

# FEAR AND LOATHING AT THE U.S. BORDER

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## INTRODUCTION

On November 3, 2010, David House arrived at Chicago O’Hare International Airport, returning to the United States after a vacation in Mexico. After passing through customs, he was stopped by two government agents from the Department of Homeland Security. The agents detained him and took his laptop computer. Forty-nine days later, they returned his computer to him.<sup>1</sup> The government’s position is that the Fourth Amendment

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<sup>1</sup> *House v. Napolitano*, No. 11-10852-DJC, 2012 WL 1038816, at \*3-4 (D. Mass. Mar. 28, 2012). As a result of the actions taken, House sued the Secretary of the Department of Homeland Security, among others, and the facts cited here are those cited in his complaint, as recited by the district court.

provides no protection to David House from this search and seizure of his personal electronic device at the border.<sup>2</sup>

Why did Customs and Border Patrol select David House for this search and seizure? It did so for political reasons. House was a founding member of the Bradley Manning Support Network and developer of the organization's website.<sup>3</sup> Bradley Manning was a United States serviceman in Iraq, who was arrested in May 2010 for having disclosed to WikiLeaks a video of U.S. forces killing Iraqi civilians during a 2007 air strike on Baghdad, and also for having disclosed various State Department cables.<sup>4</sup> Manning was charged with disclosing classified information and knowingly supplying intelligence to the enemy.<sup>5</sup> House and others formed the Support Network to coordinate international support for Manning and raise funds for his legal defense.<sup>6</sup>

House alleges, in his pending lawsuit against government officials, that after forming the organization, he became the target of federal investigators.<sup>7</sup> House alleges he was subject to ongoing surveillance and that he was questioned at work, at home, and at the airport every time he reentered the United States.<sup>8</sup> This time, on November 3, 2010, the officers also asked him questions about his relationship to Manning and WikiLeaks.<sup>9</sup> They did not ask him any questions "related to border control, customs, trade, immigration or terrorism."<sup>10</sup>

To further clarify the problem, imagine the following scenario. The United States is facing a number of key Congressional elections. The Democratic Party controls the Executive Branch, but the Republican Party controls the Legislative Branch. The Executive Branch obviously wants to regain control of the Legislative Branch in order to have the power

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<sup>2</sup> While the district court agreed with the government as to the initial search and seizure, it found that the prolonged length of seizure of the computer did implicate a possible Fourth Amendment violation and hence that claim survived the government's motion to dismiss. *Id.* at \*9-10.

<sup>3</sup> *Id.* at \*3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at \*4.

<sup>10</sup> *Id.*

to pass its agenda. The Executive Branch orders Customs and Border Patrol to search the personal electronic devices of all Republican congressmen and women returning to the United States after any international travel. Their hope is that agents will uncover anything from pornography to politically sensitive material to intelligence on election strategies that can be used against the members of the Republican Party in the upcoming elections. Like David House, these congressmen and women are targeted for no other reason than political purposes. The government's position, as set forth in House's case, would allow such a search as constitutionally permissible.

So far, the government's position that border searches of personal electronic devices (PEDs) do not violate the Fourth Amendment seems to have traction in the courts.<sup>11</sup> The district court reviewing David House's Fourth Amendment claim on a motion to dismiss summarily rejected two of his arguments. House's first argument was that it mattered *why* his laptop was seized and searched.<sup>12</sup> Citing *Whren v. United States*,<sup>13</sup> the court rejected this argument in one line, saying, "[T]he Court . . . may not consider the underlying intent or motivation of the officers when analyzing the viability of a Fourth Amendment claim,"<sup>14</sup> In *Whren*, the Supreme Court held that an officer's subjective motivation for a seizure is irrelevant to the reasonableness of the seizure as long as there was an objective, lawful basis.<sup>15</sup> *Whren*, however, has not been explicitly applied to contexts such as border searches, where no objective basis for a search or seizure is

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<sup>11</sup> See *infra* note 38 and accompanying text. These searches have the potential to violate the First Amendment if plaintiffs can prove a "direct and substantial" interference with their rights of association or speech. *Lyng v. Int'l Union*, 485 U.S. 360, 366 (1988) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)). In House's case, his First Amendment claim survived the motion to dismiss. *House*, 2012 WL 1038816, at \*12-13. However, success on these claims is far from guaranteed. See generally Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41 (2011) (discussing hurdles to First Amendment challenges to questioning by border patrol). In any case, the possibility of a First Amendment remedy has no bearing on whether there should also be a Fourth Amendment remedy.

