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Laptops, Airports, and the Border: Expanding Technology and the Shrinking Fourth Amendment in *United States v. Arnold*

CAMERON W. EUBANKS[†]

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“These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.” *Justice Robert H. Jackson*.*

INTRODUCTION

“We confront a ‘disgusting and saddening’ episode at our Nation’s

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* *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

border.”¹ At airports all across the country, the government is using an unlimited power to search individuals arriving on international flights without any suspicion. This is not a new power, but it is now being used in a new way. Instead of the overtly intrusive and degrading methods of old,² the new searches afford the government the ability to delve into the caverns of an individual’s mind. By that, government agents can now search all the contents and files of an individual’s computer without any prior suspicion. From the simplest document, to the most private pictures and conversations, the government has been given the ability to peer into these matters with absolutely no justification. *United States v. Arnold*,³ has endorsed this proposition, to the fear of civil libertarians and those who value their privacy, and their dignity, upon crossing borders.

In Part I, this note will analyze the doctrinal changes in Fourth Amendment⁴ jurisprudence that led up to the Court’s holding in *Arnold*. It analyzes the move toward the balancing test of reasonableness in Fourth Amendment jurisprudence, as well as the border search exception to the Fourth Amendment. Part II of the note provides a history of the most prescient cases that preceded *Arnold*. The underlying factual and procedural history of *Arnold* is detailed in Part III of the note. The opinion of *Arnold* will be dissected in Part IV.

Part V argues that the border search exception to the Fourth Amendment should be eliminated and that all searches should be conducted on a showing of at least reasonable suspicion, if not more toward the probable cause standard. In addition, Part V argues that the search of an individual’s laptop is highly intrusive and offensive. Therefore, it requires a heightened amount of suspicion before a search of this magnitude can take place. Part V continues by stressing that the search in *Arnold* is also unreasonable because it was not limited in scope and was outside the spirit of what the border search exception is meant to accomplish. Part V finally describes what this case means for the future of the Fourth Amendment and privacy interests at the border. A case has

1. *United States v. Montoya de Hernandez*, 473 U.S. 531, 545 (1985) (Brennan, J., dissenting) (quoting *United States v. Holtz*, 479 F.2d 89, 94 (9th Cir. 1973) (Ely, J., dissenting)).

2. *See, e.g., Montoya de Hernandez*, 473 U.S. at 534–35 (describing an alimentary canal search of a suspected cocaine smuggler).

3. 533 F.3d 1003, 1009 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

4. 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.

U.S. CONST. amend. IV.

already cited *Arnold* with approval,⁵ showing that this new innovation in the Fourth Amendment is likely going to be a permanent fixture in the landscape of border searches.

I. THE SHRINKING FOURTH AMENDMENT

Arnold lies at the intersection of a citizen's desire to avoid unwanted state incursion into one's private life⁶ and a state's need to control its own borders for the sake of maintaining its sovereignty and integrity.⁷ This balance between the state and the individual is routinely tipped very much in favor of the state when searches occur at the border.⁸

A. Firm Rules to a Flexible Test

Since the Warren Court, the Fourth Amendment has been read in light of one of the most important cases of its time, *Katz v. United States*.⁹ In *Katz*, the government placed "an electronic listening and recording device" on a phone booth to intercept the telephone conversation of the individual inside.¹⁰ The Court held this eavesdropping to be a search.¹¹ It announced that a search took place wherever the person had a subjective expectation of privacy and society was willing to recognize that privacy interest as reasonable.¹² The Fourth Amendment was read to protect people, not just places anymore.¹³ With its newfound interest in

5. See *United States v. Singh*, No. 07-30421, 2008 WL 4426643, at *1 (9th Cir. Sept. 29, 2008).

6. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.").

7. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.") (citing *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889)).

8. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976); *United States v. Montoya de Hernandez*, 473 U.S. 531, 539–40, 544 (1985).

9. 389 U.S. 347 (1967).

10. *Id.* at 348.

11. *Id.* at 353.

12. *Id.* at 361 (Harlan, J., concurring). The reciprocal of this idea is where an individual has no expectation of privacy, no search takes place. Therefore, the Fourth Amendment is not disturbed. See *id.* at 351 (majority opinion).

13. *Id.* The holding in *Katz* reverses the one reached in *Olmstead v. United States*, 277 U.S. 438 (1928). In *Olmstead*, a wiretap was not found to be a search under the Fourth Amendment because the Amendment was interpreted to protect only tangible materials or against an invasion into the home or the curtilage of the home. See *Olmstead*, 277 U.S. at 464. *Katz* makes clear that there are not protected areas under the Fourth Amendment, but instead individuals can have a reasonable expectation of privacy in many areas deserving of Fourth Amendment protection. *Katz*, 389 U.S. at 351–52. The position taken in *Katz* is the same as the one Justice Brandeis took in dissent in *Olmstead*. See *Olmstead*, 277 U.S. at 474–75. (Brandeis, J., dissenting).

protecting people's privacy, the Court set up a structure that the government must use prior to every search of an individual.¹⁴ The Court believed this unbreakable command came from the Fourth Amendment itself. First, for a search to be constitutional, the government must possess probable cause.¹⁵ Once probable cause is found, the government must obtain a warrant, or exigent circumstances must exist to make getting a warrant unrealistic.¹⁶ The Court's preference for warrants was so strong that searches without a warrant were almost always *per se* unreasonable.¹⁷ The newly minted Fourth Amendment would not last long though. Announced in *Terry v. Ohio*,¹⁸ and continuing through the Burger and Rehnquist Courts,¹⁹ the reasonableness of the search became the controlling factor in the analysis of its constitutionality.²⁰ The probable cause and warrant framework was hastily being phased out as too rigid

14. *Katz*, 389 U.S. at 359 ("The government agents here ignored the procedure of antecedent justification . . . that is central to the Fourth Amendment, a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case.") (citation and internal quotation marks omitted).

15. *Id.* at 358.

16. [T]he "warrant requirement" had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged [sic] nearly 20 such exceptions, including "searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es]. . . ."

California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (quoting Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985)).

17. *O'Connor v. Ortega*, 480 U.S. 709, 732 (1987) ("While as a general rule warrantless searches are *per se* unreasonable, we have recognized exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable'") (quoting *New Jersey v. T. L. O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

18. 392 U.S. 1 (1968).

19. Fourth Amendment jurisprudence became more conservative, beginning in 1969, with Chief Justice Burger's appointment to the Court, and continued through the Rehnquist years. This trend has continued to the present day as the make-up of the Court has shifted to the right, dismantling more of the Warren Court's holdings. The case law of the Supreme Court would bear out this fact. See *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983) (a determination of probable cause is found through a "totality of the circumstances," not with a structure of specific tests); *Acevedo*, 500 U.S. 565, 579 (probable cause in the context of a car allows police to search containers within the car); *Whren v. United States*, 517 U.S. 806, 813 (1996) (officer's motive in arresting does not play part in arrest's constitutionality, as long as probable cause exists); *Maryland v. Pringle*, 540 U.S. 366, 372 (2003) (individualized probable cause not needed to arrest any or all passengers in a car where contraband is found). See generally, Madhavi M. McCall & Michael A. McCall, *Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323, 338-39 (2006).

