth Circuit relies too heavily on privacy arguments. Reduced expectations of privacy alone are not what justify the border search exception. The exception is mainly justified by the importance of the governmental interest, and so the expectation of privacy alone cannot be enough to create a new rule under the border search exception.<sup>201</sup> Even if the Ninth Circuit is correct that personal electronic devices are unique and require a different assessment under the Fourth Amendment than luggage, briefcases, and filing cabinets, the fact that the search occurs at the border cannot be overlooked. Moreover, while the Supreme Court in *Riley* indicated that it may be willing to adopt a more expansive privacy approach for new technologies

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<sup>196</sup> *Flores-Montano*, 541 U.S. at 152 (discussing the use of the term “routine” in *Montoya de Hernandez*’s holding).

<sup>197</sup> *Id.* (finding that the considerations of dignity and privacy motivated the decision in *Montoya de Hernandez*).

<sup>198</sup> *Id.* (holding that the interests of dignity and privacy implicated in a search of the person are not implicated in the search of a vehicle).

<sup>199</sup> *See supra* notes 150-155 and accompanying text.

<sup>200</sup> *Id.*

<sup>201</sup> *See* *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (“The Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.”).

such as cell phones and computers,<sup>202</sup> during the prior term, the majority in *United States v. Jones*<sup>203</sup> bent over backwards to justify a more narrow privacy approach for new technologies rooted in tradition.<sup>204</sup> Accordingly, it remains unclear whether privacy arguments alone can buttress the *Cotterman* majority's result.

Further, even if the Supreme Court agrees wholeheartedly with the Ninth Circuit's treatment of personal electronic devices in *Cotterman* and rules that searches of personal electronic devices involve more substantial privacy interests and, therefore, demand a more searching analysis, it does not necessarily follow that such interests alone would be enough to overcome the border search exception, where "the government's interest in preventing unwanted persons and effects is at its zenith."<sup>205</sup> Simply put, the Supreme Court has made it clear that the context of the border provides the government with an interest that, for Fourth Amendment purposes, trumps all but the most vital personal interests against searches and seizures.<sup>206</sup> While laptops and other personal electronic devices are certainly more personal than a car's gas tank, they still do not involve the same personal dignity and privacy concerns as strip searches, cavity searches, and x-rays. And like other forms of property that cross the border, computers and personal electronic devices may contain evidence helpful for investigations of legitimate border concerns like drug smuggling, human trafficking, and terrorism. Absent the extraordinary privacy concerns inherent in invasive searches of the person, the government's "paramount interest" in protecting its borders outweighs the privacy concerns of the person being searched under the border search exception.<sup>207</sup> The Supreme Court has reaffirmed that rationale multiple times in the last century with little debate.<sup>208</sup> In 2004, it did so unanimously in the context of cars.<sup>209</sup> There is no reason to think that the current Supreme Court will change course and suddenly decide that personal privacy interests outweigh governmental interests. Thus, except in those searches that interfere with the most personal and private interests of the physical person, as in *Montoya de Hernandez*, the border search exception is as inflexible as ever. Without a dramatic shift in Supreme Court jurisprudence, the border search exception cannot simply be ignored or modified because a new technology raises the issue in a different context.

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<sup>202</sup> *Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (requiring police to secure a warrant before conducting a search of a cell phone).

<sup>203</sup> 132 S. Ct. 945, 949 (2012).

<sup>204</sup> *Id.* (using trespass as a grounds to find that the warrantless attachment of GPS devices to cars was an unreasonable search under the Fourth Amendment).

<sup>205</sup> *Flores-Montano*, 541 U.S. at 152.

<sup>206</sup> *See supra* Part I.B.

<sup>207</sup> *See Flores-Montano*, 541 U.S. at 153.

<sup>208</sup> *See supra* Part I.B.

<sup>209</sup> *Flores-Montano*, 541 U.S. at 152.