<sup>12</sup> *House*, 2012 WL 1038816, at \*8.

<sup>13</sup> 517 U.S. 806, 813 (1996).

<sup>14</sup> *House*, 2012 WL 1038816, at \*8.

<sup>15</sup> *Whren*, 517 U.S. at 813.

necessary. The argument against this doctrine's application at the border is that there is otherwise no Fourth Amendment barrier to the government targeting a politically unpopular citizen for a search of his PEDs.

The second argument rejected by the court was that it mattered that officials searched his *laptop* as opposed to his luggage.<sup>16</sup> The court rejected this argument, as other courts have, reasoning that a search of a laptop or other PED is "routine," like a search of any other property, and therefore requires no degree of suspicion.<sup>17</sup> The "dignity and privacy interests" alleged to attach to the information contained on a laptop do not involve the same "dignity and privacy interests" as the "non-routine" and "highly intrusive" strip searches and body cavity searches, the only situations where the Supreme Court has required a degree of suspicion.<sup>18</sup> Hence, after targeting a person for his political beliefs, the government asserts, and lower federal courts thus far have largely agreed, that it can search through volumes of House's private "papers" contained in his PED simply because he decided to travel to Mexico, and not domestically, on vacation.

In this Paper, we argue that when technology crosses the border in the form of PEDs, there is a unique confluence of factors that requires a fresh look at the border search exception. International travel is now commonplace, or at least relatively routine, and PEDs are ubiquitous and often necessary during travel. In this context, combining *Whren* with current law regarding border search results in government searches which, we submit, are "unreasonable" under the Fourth Amendment. In Part I, we demonstrate how the border search exception to the Fourth Amendment has never actually gone through a doctrinal development, and, as such, it is rather thoughtless. In Part II, we show how the doctrine should appear if developed as an administrative search rather than a *sui generis* historical exception. In this part, we demonstrate why the doctrine dictates that motive matters, at least when it comes to PEDs. Finally, in Part III, we suggest that a correct Fourth Amendment analysis

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<sup>16</sup> *House*, 2012 WL 1038816, at \*3.

<sup>17</sup> *Id.* at \*7.

<sup>18</sup> *Id.* (internal quotation marks omitted) (quoting *United States v. Flores Montano*, 541 U.S. 149, 152 (2004)).

would allow a continuance of the suspicionless border searches that *everyone* undergoes, but that before a person can be targeted for a more intrusive, discretionary secondary search or seizure of her PED, agents must have at least reasonable suspicion of criminal activity.

#### I. THE DEVELOPMENT, OR LACK THEREOF, OF THE BORDER SEARCH DOCTRINE

In studying the federal courts' and the Supreme Court's cases in the area of the border search exception to the Fourth Amendment, there is precious little to learn. Each case cites the talismanic phrases of a few Supreme Court decisions, which serve to close the door to a challenge as soon as it is opened. Border searches, as one of those phrases goes, "have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from the outside."<sup>19</sup> They require neither warrant nor suspicion.<sup>20</sup>

There has been no analysis or development of the law in this area; the border search has always been taken for granted. It is believed that the founders of our country embraced a border search exception to the Fourth Amendment when the amendment was adopted. The same Congress that passed the Fourth Amendment had also previously passed the Act of July 31, 1789, which allowed border officials to conduct warrantless searches of ships and vessels entering the United States.<sup>21</sup> This exception was embraced by the Court in *Boyd v. United States*,<sup>22</sup> where the Justices recognized that "in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment."<sup>23</sup>

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<sup>19</sup> *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

<sup>20</sup> *Id.*

<sup>21</sup> The statute still remains in effect today in legislative form. 19 U.S.C. § 482 (2006) (allowing officers authorized to board vessels to search vehicles and persons "on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law.").