20. See *Terry*, 392 U.S. at 20-21. *Terry*'s reasonableness standard for stop and frisk builds off of the synthetic type probable cause and area warrants that were created in *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967) (holding that less than probable cause could be used in municipal inspections and still pass Fourth Amendment muster).

and difficult for law enforcement to deal with.²¹ The more conservative Courts have read the Fourth Amendment to only prohibit unreasonable searches, not to create a probable cause and warrant requirement.²² When dealing with reasonableness instead of the *Katz* framework, many searches have been found to be reasonable, even where probable cause or a warrant is lacking. In some situations, like at the border, both may be absent.²³ A balancing test is much more flexible and deferential to law enforcement than the rigid rule structure of *Katz* when determining whether a search is reasonable.²⁴ The government's interests sit on one side of the scale, across from the individual's rights and dignity.²⁵ Where the government's interest outweighs the individual's, the search is reasonable and therefore constitutional.²⁶ Searches conducted at the border have been considered reasonable strictly because they occur at the border.²⁷ Here, the government is said to have the highest interest, and the individual has a much lower interest when presenting oneself for entry into the country.²⁸ Nearly all searches that occur at the border are found reasonable.²⁹

B. *The Sovereign's Inherent Authority at the Border*

In addition to the trend toward reasonableness in search and seizure doctrine,³⁰ *Arnold's* holding endorses the concept of the implied power of a sovereign to exclude whomever it chooses at its borders.³¹ In order for a state to maintain itself, it must have an absolute power to control its

21. A stop and frisk need only be reasonable. *Terry*, 392 U.S. at 30–31. A reasonableness balancing of interests test is applied to administrative and regulatory searches. *See Brown v. Texas*, 443 U.S. 47, 50–51 (1979) (citing *Dunaway v. New York*, 442 U.S. 200, 209–10 (1979) for an example of reasonableness balancing in cases involving “seizures . . . less intrusive than . . . traditional arrest[s]”). School searches by administration must be reasonable. *T.L.O.*, 469 U.S. at 341–42. Use of police force must be reasonable. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

22. *See supra* note 19 and accompanying text.

23. *See United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004).

24. *See Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (“We think it too plain for argument that the State’s proffered justification—the safety of the officer—is both legitimate and weighty.”).

25. *Id.* at 109 (“Reasonableness [of the search] depends ‘on a balance between public interest and the individual’s right to personal security free from arbitrary interference by law officers.’”) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)).

26. *See id.* at 111.

27. *Flores-Montano*, 541 U.S. at 152–53.

28. *Id.* at 152–53, 155.

29. *See id.* at 152–53 (“Time and again, we have stated that ‘searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.’”) (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1977)).

30. *See supra* note 19 and accompanying text.

31. *See 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

own borders. It has been reasoned that if the state does not have this power, then other states will have control over the integrity of the state that cannot control and maintain the flow of people and goods into its interior.³² If other nations could send anything into another that they wished, then the open state would be powerless to defend itself and would ultimately collapse.³³ This power to control the borders is a plenary and absolute power of the Federal Government.³⁴ To execute this power, searches of persons and material that cross the border can be conducted by the government with little to no prior justification.³⁵ Because the government has an absolute ability to exclude and control the borders, it must then follow that items being brought into the country can be searched as an ancillary to this plenary power—as the Court has routinely held.³⁶

C. *The Border Search Exception*

The border search exception was born out of this power of the federal government to exclude whomever and whatever it wished at the border.³⁷ Courts have held that because the government has a nearly unlimited power at the border, the Fourth Amendment's limit on government search and seizures should be discarded in favor of a blanket rule that the government need not have suspicion to justify its search. These searches at the border need not be preceded by any level of suspicion as the government's power here is so great, supposedly trumping any Fourth Amendment concerns of the individual.³⁸ These searches have

entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.”).

32. *See Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603–04 (1889) (“Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.”).

33. *See id.*

34. *See id.* This power to control the borders is not explicitly stated in the Constitution. It has been an understood implied power of the federal government since announced in the *Chinese Exclusion Case* (federal government has absolute right to exclude aliens at the border). *See United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004).

35. *See Montoya de Hernandez*, 473 U.S. at 538.

36. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (stating that the power extends to “individuals or conveyances”); *Carroll*, 267 U.S. at 154 (requiring entrants at the border to identify themselves and their belongings).

37. *Almeida-Sanchez*, 413 U.S. at 272 (citing *The Chinese Exclusion Case*, 130 U.S. at 603–04; *Carroll*, 267 U.S. at 154).

38. *See Montoya de Hernandez*, 473 U.S. at 538 (“[T]he Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior. Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant”); *United States v. Martinez-Fuerte*, 428 U.S. 543, 562–63 (1976) (holding that it is not a Fourth Amendment violation for Border Patrol to stop motorists at

been considered reasonable strictly for the fact that they occur at the border.³⁹

The border search exception also includes places that are at the “functional equivalent” of the border.⁴⁰ A search may not be possible as the individual arrives directly at the border, so the reasoning of the border search exception extends to these areas as well.⁴¹ Arrival on an international flight has consistently been considered an area that is the functional equivalent to the border under the border search exception.⁴²

D. *What is Routine?*

Under the border search exception there can be routine searches and nonroutine searches.⁴³ Routine searches require no level of suspicion before the official can perform them and are of a less intrusive nature.⁴⁴ Nonroutine searches and seizures are those that are of a highly intrusive nature. Detention to perform a search of the alimentary canal is one such search seizure that is considered nonroutine.⁴⁵ This nonroutine search requires reasonable suspicion before it can be performed, and any detention to conduct the search must be reasonable as well.⁴⁶ In dicta, the Supreme Court suggested that x-ray, strip, and cavity searches may also be nonroutine but declined to announce what level of suspicion, if any, is necessary before the government can conduct them at the border

border checkpoints without individualized suspicion, even if the stop is apparently based on national origin).

39. *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.”).

40. Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well. For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.

Almeida-Sanchez, 413 U.S. at 272–73.

41. *See id.*

42. *See id.*

43. *See Montoya de Hernandez*, 473 U.S. at 537–38 (describing some searches at the border as “routine”).

44. *See id.* For instances of routine border searches that do not require any suspicion, see *United States v. Ross*, 456 U.S. 798, 823 (1982) (luggage); *United States v. Hsi Huei Tsai*, 282 F.3d 690, 696 (9th Cir. 2002) (briefcase and luggage); *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967) (“purse, wallet, or pockets”); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (plurality opinion) (pictures).

45. *Montoya de Hernandez*, 473 U.S. at 541.

46. *Id.*

or its functional equivalent.⁴⁷

The Court in *United States v. Montoya de Hernandez* did not accept that Fourth Amendment analysis would be based on any new third level of suspicion beyond reasonable suspicion or probable cause.⁴⁸ Officials detained Montoya de Hernandez to conduct an alimentary canal search.⁴⁹ The Ninth Circuit reasoned that a “clear indication of alimentary canal smuggling” must exist before a traveler could be detained.⁵⁰ On review, the Supreme Court rejected this clear indication standard.⁵¹ While the terms routine and nonroutine seem to be categorical, requiring one level of suspicion for routine and another level of suspicion for nonroutine searches, the Court, in a later case, clarified that the terms are descriptive at best and provide little actual use.⁵² The Court looks to each type of search and its facts before determining what level of suspicion might be necessary before it can be constitutionally performed.⁵³ In *Montoya de Hernandez* the search was labeled routine, and this language seemed to spawn a categorical approach among lower courts.

Since then, the Court has continually downplayed any categorical distinction between routine and nonroutine border searches.⁵⁴ It again took the opportunity in *United States v. Flores-Montano* to mention that border searches are analyzed by their intrusiveness, and not whether the search fits into a routine or nonroutine category.⁵⁵ *Flores-Montano*, decided after September 11th, held that a vehicle’s gas tank could be removed and dissembled at the border without any reasonable suspicion.⁵⁶

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

48. *Id.* at 541.

49. *Id.* at 532–33.

50. *Id.* at 540.