## IV. ALTERNATIVE APPROACHES

A. *Subjective Intent*

Professors Janet C. Hoeffel and Stephen Singer, in an effort to curb suspicionless searches at the border, have argued that courts should scrutinize the subjective intent of customs officials conducting such searches.<sup>210</sup> They also correctly posit that the district court in *Cotterman* was wrong to dismiss this argument with a simple citation to *Whren v. United States*.<sup>211</sup> *Whren* stated that an officer's subjective intent in executing a seizure was irrelevant if objective factors justified the seizure,<sup>212</sup> but the Supreme Court has clarified that subjective intent may be relevant where the search does not require individualized suspicion.<sup>213</sup> Border searches, of course, do not require individualized suspicion. When individualized suspicion is not a prerequisite for a search and subjective intent matters, it is the *programmatic* purpose for the search that is relevant, not the subjective intent of the particular officer performing the search.<sup>214</sup>

But this focus on programmatic purposes represents the first potential problem with using subjective intent to evaluate border searches. In *Edmond*, the Court dealt with a roadblock seizure of automobiles that was designed to uncover illegal drug activity.<sup>215</sup> The issue with the program was that the primary purpose was not a special need, but a general interest in crime control that could not justify the governmental intrusion.<sup>216</sup> The Court noted that the primary programmatic purpose for the roadblock was clearly uncovering illegal drug activity and, therefore, left open what would happen in a case where the primary programmatic purpose was a legitimate special need, but the

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<sup>210</sup> Janet C. Hoeffel and Steven Singer, *Fear and Loathing at the U.S. Border*, 82 Miss. L.J. 833, 849-50 (2013) (discussing the application of *Whren* to the border search context).

<sup>211</sup> 517 U.S. 806, 813 (1996) (discussing the impact of an officer's subjective intent when conducting a search).

<sup>212</sup> *Id.* ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

<sup>213</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 45-46 (2000) ("[W]hile '[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,' programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." (citation omitted)).

<sup>214</sup> See *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006) ("But this inquiry is directed at ensuring that the purpose behind the *program* is not 'ultimately indistinguishable from the general interest in crime control.' It has nothing to do with discerning what is in the mind of the individual officer conducting the search." (citation omitted)).

<sup>215</sup> *Edmond*, 531 U.S. at 34 ("We now consider the constitutionality of a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics.").

<sup>216</sup> *Id.* at 44 n.1 ("[O]ur judgment turns on the fact that the primary purpose of the Indianapolis checkpoints is to advance the general interest in crime control.").

secondary programmatic purpose was a general interest in crime control.<sup>217</sup> This question is a vital one for the border. The government clearly could assert that the primary purpose for the programmatic search of computers is securing the border. This would mean that even if the secondary reason for searching a suspect's computer was the mere unfounded suspicion that he may be engaged in an activity the government frowned upon, the search would be justified because of its primary purpose in protecting the border. Indeed, the Supreme Court has held in the past that discovering evidence of crimes in the course of an administrative search, conducted by a police officer, "does not render that search illegal or the administrative scheme suspect."<sup>218</sup> At the absolute most, then, the subjective intent approach would be able to force the government to be more circumspect about how it chooses whom to search.

A second and possibly more fatal flaw with the subjective intent approach also comes from *Edmond*. That decision explicitly stated that it did not apply to border searches, where public safety concerns are "particularly acute."<sup>219</sup> The same governmental interests in preventing contraband, unwanted persons, or national security threats from entering the nation at the border also grant customs officers more leeway in terms of subjective intent. The strength and rigidity of the border search exception therefore foreclose yet another potential judicial remedy.

#### B. *The Extended Border Search Doctrine*

Judge Smith, dissenting in *Cotterman*, argued that the proper way to analyze searches of personal electronic devices like Howard Cotterman's was under the extended border search doctrine.<sup>220</sup> The *Cotterman* majority disagreed with Judge Smith, holding that before a search could be considered under the extended border search doctrine as opposed to under the border search exception, customs officials had to return the possessions.<sup>221</sup> The return of the possessions is a key consideration in such an analysis because it restores some expectation of privacy (though not a full one), which is why reasonable

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<sup>217</sup> *Id.* at 47 n.2 ("[W]e need not decide whether the State may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics.").