<sup>22</sup> 116 U.S. 616 (1886).

<sup>23</sup> *Id.* at 624.

This limited exception, originating from the time of the Fourth Amendment's adoption, inspired the Court, in 1977, in *United States v. Ramsey*, to make the following blanket exception that has driven the doctrine for every manner and kind of border search that has followed:

Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. 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>24</sup>

The development of the doctrine has more or less stopped there. The only refinement of this incredibly broad search power has been the development of a requirement of reasonable suspicion for non-routine body searches, such as a body cavity or strip search.<sup>25</sup>

Every other conceivable search and seizure at the border (or the functional equivalent of the border, such as an international airport) has been deemed "routine" and not requiring any degree of particularized suspicion under the Fourth Amendment.<sup>26</sup> The Court does not require any particularized suspicion to target a

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<sup>24</sup> 431 U.S. at 619.

<sup>25</sup> See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (holding that reasonable suspicion of alimentary canal smuggling is required for a non-routine prolonged detention to await a bowel movement); *United States v. Mastberg*, 503 F.2d 465 (9th Cir. 1974) (holding reasonable suspicion justifies strip search at border); *Rivas v. United States*, 368 F.2d 703 (9th Cir. 1966) (requiring "clear indication" of possession of narcotics before intrusion beyond the body's surface), *cert. denied*, 386 U.S. 945 (1967).

<sup>26</sup> See, e.g., *United States v. Flores-Montano*, 541 U.S. 149 (2004) (removal and disassembly of motorist's fuel tank at the border "routine" and did not require any suspicion); *United States v. Braks*, 842 F.2d 509 (1st Cir. 1988) (holding that lifting of skirt to reveal girdle more in the nature of a "routine" border search); *United States v. Oyekan*, 786 F.2d 832 (8th Cir. 1986) (holding pat-down search "routine" border search). *But see* *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc) (holding that a comprehensive forensic examination of a laptop at the border impacts the "dignity and privacy interests of a person" and requires reasonable suspicion); see also *infra* note 38.

person for a second, longer detention with another search.<sup>27</sup> For example, in *Tabbaa v. Chertoff*,<sup>28</sup> the Customs and Border Patrol questioned, fingerprinted, photographed, frisked, used some physical force on, and searched the cars of a group of U.S. citizens who were coming back to the United States after attending an Islamic conference in Toronto.<sup>29</sup> The border agents detained them for between four and six hours and questioned them about their activities at the conference.<sup>30</sup> The Second Circuit found all of this “routine” under the border search exception and required no further Fourth Amendment scrutiny.<sup>31</sup>

In David House’s case, the district court’s only Fourth Amendment concern was with the length of the seizure of House’s laptop.<sup>32</sup> On the search and seizure of his laptop itself, the court fell in line with every other federal court to consider the issue. The search of a PED, despite its unique capacity to store volumes of highly personal, sensitive, and privileged information, is “routine,” requiring no particularized suspicion.<sup>33</sup> As with the recent debate over whether police can search cell phones “incident to arrest,” courts analogize PEDs to ordinary containers, like luggage, simply

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<sup>27</sup> In *United States v. Martinez-Fuerte*, 428 U.S. 543, 547 (1976), the government admitted it did not have suspicion for either the stop at the border checkpoint, to which all were subject, or for the detention of the defendant at a secondary inspection station. The Court treated the entire procedure as allowable suspicionless border procedure. *Id.*; see also Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 286-287 (2011).

<sup>28</sup> 509 F.3d 89 (2d Cir. 2007).

<sup>29</sup> *Id.* at 94-95.

<sup>30</sup> *Id.* at 95.

<sup>31</sup> *Id.* at 99-101.