51. The Court of Appeals held that the initial detention of respondent was permissible only if the inspectors possessed a “clear indication” of alimentary canal smuggling. This “clear indication” language comes from our opinion in *Schmerber v. California*, but we think that the Court of Appeals misapprehended the significance of that phrase in the context in which it was used in *Schmerber*. The Court of Appeals viewed “clear indication” as an intermediate standard between “reasonable suspicion” and “probable cause.” But we think that the words in *Schmerber* were used to indicate the necessity for particularized suspicion that the evidence sought might be found within the body of the individual, rather than as enunciating still a third Fourth Amendment threshold between “reasonable suspicion” and “probable cause.”

Id. (footnote and citations omitted).

52. See *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

53. *Id.*

54. *Id.* at 152–53.

55. *Id.*

56. *Id.* at 155.

In addition to allowing routine nonintrusive searches based on no suspicion, and highly intrusive nonroutine searches to be based on a reasonable suspicion, border searches must be limited in their scope to be reasonable.⁵⁷ The search must be no more intrusive than necessary, and the initial search must confirm or dispel the official's suspicions.⁵⁸ If the suspicions are gone after a cursory search, then the search must end.⁵⁹ The search is not limited in scope if the item will be destroyed, because at this point a routine search would become highly intrusive and then a reasonable suspicion would be needed before the property could be destroyed.⁶⁰ The search of a laptop at the border raises interesting questions about whether this type of search really can be limited in scope.

II. THE ROAD TO *ARNOLD*

"While many courts have stopped their analysis after finding a reasonable suspicion, a few courts have dealt with the issue of laptop border searches more directly."⁶¹ While *Arnold* was truly a suspicionless search, two cases have predictive value in understanding *Arnold*. The first, *United States v. Romm*,⁶² was decided by the same Ninth Circuit Court just two years prior to *Arnold*. The case involves a similar search of a computer at the border.⁶³ Romm had looked at child pornography on his computer over the Internet and then deleted the images, but the deleted images remained in his computer's Internet cache.⁶⁴ Romm flew to Canada where he was stopped for questioning regarding his prior criminal history.⁶⁵ The agents at the airport booted up his computer and looked at his Internet history.⁶⁶ Several child pornography websites were found, and he was subsequently denied access to Canada.⁶⁷ Romm was held in "detention until the next flight" back to the United States, via Seattle, Washington.⁶⁸ His computer was searched again once he arrived

57. *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985).

58. *See id.* at 544; *Wilson v. Layne*, 526 U.S. 603, 611 (1999) ("[I]f the scope of the search exceeds that permitted by . . . the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more.").

59. *See United States v. Price*, 472 F.2d 573, 575 (9th Cir. 1973).

60. *Flores-Montano*, 541 U.S. at 155–56.

61. Rasha Alzahabi, Note, *Should You Leave Your Laptop Home When Traveling Abroad?: The Fourth Amendment and Border Searches of Laptop Computers*, 41 IND. L. REV. 161, 170 (2008) (discussing *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005) and *United States v. Romm*, 455 F.3d 990 (9th Cir. 2006)).

62. 455 F.3d 990 (9th Cir. 2006).

63. *Id.* at 993.

64. *Id.*

65. *Id.* at 994.

66. *Id.*

67. *Id.*

68. *Id.*

back in the United States.⁶⁹ In Romm's case the Ninth Circuit held that the computer could be searched without reasonable suspicion under the border search doctrine as a routine search.⁷⁰ The Ninth Circuit stated, "[t]hus, the routine border search of Romm's laptop was reasonable"⁷¹ *Romm* is not exactly the same as *Arnold* because the defendant in *Romm* had first been searched by foreign officials in Canada.⁷² While slightly different, *Romm* does show that the Ninth Circuit was willing to accept that a search of a computer at the border was routine prior to its decision in *Arnold*.⁷³ It gave short shrift to any argument based on the intrusiveness of the search or whether the material searched was of an expressive nature.⁷⁴

The second border search case, *United States v. Ickes*,⁷⁵ was handed down from the Fourth Circuit in 2005. Ickes attempted to enter the United States from Canada, and his van was stopped at the border.⁷⁶ His computer was searched after two prior searches of his vehicle turned up suspicious videos and marijuana.⁷⁷ Ickes's computer contained child pornography, similar to Arnold's.⁷⁸ In contrast to *Arnold*, before searching the defendant's computer, the officials in *Ickes* had prior suspicion based on contraband found in Ickes's vehicle.⁷⁹ Also, Ickes's computer was found inside his vehicle, which the court has time and again found to be a reasonable search.⁸⁰ The court found Ickes's policy argument to be fanciful.⁸¹ It stated:

Ickes claims that our ruling is sweeping. He warns that "any person carrying a laptop computer . . . on an international flight would be subject to a search of the files on the computer hard drive." This prediction seems far-fetched. Customs agents have neither the time nor the resources to search the contents of every computer.⁸²

69. *Id.*

70. *Id.* at 997.

71. *Id.*

72. *Id.* at 994. The defendant in *Arnold* was searched by U.S. officials as he attempted to enter the U.S. from the Philippines. *U.S. v. Arnold*, 533 F.3d 1003, 1005 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

73. *See Romm*, 455 F.3d at 997.

74. *See id.* (declining to address the intrusiveness argument because it was not raised in the defendant's brief).

75. 393 F.3d 501 (4th Cir. 2005).

76. *Id.* at 502.

77. *Id.* at 502–03.

78. *Id.* at 503; *U.S. v. Arnold*, 533 F.3d 1003, 1005 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

79. *Ickes*, 393 F.3d at 503.

80. *Id.* at 505–06 (discussing the government's "broad authority to search the belongings of would-be entrants" at the border).

81. *See id.* at 506–07.

82. *Id.*

As Arnold would find out, the court's forecast would miss the mark. The government has seized on this very power that the *Ickes* court downplayed. The government now conducts widespread searches of computers based on no prior suspicion—all from the power of the border search exception.

III. FROM THE PHILIPPINES TO THE NINTH CIRCUIT

On July 27, 2005, Michael Arnold's flight arrived at Los Angeles International Airport.⁸³ He had just completed a twenty-three hour journey from the Philippines where he had been on "vacation for three weeks visiting friends."⁸⁴ Arnold proceeded to customs after collecting his bags.⁸⁵ He was selected for a secondary screening by Customs and Border Protection ("CPB") officer Laura Peng while he was standing in line to enter the country.⁸⁶ Mr. Arnold was forced to boot up his computer that was packed away inside his luggage.⁸⁷ The computer was turned over to another CPB officer, John Roberts, while Officer Peng continued to search Arnold's other belongings.⁸⁸ Six compact discs and a flash drive were found as well.⁸⁹ While searching the computer, the officers proceeded to click on the desktop icons titled "Kodak Pictures" and "Kodak Memories," even though the computer was booted up solely to determine whether it was operational.⁹⁰ Once inside the picture files, the officers viewed a photograph containing two naked women.⁹¹ Officer Roberts alerted his superiors, who in turn contacted Immigration and Customs Enforcement ("ICE") with the Department of Homeland Security ("DHS").⁹² Arnold was detained by ICE agents for several hours and interrogated about the contents of his computer.⁹³ ICE found more nude pictures after a further search of Arnold's computer, this time some of them believed to be child pornography.⁹⁴ ICE seized the computer, flash drive, and CDs, and allowed Mr. Arnold to leave.⁹⁵ Two weeks later, federal agents received a warrant based on their initial sus-