<sup>218</sup> *New York v. Burger*, 482 U.S. 691, 716 (1987).

<sup>219</sup> *Edmond*, 531 U.S. at 47-48 ("Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.").

<sup>220</sup> *United States v. Cotterman*, 709 F.3d 952, 990 (9th Cir. 2013) (Smith, J., dissenting) ("I would hold that the search which took place 170 miles from the border, five days after crossing—a much greater lapse than the thirty-six hours in *Alfonso*—requires this case to be analyzed as an extended border search.").

<sup>221</sup> *Id.* at 962 (majority opinion) ("Because *Cotterman* never regained possession of his laptop, the fact that the forensic examination occurred away from the border, in Tucson, did not heighten the interference with his privacy.").

suspicion is necessary for extended border searches.<sup>222</sup> Considering the same issue, the Sixth Circuit agreed with the *Cotterman* majority, with both circuits noting that the exact same search would be conducted in either instance.<sup>223</sup>

Yet, even if accepted, this approach would provide no further protection for personal electronic devices at the border; it would simply be more cumbersome for the government to execute such searches. For instance, in *Cotterman* itself, the technician conducting the forensic examination acknowledged that he could have executed the search at the physical border using a laptop but that he instead brought Cotterman's electronic devices to his lab in order to *save* time.<sup>224</sup> The same search would have occurred in both instances – it was simply quicker and easier to transport the devices from the border.<sup>225</sup> To be sure, applying the extended border search doctrine may be helpful in some cases. The analysis would help in the most egregious examples, where police seize devices for extended periods of time in order to search them.<sup>226</sup> But instead of providing substantive privacy protections and stopping personal electronic device searches, the extended border search exception would provide guidelines on requirements for the government as to *how* they must conduct invasive and comprehensive personal electronic device searches. The government would have to equip all border crossings, physical and functional, with the necessary equipment to administer forensic computer searches. In the short term, this requirement may reduce the number of searches because the government simply cannot afford to outfit every single border crossing with the necessary technology. But as technology progresses and forensic search programs become cheaper, faster, and easier, this approach would not provide any additional privacy protections beyond those currently in place, and eventually the amount of forensic computer searches would return to current levels, if not increase. Substituting the extended border search doctrine for the border search exception treats only the symptoms, and not the cause, of the problem, and is therefore an inadequate solution.

## V. LEGISLATIVE SOLUTIONS

This Note has tried to make clear that barring a major and unlikely break with a long and well-established line of precedent, there is no possibility of a judicial remedy for the suspicionless search of personal electronic devices at

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<sup>222</sup> *Id.* at 961.

<sup>223</sup> *United States v. Stewart*, 729 F.3d 517, 525 (6th Cir. 2013) (“The key feature of an extended border search is that an individual can be assumed to have cleared the border and thus regained an expectation of privacy in accompanying belongings.” (quoting *Cotterman*, 709 F.3d at 961)).

<sup>224</sup> *Cotterman*, 709 F.3d at 962 (“Agent Owen had a laptop with forensic software that he could have used to conduct an examination at the port of entry itself, although he testified it would have been a more time-consuming effort.”).

<sup>225</sup> *Id.*

<sup>226</sup> *See supra* Introduction.

the U.S. border. Even if such a break were to occur, it is likely that its development would be slow and haphazard.<sup>227</sup> Even if the *Cotterman* decision stands, and even if it begins the move toward a new Fourth Amendment jurisprudence, it will likely take years before the change is affected nationwide. In the absence of a judicial remedy, an executive or legislative remedy is necessary if the situation at the border is to change. The recent trends in executive power may make the possibility of an executive remedy equally as remote as a judicial remedy. In 2013, the Department of Homeland Security's ironically named Office for Civil Rights and Civil Liberties argued that imposing a suspicion requirement on customs officials would not provide significant civil liberties benefits.<sup>228</sup> Presidential elections are not won and lost on the border search exception. At the very least, such an approach is not directly within the control of the people. Therefore, the most viable option, and the only one in the hands of the people directly affected by expansive border searches, is a legislative remedy.