<sup>32</sup> *House v. Napolitano*, No. 11-10852-DJC, 2012 WL 1038816, at \*9 (D. Mass. Mar. 28, 2012). The court deferred the issue of whether forty-nine days of detention was “reasonable.” *Id.* Immigration and Customs Enforcement procedures allow seizure for thirty days unless circumstances exist to warrant more time. *Id.* The government contended such circumstances existed. *Id.*

<sup>33</sup> *Id.* at \*7; *United States v. Arnold*, 533 F.3d 1003, 1008 (9th Cir. 2008) (holding no reasonable suspicion needed for border officials to search laptop), *cert. denied*, 555 U.S. 1176 (2009); *United States v. Ickes*, 393 F.3d 501, 505 (4th Cir. 2005) (same); *cf.* *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc) (holding that a “comprehensive” forensic examination of a laptop at the border requires reasonable suspicion, as distinguished from a “quick look and unintrusive search of a laptop, which does not require reasonable suspicion). While the authors agree with the holding in *Cotterman*, we go further and argue that *all* searches of PEDs at the border, forensic or manual, implicate the same “substantial privacy interests” that persuaded the Ninth Circuit. *Id.*

capable of holding more.<sup>34</sup> However, as we will show, the nature of the container makes a difference when it comes to suspicionless, discretionary, secondary searches at the border.

By dint of historical pedigree, the border search doctrine is unmoored from every other “administrative needs” search scrutinized by the Court. If it were treated as the administrative search that it is, the courts would scrutinize and likely condemn the extraordinary breadth of discretion and potential for abuse of that discretion by border officials. While the border search exception came of age during a time when few ordinary citizens crossed the international borders, many now do, taking international flights and carrying their PEDs as a matter of course and necessity.<sup>35</sup> An international border crossing is no longer *sui generis* and extraordinary. Privacy expectations and technology are as present at the border as they are within the United States. It is well past time to take a fresh—even first—look at the border exception and consider reining in the extraordinary power of government officials.

## II. BORDER SEARCHES AS ADMINISTRATIVE SEARCHES

The lip service paid to the dying warrant clause of the Fourth Amendment is that any search or seizure undertaken by government agents without a warrant is *per se* unlawful. Of course, there are many exceptions to the warrant requirement.<sup>36</sup>

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<sup>34</sup> See, e.g., *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007) (upholding warrantless search of cell phone incident to arrest), *cert. denied*, 549 U.S. 1353 (2007); *United States v. Hill*, No. CR 10-00261 JSW, 2011 WL 90130 (N.D. Cal. Jan. 10, 2011) (same); *United States v. Wurie*, 612 F. Supp. 2d 104, 109-11 (D. Mass. 2009) (same).

<sup>35</sup> See *Cotterman*, 709 F.3d at 952 (“Every day more than a million people cross American borders, from the physical borders with Mexico and Canada to functional borders at airports such as Los Angeles (LAX), Honolulu (HNL), New York (JFK, LGA), and Chicago (ORD, MDW). As denizens of a digital world, they carry with them laptop computers, iPhones, iPads, iPods, Kindles, Nooks, Surfaces, tablets, Blackberries, cell phones, digital cameras, and more. These devices often contain private and sensitive information ranging from personal, financial, and medical data to corporate trade secrets.”).

<sup>36</sup> See, e.g., *Arizona v. Gant*, 556 U.S. 332 (2009) (search incident to arrest exception); *Brigham City v. Stuart*, 547 U.S. 398 (2006) (exigency exception); *California v. Acevedo*, 500 U.S. 565 (1991) (automobile exception); *Horton v. California*, 496 U.S. 128 (1990) (plain view exception); *Colorado v. Bertine*, 479 U.S. 367 (1987) (inventory exception); *United States v. Watson*, 423 U.S. 411 (1976) (public arrest exception); *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk exception).



Those exceptions nonetheless typically require the police to have some particularized suspicion before engaging in the search or seizure, whether it is probable cause or the lower threshold of “reasonable suspicion.”<sup>37</sup>

However, the Court has allowed for one breed of suspicionless search and seizure when the primary purpose of the search or seizure is not to detect ordinary criminal wrongdoing and individualized suspicion of criminal activity is deemed not to be a relevant or appropriate measure. This breed is “administrative” or “special needs” searches. While individualized suspicion is not relevant in these circumstances, the “reasonableness” requirement of the Fourth Amendment must still be met.<sup>38</sup>

In *Brown v. Texas*,<sup>39</sup> the Court set out a three-factor balancing test to determine whether an administrative needs search is “reasonable” for Fourth Amendment purposes.<sup>40</sup> Those three factors are: (1) the gravity of the public concerns served (often phrased as the importance of the government interest); (2) the degree to which the seizure (or search) advances the public interest, (i.e., the efficacy of the procedures); and (3) the severity of the interference with individual liberty (also described as intrusion on individual privacy).<sup>41</sup> We will take each of these and apply them to the border search.