83. *Arnold*, 533 F.3d at 1005.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

picionless search.⁹⁶ The search turned up even more child pornography.⁹⁷

In the United States District Court for the Central District of California, Arnold brought a motion to suppress the initial photographs taken at the airport and the photos obtained using the warrant.⁹⁸ Arnold's motion to suppress was granted by the district court, which held that a search of a person's computer hard drive and storage devices is of such an intrusive nature that reasonable suspicion is required for the search to pass constitutional muster under the Fourth Amendment.⁹⁹ According to the district court, such suspicion was required even where the search occurs at the functional equivalent of a border¹⁰⁰ after a passenger arrives on an international flight.¹⁰¹ The court also determined that the CPB officers lacked the requisite "reasonable suspicion."¹⁰² Arnold's nervousness was not sufficient to give an officer reasonable suspicion to search.¹⁰³ The district court also found that the search was not limited in scope.¹⁰⁴ The scope of the search should have been limited to booting up the computer to confirm that it was a working device.¹⁰⁵ The court used a sliding scale test to determine the constitutionality of the laptop computer search.¹⁰⁶ Under the test, "as the intrusiveness of [the] search increases," so must the amount of suspicion needed to conduct the search.¹⁰⁷ According to the court, while the balance is usually tipped in the government's favor at the border, the computer's hard drive contains the type of data and information that makes a search of its contents highly intrusive—intrusive enough where some suspicion would be needed.¹⁰⁸

On review, the Ninth Circuit reversed the district court's order granting the motion to suppress.¹⁰⁹ The Ninth Circuit ultimately held that "reasonable suspicion is not needed" for the government to search a

96. *Id.*

97. *United States v. Arnold*, 454 F. Supp. 2d 999, 1001 (C.D. Cal. 2006), *rev'd*, 533 F.3d 1003 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

98. *Id.* at 1000.

99. *Id.* at 1000–01.

100. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272–73 (1973) (noting that the search of passengers and cargo arriving in the U.S. after an international flight would "clearly be the functional equivalent of a border search").

101. *Arnold*, 454 F. Supp. 2d at 1002–03.

102. *Id.* at 1004.

103. *Id.* at 1006.

104. *Id.* at 1007.

105. *Id.*

106. *See id.* at 1003.

107. *Id.* (citing *United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995)).

108. *Id.* at 1002–03.

109. *United States v. Arnold*, 533 F.3d 1003, 1010 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

computer hard drive and storage devices at the United States border or its functional equivalent.¹¹⁰ Arnold's motion to suppress was reversed and the child pornography found on his computer was admitted.¹¹¹

IV. THE OPINION IN *UNITED STATES V. ARNOLD*

A. *The Government's Plenary Power at the Border*

The Ninth Circuit begins its analysis in *Arnold* by reminding us all that the government has great power to search and exclude at the border.¹¹² Drawing on the dicta of *Almeida-Sanchez v. United States*,¹¹³ the Ninth Circuit labels the search of Arnold's computer at the airport as at the "functional equivalent of the border," so as to bring this search under the border search exception to traditional Fourth Amendment analysis.¹¹⁴ The court reiterates the inherent power of a sovereign to control its borders and protect its "territorial integrity,"¹¹⁵ and that searches conducted at the border are generally reasonable simply because they occur at the border.¹¹⁶ The Ninth Circuit and the district court both agree that the government's power here is at its zenith.¹¹⁷ The district court limits this language,¹¹⁸ but the Ninth Circuit takes it and runs with it.¹¹⁹ The Ninth Circuit used *United States v. Ross* to make us believe that all property can be searched at the border without any prior suspicion and that all objects can be searched equally at the airport.¹²⁰ This is off the mark. The Supreme Court in *Flores-Montano* admitted some property searches

110. *Id.* at 1008.

111. *Id.* at 1010.

112. *Id.* at 1006–07.

113. *See supra* note 40 and accompanying text.

114. *Arnold*, 533 F.3d at 1006 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973)).

115. *Id.* (quoting *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004)).

116. *Id.* at 1006–07 (citing *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *Torres v. Puerto Rico*, 442 U.S. 465, 473 (1979)).

117. *Id.* at 1007 ("[T]he '[g]overnment's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.'" (quoting *Flores-Montano*, 541 U.S. at 152); *United States v. Arnold*, 454 F. Supp. 2d 999, 1002 (C.D. Cal. 2006), *rev'd*, 533 F.3d 1003 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009) (citing the same quotation).

118. *Arnold*, 454 F. Supp. 2d at 1002 (noting that "highly intrusive searches are not reasonable merely because they take place at the border").

119. *See Arnold*, 533 F.3d at 1006–10.

120. Therefore, "[t]he luggage carried by a traveler entering the country may be searched at random by a customs officer . . . no matter how great the traveler's desire to conceal the contents may be." Furthermore, "a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case."

Id. at 1007 (quoting *United States v. Ross*, 456 U.S. 798, 822–23 (1982)) (alterations in original) (citation omitted).

would need a measurable amount of prior suspicion to search.¹²¹ The Court recognized that the government does not have carte blanche authority to search, even at the border.¹²² The Ninth Circuit overstates the government's power to search at the border very early in its opinion to make this case seem like a slam dunk.

B. *Is the Search of a Laptop Intrusive?*

Next, the court opines on the distinction between whether searches should be deemed routine or nonroutine at the border.¹²³ The court wants to believe *Montoya de Hernandez*¹²⁴ and *Flores-Montano*¹²⁵ create a need for reasonable suspicion only on highly intrusive searches of the persons, not on any type of nondestructive property search.¹²⁶ While the Supreme Court repeatedly announces that there are not routine and nonroutine searches at the border, but only intrusive and nonintrusive ones,¹²⁷ the search here is not considered "particularly offensive" by the Ninth Circuit.¹²⁸ The court here suggests the search is just like if the government was to search the contents of a backpack or luggage.¹²⁹ The Ninth Circuit even goes so far as to suggest property searches are almost

121. *Flores-Montano*, 541 U.S. at 155 n.2 ("We again leave open the question, whether, and under what circumstances, a border search might be deemed unreasonable because of the particularly offensive manner in which it is carried out.") (quoting *United States v. Ramsey*, 431 U.S. 606, 618 n.13 (1977) (internal quotation marks omitted)); *Id.* at 155–56 ("While it may be true that some searches of property are so destructive as to require a different result, this was not one of them.").

122. *See id.* at 155–56, 155 n.2.

123. *Arnold*, 533 F.3d at 1008.

124. *Montoya de Hernandez* involved the inspection of a defendant's alimentary canal for cocaine. *United States v. Montoya de Hernandez*, 473 U.S. 531, 532–33 (1985).

125. Complete disassembly and reassembly of a gas tank was not considered destructive and did not need reasonable suspicion. *Flores-Montano*, 541 U.S. at 155–56. The Court did not address whether drilling into of the body of the car would be considered sufficiently destructive. *Id.* at 154, n.2.

126. *See Arnold*, 533 F.3d at 1007–08 ("Other than when 'intrusive searches of the person' are at issue, the Supreme Court has held open the possibility, 'that some searches of property are so destructive as to require' particularized suspicion.") (quoting *Flores-Montano*, 541 U.S. at 155–56) (citation omitted).

127. The Court of Appeals seized on language from our opinion in *United States v. Montoya de Hernandez*, in which we used the word "routine" as a descriptive term in discussing border searches. The Court of Appeals took the term "routine," fashioned a new balancing test, and extended it to searches of vehicles. 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. 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.

Flores-Montano, 541 U.S. at 152 (citations omitted).

128. *Arnold*, 533 F.3d at 1009.

129. *Id.* at 1009.

never intrusive.¹³⁰ By doing this the court is distinguishing and doing away with all the cases that the lower court cites dealing with border searches of the person.¹³¹ These cases state that some heightened measure of suspicion is needed before an intrusive search of a person can be performed.¹³² The property search cases that the Ninth Circuit relies on significantly bolster its case,¹³³ but those cases do not deal with the search of the computer as in *Arnold*. The search of the computer in *Arnold* is more analogous to the intrusive bodily searches than to the property cases, especially the vehicle search cases. The Ninth Circuit is sorely mistaken to distinguish this case from the more humiliating searches that can take place at the airport.