In an increasingly mobile society, the fact that personal electronic devices are completely exposed to government eyes should, and likely would, cause discomfort for a large number of Americans if brought to their attention. In light of the Edward Snowden leaks regarding NSA surveillance in 2013, concerns over privacy and government snooping are as prominent in the public discourse as they have been in decades. Given these intensified focuses, the time may be ripe to rein in the border search exception. Two Pew Research Center polls, conducted less than three years apart, illustrate this point. When asked in a poll published in October 2010, only 32% of respondents were concerned that government anti-terror policies were restricting civil liberties,

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<sup>227</sup> Recently, a Maryland district court tried to draw a clearer distinction between cursory computer searches and forensic computer searches, and to impose a reasonable suspicion requirement in the case of the latter. *See* *United States v. Saboonchi*, No. PWG-13-100, 2014 WL 1364765, at \*28 (D. Md. Apr. 7, 2014) (“[A] forensic computer search cannot be performed under the border search doctrine in the absence of reasonable suspicion.”). However, the decision raises some obvious problems. First, the Fourth Circuit, which encompasses Maryland, has already ruled in strong language that no suspicion is required for computer searches. *See* *United States v. Ickes*, 393 F.3d 501, 506 (4th Cir. 2005) (declining to impose any suspicion requirement on computers, while making no distinction between cursory or forensic searches). This raises obvious doubts about whether the *Saboonchi* decision will simply be overturned. However, more importantly, the decision itself explicitly recognizes that the reasonable suspicion standard is low enough that it will not affect any real change in the current state of border policy. *Saboonchi, supra*, at \*29-30 (“This standard is far from onerous and still leaves officers with considerable freedom to search suspicious persons and respond to unexpected factual developments. . . . Nor is my ruling likely meaningfully to change anything that actually happens at the border.” (citation omitted)).

<sup>228</sup> TAMARA KESSLER, DEP’T OF HOMELAND SEC., CIVIL RIGHTS/CIVIL LIBERTIES IMPACT ASSESSMENT: BORDER SEARCHES OF ELECTRONIC DEVICES (2014) (executive summary), [http://www.dhs.gov/sites/default/files/publications/crcl-border-search-impact-assessment\\_01-29-13\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/crcl-border-search-impact-assessment_01-29-13_1.pdf), archived at <http://perma.cc/D2S2-MTXE>.

while 47% felt the programs did not go far enough to protect against the threat of terrorism.<sup>229</sup> In a poll published in July 2013, 47% were concerned that government anti-terror policies were restricting civil liberties, while only 35% were worried that the programs were not going far enough.<sup>230</sup> This shift occurred evenly across Republican, Democratic, and independent voters.<sup>231</sup> Despite these concerns, 50% approved NSA surveillance in the July 2013 poll, while 44% disapproved and 6% were undecided.<sup>232</sup> The shift in public opinion and the associated negative attention on the government may help explain why the government argued against Supreme Court certiorari in the *Cotterman* decision even though the imposition of reasonable suspicion was a new and heightened standard.<sup>233</sup>

The proposed Securing Our Borders and Our Data Act of 2011<sup>234</sup> provides an example of what a possible legislative solution could look like. The bill is very basic. It simply would require that police base any searches of electronic devices at the border upon reasonable suspicion.<sup>235</sup> Somewhat redundantly, it would also require an additional constitutional justification for the search, besides simply the border search exception.<sup>236</sup> The bill was introduced in the House of Representatives in December 2012, and neither the House nor the Senate has taken any action on it since.<sup>237</sup> Again, given the shifting public attitudes towards government surveillance and government overreach, the bill likely could gain more momentum today. Though the proposed statute provides a good example, its failing is that it does not go far enough. Probable cause is the only constitutional standard that can provide real protections for computers and other electronic devices at the border.