#### A. *Intrusion on Individual Liberty or Privacy*

In an administrative search or seizure, given that the procedure will be undergone without any degree of suspicion, a key ingredient to reducing the intrusion on individual liberty or privacy is the minimization of police discretion. In *Camara v.*

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<sup>37</sup> Probable cause is required for a warrantless automobile exception, *Carroll v. United States*, 267 U.S. 132 (1925), and for a public arrest, *United States v. Watson*, 423 U.S. 411 (1976). Reasonable suspicion is required for a warrantless stop and frisk, *Terry v. Ohio*, 392 U.S. 1 (1968), a protective sweep of a house, *Maryland v. Buie*, 494 U.S. 325 (1990), seizure of property, *United States v. Place*, 462 U.S. 696 (1983), and a frisk of a car, *Michigan v. Long*, 463 U.S. 1032 (1983).

<sup>38</sup> See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (describing requirements); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (same); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (same).

<sup>39</sup> 443 U.S. 47, 50 (1979).

<sup>40</sup> *Id.* at 50-51.

<sup>41</sup> *Id.*

*Municipal Court*,<sup>42</sup> the case that introduced the administrative needs exception, the Supreme Court emphasized the need for standardized procedures involving neutral criteria so as not to leave individuals “subject to the discretion of the official in the field.”<sup>43</sup> Individuals to be seized or searched should not experience surprise, fear, or concern of being purposely singled out by the government for differential treatment.

Hence, the Supreme Court has held that police officers cannot rove and engage in suspicionless stops of vehicles in search of violations of licensing and registration laws<sup>44</sup> or in search of illegal aliens having crossed the border.<sup>45</sup> However, police and border patrol can set up checkpoints with standardized procedures to do the same.<sup>46</sup> Checkpoints minimize the potential abuse of discretion because there is a plan for eliminating discretion as to who is stopped—either everybody is stopped or everyone in a pre-set random scheme (e.g., every third car) is stopped. Only upon a showing of individualized suspicion can an officer single out a particular individual from the checkpoint for further scrutiny at a secondary station.<sup>47</sup>

It is instructive to look at airport screening searches and seizures as there are many similarities to border searches. When airport screening procedures to deter hijacking began in the 1970s, the courts had to grapple with whether they satisfied the reasonableness clause of the Fourth Amendment. The Ninth Circuit and the California Supreme Court both upheld as constitutional pre-departure screening of carry-on baggage at the

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<sup>42</sup> 387 U.S. 523 (1967).

<sup>43</sup> *Id.* at 532.

<sup>44</sup> *Delaware v. Prouse*, 440 U.S. 648, 662 (1979) (citing “grave danger” of abuse of discretion” in allowing police to stop citizens at random for regulatory checks).

<sup>45</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (holding it was not a proper administrative search, citing *Camara*’s condemnation of searches at the “discretion of the official in the field”); *see also* *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (disallowing roving stop near border when only ground for suspicion was occupants appeared to be of Mexican ancestry).

<sup>46</sup> *See Prouse*, 440 U.S. at 663 (suggesting that “[q]uestioning of all oncoming traffic at roadblock-type stops” would be a lawful means of effectuating a regulatory check); *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-77 (1976) (upholding checkpoints to look for illegal aliens crossing the border).