C. Rejection of the Lower Court's Sliding Scale Test

The Ninth Circuit describes the lower court's reliance on *United States v. Vance*¹³⁴ as "erroneous" and rejects the lower court's central premise that a balancing test must be used to weigh the search's intrusiveness against the government's interests.¹³⁵ In *Vance*, the suspect was patted down after a flight from Hawaii to Guam.¹³⁶ The *Vance* court did not suppress the evidence turned up, but noted that "[a]s the search becomes more intrusive, more suspicion is needed."¹³⁷ The Ninth Circuit's *Arnold* opinion reads *Vance* to apply only to searches of the

130. *Arnold* argues that the district court was correct to apply an intrusiveness analysis to a laptop search despite the Supreme Court's holding in *Flores-Montano*, by distinguishing between one's privacy interest in a vehicle compared to a laptop. However, this attempt to distinguish *Flores-Montano* is off the mark. The Supreme Court's analysis determining what protection to give a vehicle was not based on the unique characteristics of vehicles with respect to other property, but was based on the fact that a vehicle, as a piece of property, simply does not implicate the same "dignity and privacy" concerns as "highly intrusive searches of the person."

Id. at 1008. (quoting *Flores-Montano*, 541 U.S. at 152).

131. In any event, the district court's holding that particularized suspicion is required to search a laptop, based on cases involving the search of the person, was erroneous. Its reliance on such cases as *United States v. Vance* to support its use of a sliding intrusiveness scale to determine when reasonable suspicion is needed to search property at the border is misplaced.

Id. (internal citation omitted) (citing *United States v. Arnold*, 454 F. Supp. 2d 999, 1002–04 (C.D. Cal. 2006), *rev'd*, 533 F.3d 1003 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009)).

132. See *Arnold*, 454 F. Supp. 2d at 1002 (citing *United States v. Aman*, 624 F.2d 911, 912–13 (9th Cir. 1980) (real suspicion required for strip search); *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967) (heightened suspicion required for cavity search); *United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970) (articulable suspicion required for strip search)).

133. See *Arnold*, 533 F.3d at 1008–10 (discussing the search of the computer in the context of property and vehicle search cases).

134. 62 F.3d 1152 (9th Cir. 1995).

135. *Arnold*, 533 F.3d at 1008.

136. *Vance*, 62 F.3d at 1155.

137. *Id.* at 1156.

human body.¹³⁸ The lower court read it to apply to the search of Arnold's computer, which it deemed to be sufficiently intrusive to warrant some prior suspicion.¹³⁹ To limit the *Vance* holding, the Ninth Circuit quotes *Flores-Montano* and states that "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."¹⁴⁰ The Ninth Circuit's use of this passage is misplaced. *Flores-Montano* dealt with the search of an automobile's gas tank.¹⁴¹ *Arnold* deals with a much different kind of property, a computer. The language from *Flores-Montano* did not seem to apply to all kinds of property.¹⁴² It just applied to vehicle searches at the border and meant that the gas tank search couldn't be considered highly intrusive.¹⁴³ There is a lower expectation of privacy in an automobile than in a computer and even less in that automobile's gas tank.¹⁴⁴ A computer has the potential to store everything about its owner. It is so much more than a gas tank, and typical routine property border search analysis does not give justice to the magnitude of the intrusion in such a case. The Supreme Court in *Flores-Montano* did not want a balancing test used in dealing with vehicle searches.¹⁴⁵ The holding of *Flores-Montano* does not apply as broadly as the Ninth Circuit wished it did while relying on it. The Supreme Court, in many of its border search cases, is careful to limit the holding to the specific search conducted in the case before it.¹⁴⁶ Many new types of searches can appear at the border, and some amount of suspicion might be needed if the search is of such a highly intrusive nature. The Ninth Circuit is using cases like *Flores-Montano* and *Montoya de Hernandez* to stand for very broad principles of what is reasona-

138. *Arnold*, 533 F.3d at 1008.

139. *United States v. Arnold*, 454 F. Supp. 2d 999, 1003 (C.D. Cal. 2006), *rev'd*, 533 F.3d 1003 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

140. *Arnold*, 533 F.3d at 1008 (quoting *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004)).

141. *Flores-Montano*, 541 U.S. at 150.

142. The Court in *Flores-Montano* was careful to limit its holding to removal of the automobile's gas tank. It did not address other concerns about automobile disassembly and even conceded that some property searches conducted at the border may need to be preceded by reasonable suspicion. *Id.* at 155–56.

143. *Id.* at 152 ("[T]he reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person . . . simply do not carry over to vehicles.").

144. The defendant's lowered expectation of privacy in his car and its gas tank was a significant factor in the outcome of the case. *See id.* at 154.

145. The Court states that no balancing test is needed to search a vehicle at the border, but specifically differentiates this from some highly intrusive searches of the person that may need a reasonable balancing test because they implicate dignity and privacy concerns. *Id.* at 152.

146. *See, e.g., id.* at 155 ("For the reasons stated, we conclude that the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank.").

ble at the border, when they clearly do not stand for such principles.¹⁴⁷ The Supreme Court even states that it leaves open many questions dealing with vehicle searches in *Flores-Montano*.¹⁴⁸ *Montoya de Hernandez* leaves open many questions about bodily searches.¹⁴⁹ The Ninth Circuit was misplaced to believe that these cases make *Arnold* a simple routine border search case delineated on whether the search is of property or of the body. The sliding scale approach used in *Vance*, and relied upon by the lower court, seems to be more on point for the search of a computer's files.¹⁵⁰ The privacy concerns of the computer search would warrant such a careful determination of what the government's interests are and what amount of power it can use to achieve these goals.

The search of a computer implicates the same dignity and privacy concerns as a search of the person. While the search may not endanger physical dignity like a cavity search or alimentary canal search,¹⁵¹ it damages the individual's mental and psychological dignity.¹⁵² The District Court correctly analogized the computer more similarly to the human brain, than to a vehicle.¹⁵³ The reasons are obvious. The government can read an individual's most personal thoughts, see intimate pictures, track Internet browsing history, and follow private conversations.¹⁵⁴ The privacy concerns of the individual are clearly implicated by this search of the computer, and it is not to be analogized to a car or luggage.¹⁵⁵ Once the sliding scale approach from below was done away with, the Ninth Circuit had an easy time characterizing this

147. The Court limits each holding to the specific type of search performed. *See id.* (gas tank searches); *see also* *United States v. Montoya de Hernandez*, 473 U.S. 531, 544 (1985) (alimentary canal search).

148. *Flores-Montano*, 541 U.S. at 155 n.2 ("We again leave open the question whether, and under what circumstances, a border search might be deemed unreasonable because of the particularly offensive manner in which it is carried out.") (internal quotation marks omitted).

149. Because the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches. Both parties would have us decide the issue of whether aliens possess lesser Fourth Amendment rights at the border; that question was not raised in either court below and we do not consider it today.

Montoya de Hernandez, 473 U.S. at 541 n.4.

150. *See United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995) ("As the search becomes more intrusive, more suspicion is needed.").

151. *See Montoya de Hernandez*, 473 U.S. at 534–35.

152. A large concern facing the Court in *Miranda v. Arizona*, 384 U.S. 436, 456 (1966), was the use of psychologically deceptive techniques during interrogation. The Court said of the mental tactics used by police—they "exact[] a heavy toll on individual libert[ies] To be sure, this is not physical intimidation, but it is equally destructive of human dignity." *Id.* at 455–57.

153. *See United States v. Arnold*, 454 F. Supp. 2d 999, 1003–04 (C.D. Cal. 2006), *rev'd*, 533 F.3d 1003 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

154. *See id.* at 1003–04.