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<sup>229</sup> *Few See Adequate Limits on NSA Surveillance Program: But More Approve than Disapprove*, PEW RESEARCH CTR. (July 26, 2013), archived at <http://perma.cc/Y5EH-GCDP>.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* (“The increase in concern about civil liberties has been taken across the board, with double-digit shifts in opinion among nearly all partisan and demographic groups.”).

<sup>232</sup> *Id.*

<sup>233</sup> See Brief for the United States in Opposition at 10, *Cotterman v. United States*, 709 F.3d 952 (9th Cir. 2013) (No. 13-186).

<sup>234</sup> H.R. 6651, 112th Cong. (2012) (imposing limitations on searches of electronic devices at the border).

<sup>235</sup> *Id.* § 2(a)(1) (“Except as otherwise provided in this subsection, no search of the digital contents of the device or media may be based on the power of the United States to search a person and that person’s possessions upon entry into the United States, unless that search is based on reasonable suspicion regarding that person.”).

<sup>236</sup> *Id.* § 2(a)(2) (“No seizure of the digital contents of a device or media, or of the device or media itself, may be based on the power of the United States to search a person and that person’s possessions upon entry into the United States, but must be based on some other constitutional authority to make the seizure.”).

<sup>237</sup> H.R. 6651 – *Securing Our Borders and Our Data Act of 2011*, CONGRESS.GOV (last visited Apr. 19, 2014), archived at <http://perma.cc/J8JF-ZSDN>.

Though it is far from common practice for legislatures to impose higher standards under the Fourth Amendment than the Supreme Court, the Court itself has endorsed such an approach on multiple occasions. Concurring in *Riley*, Justice Alito urged legislatures to craft potential solutions for Fourth Amendment problems with technology.<sup>238</sup> He argued that legislators were in a better position to “assess and respond to changes” than the Court, which is armed only with “the blunt instrument of the Fourth Amendment.”<sup>239</sup> The Court has endorsed the legislative approach in a majority opinion as well, albeit in a very different context.<sup>240</sup> In *Atwater v. City of Lago Vista*,<sup>241</sup> Gail Atwater was harassed, arrested, and taken to jail for failure to wear a seatbelt.<sup>242</sup> Under Texas law, failure to wear a seatbelt was punishable by a fine of no more than \$50, but the statute specifically authorized officers to arrest violators without a warrant.<sup>243</sup> Justice Souter, writing for the majority, rejected the claim that the seizure was unreasonable under the Fourth Amendment because the penalty was too excessive for the crime, and the Court held that the standard of probable cause applies to all arrests.<sup>244</sup> The Court then went on to suggest in dicta that a legislative remedy would be a better way to apply a “minor-offense limitation” for seizures than “deriv[ing] one through the Constitution” because such a statute could “turn on any sort of practical

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<sup>238</sup> *Riley v. California*, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring) (“I would reconsider the question presented here if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.”).

<sup>239</sup> *Id.*

<sup>240</sup> *See Atwater v. City of Lago Vista*, 532 U.S. 318, 352-53 (2001) (“It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle.”).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 323-24 (“None of them was wearing a seatbelt. . . . Turek then handcuffed Atwater, placed her in his squad car, and drove her to the local police station, where booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets.”).

<sup>243</sup> *Id.* at 323 (“In Texas, if a car is equipped with safety belts a front-seat passenger must wear one, and the driver must secure any small children riding in front. . . . Texas law expressly authorizes ‘[a]ny peace officer [to] arrest without a warrant a person found committing a violation’ of these seatbelt laws.” (citations omitted)).