<sup>47</sup> *See, e.g., Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 454-55 (1990) (upholding checkpoint for drunk driving where individuals only detained at secondary station upon signs of intoxication).

airport, in part because *all* passengers were required to undergo the screening.<sup>48</sup> As the California Supreme Court said:

[A] . . . feature of public facility screening searches which operates to soften the impact of their intrusion upon individual privacy is the fact that all citizens who wish to use the particular facility involved are subject to the same screening procedures. No one is singled out for different treatment from his fellow travelers. There is no social stigma associated with airport screening inspections and the individuals who must submit to these searches do not run the risk of public ridicule or suspicion.<sup>49</sup>

By contrast, there are no procedures to minimize the discretion of border officials as to when, where, and how they search the PEDs of persons crossing the border. While there are procedures and policies set forth by the Department of Homeland Security, those procedures allow an officer to search and seize, for up to five days, *any* person's laptop without individualized suspicion.<sup>50</sup> Officers can, and do, choose individuals for a more intense search on the basis of race, religion, or other proxies for potential terrorists.<sup>51</sup> There is also complete discretion to engage in a search for evidence of ordinary criminal wrongdoing. While the Customs and Border Patrol demands from *everyone* certain identification documents and declaration forms describing what is being brought into the country. They do not search everyone's PEDs.<sup>52</sup> Indeed it would not be practical. Rather, individuals are

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<sup>48</sup> *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973), *overruled on other grounds* by *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007); *People v. Hyde*, 524 P.2d 830 (Cal. 1974).

<sup>49</sup> *Hyde*, 524 P.2d at 843.

<sup>50</sup> U.S. Customs and Border Protection, *CBP Directive No. 3340-049, Border Search of Electronic Devices Containing Information*, §§ 5.1–5.3.1.1 (2009), [http://www.dhs.gov/xlibrary/assets/cbp\\_directive\\_3340-049.pdf](http://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf).

<sup>51</sup> See *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007); see also *infra* note 54; Tracey Maclin, "Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror, 73 *MISS. L.J.* 471 (2003) (describing and condemning post-9/11 ethnic profiling).

<sup>52</sup> While we admit that a luggage search also appears to be discretionary at the border, the nature of the container makes all of the difference here. As described by the Ninth Circuit in *Cotterman*:

The amount of private information carried by international travelers was traditionally circumscribed by the size of the traveler's luggage or

hand-picked by the Customs and Border Patrol, with no required degree of suspicion, for a further detention, questioning, and a PED search.

And who do they chose? David House, for example, or Zakariya Reed, a United States citizen and veteran of the National Guard who converted to Islam and was questioned at the border about a letter to the editor he wrote that criticized United States support for Israel and for the war in Iraq.<sup>53</sup> People of Arab descent and Muslims are pulled aside for detailed searches of their PEDs and asked to identify family members in photographs, answer questions about their local mosques and their views on foreign policy.<sup>54</sup> The United States fears Muslims, and Muslims fear the intrusive process of international travel. That is the “fear” in the title of this Article.

While a PED may not be more special than a suitcase when police have probable cause or reasonable suspicion for a search, it is of a different caliber when absolute discretion is combined with a lack of particularized suspicion. It is by necessity that most of us travel with most of the confidential and personal documents we

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automobile. That is no longer the case. Electronic devices are capable of storing warehouses full of information. The average 400-gigabyte laptop hard drive can store over 200 million pages—the equivalent of five floors of a typical academic library. . . . The nature of the contents of electronic devices differs from that of luggage as well. Laptop computers, iPads and the like are simultaneously offices and personal diaries. They contain the most intimate details of our lives: financial records, confidential business documents, medical records and private emails. This type of material implicates the Fourth Amendment’s specific guarantee of the people’s right to be secure in their ‘papers.’ . . . 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. 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. A person’s digital life ought not be hijacked simply by crossing a border. When packing traditional luggage, one is accustomed to deciding what papers to take and what to leave behind. When carrying a laptop, tablet or other device, however, removing files unnecessary to an impending trip is an impractical solution given the volume and often intermingled nature of the files. It is also a time-consuming task that may not even effectively erase the files.

United States v. Cotterman, 709 F.3d 952, 964-65 (9th Cir. 2013).

<sup>53</sup> Sinnar, *supra* note 11, at 52.

<sup>54</sup> *Id.* at 52-55 (cataloguing numerous such incidents).

possess on our PEDs. Simply by travelling internationally, we place all of that information at the feet of government officials.