155. *Id.* at 1003 (citing *United States v. Molina-Tarazon*, 279 F.3d 709, 716 (9th Cir. 2002); *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004)).

search as just another typical border search case.¹⁵⁶

D. *Mobile Homes, Papers Bags, and Computers*

The court gets even further sidetracked from the relevant issue and goes into a discussion on the noteworthy container cases.¹⁵⁷ *California v. Acevedo*¹⁵⁸ is used by the court for the proposition that storage capacity of the computer is irrelevant to the intrusiveness of the search and that the computer, like any other container, is subject to typical border search analysis.¹⁵⁹ *California v. Carney*,¹⁶⁰ regarding a mobile home search, is another case relied on by the Ninth Circuit.¹⁶¹ *Carney* is also not helpful because since a mobile home is subject to the vehicle exception to the warrant requirement it does not bolster the court's argument that a computer is a traditional container.¹⁶² The Fourth Circuit recognized this distinction in *Ickes* and stated, "However the Constitution limits the government's ability to search a person's vehicle generally, our law is clear that searches at the border are a different matter altogether."¹⁶³ The container and the amount that it can store are really not important. The key factor is the intrusiveness of the search, which has been reiterated by the Supreme Court in border search cases.¹⁶⁴

If the computer was going to be searched like a container then it could be x-rayed to make sure it did not contain something within its casing. This would be the only way that these cases have anything to do with the issue at hand in *Arnold*. A traditional container—like a bag, luggage, or locker—contains a tangible object.¹⁶⁵ And the worthiness of the container is not relevant to Fourth Amendment analysis.¹⁶⁶ Here, the computer is not being searched like a traditional container so the cases do not apply. The computer must be turned on, and the thing to be

156. *United States v. Arnold*, 533 F.3d 1003, 1008 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

157. *Id.* at 1009–10.

158. 500 U.S. 565 (1991).

159. *See Arnold*, 533 F.3d at 1010. *Acevedo* is not really on point with *Arnold*. *Acevedo* holds that if the police have probable cause to search a vehicle, then it is reasonable to search a container located within the vehicle, even if the probable cause does not go to the container itself. *Acevedo*, 500 U.S. at 580.

160. 471 U.S. 386 (1985).

161. *See Arnold*, 533 F.3d at 1009–10. *Carney* holds that even though a mobile home is "capable of functioning as a home," it still is a movable vehicle and subject to search only on a finding of probable cause. *Carney*, 471 U.S. at 393–95.

162. *See Arnold*, 533 F.3d at 1009–10 (discussing *Carney*, 471 U.S. 386).

163. *United States v. Ickes*, 393 F.3d 501, 503 (4th Cir. 2005).

164. *See supra* note 97 and accompanying text.

165. *See, e.g., California v. Acevedo*, 500 U.S. 565, 567 (1991) (paper bag containing marijuana).

166. *Carney*, 471 U.S. at 394 (citing *United States v. Ross*, 456 U.S. 798, 822 (1982)).

searched is not a tangible object. Instead, it is an electronic file or something that must be manipulated for the human eye to see it. This search is far different from opening up a bag and finding cocaine, which the Ninth Circuit seems to think this is analogous to.¹⁶⁷ In the end, the Ninth Circuit concludes that the search here was reasonable without any prior suspicion and that the child pornography found on Arnold's computer should be admitted.¹⁶⁸

V. WHAT SHOULD BE DONE AT THE AIRPORT INSTEAD

A. *Border Search Exception Should be Eliminated*

Any search founded on neither probable cause nor reasonable suspicion should not be constitutional.¹⁶⁹ Thus, the border search exception needs to be eliminated from our Fourth Amendment jurisprudence. The government should not be allowed to violate the constitution strictly because the situation arises at our nation's borders. The constitutional guarantees should apply at all times to restrain the power of the government and to provide the greatest freedom from arbitrary police power to the individual.¹⁷⁰ The Supreme Court's case law has given the government wide latitude in ignoring the constitution at the border.¹⁷¹ The balancing test of reasonableness has now swung right, very much in favor of the government.¹⁷² Courts have routinely decided that individuals have no expectation of privacy at the border and that searches conducted there are nearly always constitutional.¹⁷³ But individuals do have an expectation of privacy at the airport. The government may have a higher interest in searching items at the border, but the individual's interests sitting across from the government's on the scale are not any lower than if the search had occurred within the interior of the country. In this case,

167. See *Arnold*, 533 F.3d at 1009–10.

168. *Id.* at 1008, 1010.

169. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) ("The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. While such suspicion is not an irreducible component of reasonableness, we have recognized only limited circumstances in which the usual rule does not apply.") (citations and internal quotation marks omitted).

170. See *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1052 (1984) (Brennan, J., dissenting) ("The Government of the United States bears an obligation to obey the Fourth Amendment; that obligation is not lifted simply because the law enforcement officers were agents of the Immigration and Naturalization Service, nor because the evidence obtained by those officers was to be used in civil deportation proceedings.").

171. See *Chae Chang Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 603 (1889).

172. See *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004); *United States v. Montoya de Hernandez*, 473 U.S. 531, 539–40, 544 (1985).

173. See, e.g., *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004); *United States v. Ickes*, 393 F.3d 501, 503 (4th Cir. 2005).

since we are dealing with balancing, the balance should be struck in terms of a reasonable suspicion requirement. The search at the border can occur if the government has a well-founded reasonable suspicion. This strikes the balance somewhere in between the best case for the government and the individual.

Admittedly, the government does have legitimate concerns at the border. Its interests are undoubtedly higher there, where the country is the most vulnerable to outside influence and disruption.¹⁷⁴ The government should be given a slight advantage there as compared to within the country. Even conceding this point, the government should need to have a prior reasonable suspicion because searches will be not as arbitrary if some prior suspicion is required as opposed to no suspicion.¹⁷⁵ The government should not get complete authority there, as they have been given under the existing border search exception.¹⁷⁶ Some suspicion should be required before a search could take place. This would strike the balance between state concerns and the dignity of the individual.

B. *Laptop Searches are Highly Intrusive and Nonroutine*

The search of a computer's files is highly intrusive. While differing from a stomach pump or cavity search, the search of a computer can have all the lasting stigma and privacy concerns as the latter.¹⁷⁷ The district court was correct to reason that the computer was just like the mind. According to the court, "opening and viewing confidential computer files implicates dignity and privacy interests. Indeed, some may value the sanctity of private thoughts memorialized on a data storage device above physical privacy."¹⁷⁸

The lower court also stated that "[a] laptop and its storage devices have the potential to contain vast amounts of information. People keep all types of personal information on computers, including diaries, per-

174. See *Chinese Exclusion Case*, 130 U.S. at 603–04.

175. The complete move to reasonableness balancing in Fourth Amendment analysis has never completely occurred. The Court has never truly overruled *Katz*, but the exceptions seem to be the rule. See *supra* note 16 and accompanying text.

176. See *United States v. Ramsey*, 431 U.S. 606, 616–19 (1977) (describing and affirming the government's plenary power at the border); *United States v. Arnold*, 533 F.3d 1003, 1006 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

177. *United States v. Arnold*, 454 F. Supp. 2d 999, 1004 (C.D. Cal. 2006), *rev'd*, 533 F.3d 1003 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009) ("Attorneys' computers may contain confidential client information. Reporters' computers may contain information about confidential sources or story leads. Inventors' and corporate executives' computers may contain trade secrets.").