<sup>244</sup> *Id.* at 354 (“[W]e confirm today what our prior cases have intimated: the standard of probable cause ‘applie[s] to all arrests, without the need to “balance” the interests and circumstances involved in particular situations.’” (quoting *Dunaway v. New York*, 442 U.S. 200, 208 (1979))).

consideration without having to subsume it under a broader principle.”<sup>245</sup> The Court also noted that any such remedy would be politically accountable.<sup>246</sup>

Of course, there are obvious differences between a minor-offense limitation on Fourth Amendment seizures and a probable cause requirement for Fourth Amendment personal electronic device searches at the border. But there is no logical reason why the approach endorsed in *Atwater* – of the Constitution as a floor that the legislature is free to go beyond in providing protections for citizens against the government – is any less applicable. Like the minor-offense limitation, a statute requiring probable cause for searches of personal electronic devices at the border would have the advantage of being a narrow solution. It would not undermine the border search exception generally as the Supreme Court has developed it and, therefore, it would be immune to claims that weakening the border search exception would be a slippery slope. It would also provide the same advantage of political accountability noted in Justice Souter’s *Atwater* opinion. Much of the reasoning used in *Atwater* is equally applicable to the border search exception; but, if nothing else, *Atwater* makes clear that a legislative approach providing protection beyond what the Supreme Court has delineated is available to Congress.

One of the main historical justifications for the border search exception is that the First Congress authorized customs officials’ plenary authority at the border, free from the restrictions of the Fourth Amendment.<sup>247</sup> It would therefore be fitting if Congress were to do what the courts will not and curtail the border search exception in certain contexts by requiring probable cause, as determined by a neutral magistrate, before allowing customs officers to conduct expansive searches of personal electronic devices at the United States border. Unlike the reasonable suspicion standard – which, as Justice Marshall pointed out in *Sokolow*, is a flexible standard that can be easily met in most circumstances – imposing a probable cause requirement will provide substantive protections for individual privacy.<sup>248</sup> Doing so will require raising awareness of the border search exception issue, and action on the part of constituents to force their representatives to act. The Supreme Court has repeatedly held that governmental interests at the border outweigh individual privacy concerns. If Americans truly disagree with that assessment, and value the privacy of their personal electronic devices, the most effective way to ensure their protection is to make that fact well known to the people tasked

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<sup>245</sup> *Id.* at 352.

<sup>246</sup> *Id.* at 353 (“The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials, is a dearth of horrors demanding redress.”).

<sup>247</sup> *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977) (“The historical importance of the enactment of this customs statute by the same Congress which proposed the Fourth Amendment is, we think, manifest.”).

<sup>248</sup> See notes 30-43 and accompanying text.

with representing them. Then, and only then, will the current status quo at the border be upended.

#### CONCLUSION

The decision in the Ninth Circuit's *United States v. Cotterman* opinion is a somewhat strange and conflicting opinion. The majority went to great lengths to change the standard of review for forensic computer searches at the border and impose a requirement of reasonable suspicion in such instances, only to eventually find that border officials *did* have reasonable suspicion in the *Cotterman* case and uphold the conviction. The Ninth Circuit's attempted alteration in the standard of review was somewhat ambitious, but it was also mistaken. A long line of Supreme Court precedents establishing the border search exception, and that exception's immutability, ultimately means that the Ninth Circuit got the decision wrong.

The bare fact that anyone could be subjected to such an invasive search, with all of their electronics thoroughly analyzed by forensic experts, simply for crossing the U.S. border should cause enough public concern to lead to a legislative change. That path could also provide the more thorough and concrete protection of probable cause as opposed to the tenuous and nebulous reasonable suspicion standard pronounced in *United States v. Cotterman*. Given the current state of the law, and the ensconced position the border search exception holds, the Supreme Court is highly unlikely to provide a judicial remedy requiring heightened suspicion for forensic computer searches. If the American people do not want the government in their computers and other electronic devices at the border, the best way, and the only realistic way available, is through the legislative process.