178. *Id.* at 1003. "[G]overnment intrusions into the mind—specifically those that would cause fear or apprehension in a reasonable person—are no less deserving of Fourth Amendment scrutiny than intrusions that are physical in nature." *Id.* (quoting *United States v. Molina-Tarazon*, 279 F.3d 709, 716 (9th Cir. 2002)).

sonal letters, medical information, photos and financial records.”¹⁷⁹ The lower court was correct in its understanding of intrusiveness and how it applied to this search. This search was not like a vehicle or a briefcase. The computer plays a certain, specific role in the everyday lives of individuals. A search of the files can have a more acute impact on the traveler than a different type of search of a more typical piece of property. A wide-ranging fishing expedition into the contents of a computer’s files can cause the same feelings of fear and apprehension in an individual as a more physical search. If a search can strike fear into the heart of the individual then it is of a highly intrusive nature, regardless of whether the search is of a piece of property.¹⁸⁰

C. Laptop Searches Must be Limited in Scope

In addition to being a highly intrusive search, the search of Arnold’s computer was not limited in scope and therefore was unconstitutional. To be limited in scope the search must be no more intrusive than necessary.¹⁸¹ A limited search of a computer at the airport would be to turn the computer on and see whether it is a normally functioning machine. Once the official learned that the computer was functioning properly the search must end to maintain its limited nature. It could be x-rayed to make sure the computer is not a bomb or contains some kind of illegal material inside its casing. This is the amount of searching that would be reasonable and limited in its scope under the current border search doctrine. The container cases relied upon in the Ninth Circuit’s opinion¹⁸² only increase the wide ranging nature of this search. A typical container can be easily searched and the contents within are easily discernible. To search the files and contents of the computer’s hard drive the official must give it commands for the computer to spill its inner secrets. Buttons must be clicked and keys must be typed to dive further and further into the computer, making the search less and less limited in its scope. The government has no interest in the material contained within the computer at the border. The government has an interest in regulating and enforcing customs,¹⁸³ not peering further into a person’s inner thoughts and habits that are stored within his computer. It is for the owner and the owner alone. Viewing anything that it pleases is not a

179. *Id.* at 1003–04.

180. *Id.* at 1003. (citing *Molina-Tarazon*, 279 F.3d at 716).

181. See *United States v. Price*, 472 F.2d 573, 574–75 (9th Cir. 1973).

182. *United States v. Arnold*, 533 F.3d 1003, 1009–10 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009) (citing *California v. Acevedo*, 500 U.S. 565 (1991); *California v. Carney*, 471 U.S. 386 (1985); *Carroll v. United States*, 267 U.S. 132 (1925)).

183. *United States v. Ramsey*, 431 U.S. 606, 616–19 (1977); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (plurality opinion).

legitimate governmental interest, even when in the name of fighting terrorism and providing safety to Americans.

D. *The Law Must Adapt With Technology*

The presence of new technology in society has prompted the Supreme Court to fashion new Fourth Amendment doctrine before. This should be the next area where Fourth Amendment thinking needs to be altered. The first such example of this is *Katz v. United States*.¹⁸⁴ *Katz* abolished the need for a physical trespass to constitute a search and extended Fourth Amendment protection when the government used an electronic device to listen to and record a person in a phone booth.¹⁸⁵ Prior to *Katz*, the government's use of this device would not have violated the Fourth Amendment.¹⁸⁶

A more recent and important case demonstrating the need to alter Fourth Amendment doctrine when it comes to new technology is *Kyllo v. United States*.¹⁸⁷ In *Kyllo*, the police searched a man's home without probable cause or reasonable suspicion, but this search was of a most unusual sort.¹⁸⁸ From across the street, the police used a thermal image scanner to detect heat that was being emitted through the walls by *Kyllo*'s marijuana-growing lamps.¹⁸⁹ The Court held that the use of the thermal scanner was a search, and therefore "presumptively unreasonable without a warrant."¹⁹⁰ This type of rule should be applied to the search of a laptop computer's files. The Court in *Kyllo* was concerned that the device could pick up "intimate details," which is the exact same concern in *Arnold*.¹⁹¹ A search conducted without any prior suspicion should not be able to detect all the intimate details of a person's life.¹⁹² The intrusiveness and gravity of the liberty interest are too great to be ignored in this area.¹⁹³ The Court in *Kyllo* continued by declining to apply an "intimate details" standard because "no police officer would be able to know *in advance* whether his . . . surveillance picks up 'intimate' details—and thus would be unable to know in advance whether it is

184. 389 U.S. 347 (1967).

185. *Id.* at 353.

186. *Id.* at 352–53 (discussing the change in technology and the Fourth Amendment interpretation from the time of *Olmstead v. United States*, 277 U.S. 438 (1928)).

187. 533 U.S. 27 (2001).

188. *See id.* at 29–30.

189. *Id.*

190. *Id.* at 34–35, 40.

191. *Id.* at 37–38; *see United States v. Arnold*, 454 F. Supp. 2d 999, 1003–04 (C.D. Cal. 2006), *rev'd*, 533 F.3d 1003 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

192. *See Kyllo*, 533 U.S. at 37–38.

193. *Id.* at 34 (describing a particular concern over a person's privacy interests within their home).

constitutional.”¹⁹⁴ An unlimited power to search laptops will pose the exact same concerns as the search in *Kyllo*. The border patrol officer has no idea what he is going to find because he currently needs no justification to conduct his search. It could turn up anything or nothing. This unfettered ability to pry into the intimate details of an individual’s life should be “presumptively unreasonable without a warrant.”¹⁹⁵ While modern technology is evolving at a more rapid pace than the common law and Supreme Court jurisprudence, *Kyllo* is a shining example of the Court recognizing that rules must keep up with society. The analysis of laptop searches at the border must be given a similar reevaluation.

E. *Laptop Searches are Outside the Scope of
Border Search Exception*

Another reason that the border search exception should not be applied to a laptop computer’s files is the reasoning behind the border search exception itself. In *Montoya de Hernandez*, the Court announced again that this was a necessary rule to give the state sufficient power to control contraband, collect tariffs and duties, and to prevent undocumented immigration into the country.¹⁹⁶ None of these concerns apply when a computer arrives at the border. The contraband contained on a computer, usually child pornography, can be downloaded into this country without ever passing through the border. This is totally inapposite to other types of contraband that must always be transported over a physical border. There is no way to smuggle drugs, aliens, or other forms of contraband into the United States without them physically crossing the border, allowing a border official to search and find these items. This rationale underlying the government’s ability to search at the border is of no use when a computer is being searched.¹⁹⁷ If Arnold did not have any “contraband” on his computer at the time of his search at the border, he could easily have gone home and “smuggled” child pornography into this country by using the same computer, and a border search of the computer would have been powerless to prevent it. Without physical contraband on the computer, the border search exception should not apply to the computer because it is just another unnecessary aggrandizement of police power into the private lives of individuals.

In addition, Arnold is not even being searched at the border. He is

194. *Id.* at 39.

195. *Id.* at 40.

196. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (citing *United States v. Ramsey*, 431 U.S. 606, 616–17 (1977)); *Chae Chan Ping v. United States* (Chinese Exclusion Case), 130 U.S. 581, 603–04 (1889).

197. *See Montoya de Hernandez*, 473 U.S. at 537.

only at the functional equivalent of the border.¹⁹⁸ Again, the border search exception was designed to prevent the entrance of physical contraband into the United States by crossing the physical border.¹⁹⁹ Searching electronic files at the functional equivalent of the border shows just how far out of hand this exception to the Fourth Amendment has become. It has become a monster that the courts have decided to keep enlarging in the name of increased security, when this country is really no safer for it.

F. *What Arnold Means to Everyone at the Airport*

1. CURRENT SEPTEMBER 11TH THINKING

The need to combat terrorism is only briefly mentioned by the Ninth Circuit in *Arnold*,²⁰⁰ but the war on terror rationale behind the decision oozes and bubbles out of the opinion. The court in *Arnold* said that it did not want to “protect terrorist communications.”²⁰¹ After September 11th, this court suggests that citizens must lose more of their privacy in the name of battling an amorphous enemy.

In a post–September 11th world, the demand for tighter border security and airline safety has become a key concern for many Americans,²⁰² even at the expense of constitutional protections.²⁰³ Tighter security measures, increased storage of information technology, and greater disregard for constitutional protections all led to the ultimate holding in *Arnold*. “Since September 11th, government agents have been searching and seizing laptops, digital cameras, cell phones, PDAs, and other electronic media at border crossings” under the guise of legitimate crime fighting,²⁰⁴ when this is just another example of expanded state power at the cost of constitutional guarantees. *Arnold*’s holding is a

198. *United States v. Arnold*, 533 F.3d 1003, 1006 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

199. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

200. *See Arnold*, 533 F.3d at 1010.

201. *Id.* (citing and following the reasoning of *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005)).

202. Security, safety, and terrorism have become some of the most important issues in Presidential elections since 2001. *See, e.g.*, CNN Election Center 2008: Homeland Security, <http://www.cnn.com/ELECTION/2008/issues/issues.homelandsecurity.html> (last visited Mar. 19, 2010).

203. *See generally* Michelle Lirtzman, *Surveillance Cameras Win Broad Support*, ABC News, July 29, 2007, <http://www.abcnnews.go.com/US/story?id=3422372&page=1> (noting that the majority of Americans favor the surveillance cameras for the extra security, despite the loss of privacy).

204. *See* Bruce E. H. Johnson & Sarah K. Duran, *Recent Developments in Commercial Speech and Consumer Privacy Interests*, in 952 PRACTISING LAW INSTITUTE: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES No. 14142, COMMUNICATIONS LAW IN THE DIGITAL AGE 53, 79 (2008).

powerful tool for the government. As noted by one law firm client alert, the effects of *Arnold* came quickly:

[R]ecent anecdotal [evidence] indicate[s] that many travelers are being asked to boot up their laptop computers so that border officials may search through the files stored on the computer's hard drive. . . . Some travelers have reported that their mobile phones, BlackBerrys and other handheld devices have also been searched. In some cases, they are merely looked at briefly while the traveler stands by; in other cases, officers retain the devices for several hours and download the content.²⁰⁵

While the border search exception to the Fourth Amendment is usually justified by the government's need to control and enforce customs at the border,²⁰⁶ the government notices that its new power is helpful in general law enforcement. The government now claims it searches computers at the airport to fight child pornography.²⁰⁷ Interestingly, searching computers is turning up child pornography rather than providing any kind of additional safety to Americans. While child pornography is a disgusting and heinous practice, "it is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."²⁰⁸

2. *ARNOLD* HAS ALREADY DOOMED ANOTHER TRAVELER

The holding of *Arnold* has already been followed by the Ninth Circuit in *United States v. Singh*.²⁰⁹ In *Singh*, the defendant was stopped at the border based on possible immigration document fraud.²¹⁰ The government decided to search his laptop computer.²¹¹ The *Singh* opinion is only three paragraphs long.²¹² Only one is dedicated to the Fourth Amendment issue and the only case cited is *Arnold*.²¹³ In the Ninth Circuit the holding in *Arnold* is devastating to an individual's claim of pri-

205. *U.S. Client Alert: U.S. Border Officials May Search Travelers' Electronic Devices*, FRAGOMEN NEWS AND RESOURCES, July 31, 2008, <http://www.fragomen.com/newsresources/xprNewsDetailFrag.aspx?xpST=USAlerts&news=205>.

206. See *United States v. Ramsey*, 431 U.S. 606, 616–17 (1977).

207. See FRAGOMEN NEWS AND RESOURCES, *supra* note 205. ("The U.S. Department of Homeland Security . . . claims that searches and seizures of electronic devices at the border are justified by security concerns and in order to fight child pornography . . .").

208. *United States v. Montoya de Hernandez*, 473 U.S. 531, 548 (1985) (Brennan, J., dissenting) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)) (internal quotation marks omitted).

209. No. 07-30421, 2008 WL 4426643, at *1 (9th Cir. Sept. 29, 2008) (citing *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009)).

210. *Id.*

211. *Id.*

212. See *id.*

213. *Id.*

vacy in his computer at the border, and it could be equally crippling around the country if *Arnold* is followed by the other Circuits.²¹⁴ So much so that the Ninth Circuit deems it is the only case it would need to cite to dispatch with Singh's argument in short shrift. It gives very little credence to the notion that any reasonable suspicion would actually be a requisite to perform a search of this type on Singh's computer.²¹⁵ The effect of the *Arnold* holding on searches such as these is described as this:

The parties are familiar with the facts. We address the law. Singh's argument that the border officer needed reasonable suspicion to search his laptop computer is squarely foreclosed by *United States v. Arnold*. There, we held that searches of the defendant's computer hard drive at the border, like searches of other property, did not require reasonable suspicion under the Fourth Amendment.²¹⁶

CONCLUSION

The Fourth Amendment is just a shadow of its former self, from the height of its breadth in *Katz*,²¹⁷ to where the Amendment is being completely ignored in *Arnold*.²¹⁸ The Amendment is on a slow march towards its demise, where nearly all governmental search and seizure is deemed to be reasonable. An overarching rules structure based on probable cause and warrants has nearly completely been replaced by a balancing test that is skewed in favor of the government in almost every case. The Court has come to embrace reasonableness in the context of searches conducted at the border in case after case, upholding arbitrary searches based on no justification. The government agents have nearly unlimited discretion to conduct these searches. This border search exception is a doctrine that must be done away with as repugnant to the spirit of the Fourth Amendment. The government should not be given a completely arbitrary power to search individuals, even when the search takes place at the functional equivalent of the international border. The constitution should not be placed aside in favor of an absolute power for law enforcement and border patrol just because a search takes place at the border.

If this shameful practice is going to continue, then what happened to *Arnold* should not fit within this exception. The search of a laptop is highly offensive and intrusive. A reasonable suspicion must be necessary before the search can take place. Here, the agents had no reason to

214. *See id.*

215. *Id.*

216. *Id.* (internal citations omitted).

217. *See supra* Part I.A.

218. *See supra* Part IV.A–D.

believe Arnold was doing anything out of the ordinary, but arbitrarily searched him because they possessed this power. Even though he happened to have incriminating photos does not mean the next poor individual will; who knows how many people have already been subjected to this arbitrary practice? A search is not constitutional because of "what it turns up."²¹⁹

The intrusiveness of the laptop search is obvious. It intrudes into its owner's thoughts and feelings, just as if it were his or her mind. Being able to search documents, Internet browsing history, and anything else an individual has in his or her laptop can be just as degrading as a physical search. The search here was also not limited in scope. This fact alone should make the search fail any type of constitutional scrutiny. A limited search of a computer would verify whether the device is operational and not a concealed bomb or a carrier of some type of contraband. A wide-ranging foray into his privacy is not reasonable because it is in no way limited.

The border search exception is supposed to help the government enforce customs and create greater security at the border.²²⁰ Since September 11th, many Americans welcome their new loss of privacy for a sense of extra protection. The government has not been very effective in using this power to provide extra security, but, since it is finding travelers carrying pornography, the government conveniently now says that that was a rationale behind the power all along.²²¹ The decision here has wide-ranging impacts on international travel. Business travelers must be prepared to have documents, files, and anything else they store on their computer searched when entering the country. Any citizen must be prepared to divulge whatever information his or her computer possesses because the government wants to see it. The government is very interested in what you are thinking, seeing, watching, and reading. This broadening of the border search exception will now give the government a nice excuse to look.

219. *Bumper v. North Carolina*, 391 U.S. 543, 548 n.10 (1968).

220. *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977).

221. See FRAGOMEN NEWS AND RESOURCES, *supra* note 205.