Besides targeting Arabs and Muslims for searches of their PEDs, the other likely party is a citizen with a criminal conviction related to child sex abuse. Here is the “loathing”: there is no more hated person in this country. Even if that conviction is over ten years old, that individual may be pulled aside and his PED searched for child pornography.<sup>55</sup> Or, as in the case of Michael Arnold, the agent’s choice to search a computer may be random, but upon viewing photos of two nude women, the traveler is pulled aside, detained for several hours, questioned about the contents of the computer, while agents search the computer, ultimately uncovering images “believed to be” child pornography.<sup>56</sup> No reasonable suspicion is required as agents rummage through the personal file drawers of a person’s computer, revealing intensely private, confidential, and noncriminal material.

The intrusion on individual privacy and liberty is therefore great in these targeted, suspicionless searches of PEDs. For reasons of the border patrol officer’s individual choice, untethered from any articulable suspicion, individuals are singled out for different treatment. Whether the person turns out to be a common criminal or an innocent citizen, the privacy interest is great and the minimization of discretion of the officer in the field is utterly absent.

### *B. Importance of the Government Interest*

A second balancing factor in the administrative search analysis is the gravity of the public concern that calls for the implicated search or seizure. As a general matter, what are the government’s interests in searches at the border? No Supreme Court case has adequately defined those interests, in part because

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<sup>55</sup> For example, in *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013), Howard Cotterman was convicted in 1992 of various child sex offenses. As a result of being a registered sex offender, his name appeared on an alert system. Fifteen years later, in 2007, he was driving from Mexico to the United States with his wife and, because of the alert, he was sent to a secondary inspection station for an initial search of his and his wife’s laptops, which the Court held could be done without reasonable suspicion. *Id.*

<sup>56</sup> *United States v. Arnold*, 533 F.3d 1003, 1005 (9th Cir. 2008).

they are assumed to be so important as not to be second-guessed. The Court has not refined a definition of the government interest beyond vague notions of “inherent authority to protect, and a paramount interest in protecting, its territorial integrity.”<sup>57</sup>

More defined interests can be gleaned from the substance of the Court’s cases. It is clear that the Court believes that among the major territorial integrity concerns of the government today are the smuggling of aliens and contraband, particularly drugs, across the border. Since 9/11, Congress and the Department of Homeland Security have added the paramount interest in preventing terrorists from entering the United States. There is little question that these government concerns are both serious and related to territorial integrity.<sup>58</sup>

The Department of Homeland Security defines the governmental interests at the border in a much broader fashion. It describes searches of electronic devices as “essential to enforcing the law at the United States Border” and crucial to detecting evidence relating to terrorism and other national security matters, narcotics and human smuggling, alien admissibility, contraband and child pornography.<sup>59</sup> The addition of child pornography is curious. The presence of child pornography on a PED does not indicate the smuggling of child pornography across the border.

First, it is far more likely that these images are carried around on a PED at all times than that they are collected in a different country. Second, information transmitted electronically does not implicate the border—it need not be physically smuggled across the border, such as with drugs or other physical contraband. Rather, electronic information is transmitted from one electronic device to another with the click of a button. The digital world has no borders. Information may be contained in

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<sup>57</sup> United States v. Flores-Montano, 541 U.S. 74, 153 (2004).

<sup>58</sup> While it is difficult to dispute the importance of preventing terrorists from crossing our borders, the link to 9/11 as proof of its importance is disingenuous. The 9/11 terrorists were already in the United States for months, training and getting information electronically. Their activities were not discernible at the border. See 9/11 Commission, *The 9/11 Commission Report*, 215–240, available at [http://govinfo.library.unt.edu/911/report/911Report\\_Ch7.pdf](http://govinfo.library.unt.edu/911/report/911Report_Ch7.pdf).

<sup>59</sup> Carolyn James, *Balancing Interests at the Border: Protecting Our Nation and Our Privacy in Border Searches of Electronic Devices*, 27 SANTA CLARA COMPUTER & HIGH TECH. L.J. 219, 224 (2010) (quoting and citing *CBP Directive No. 3340-049*, *supra* note 50, § 5.3.2.2).

“clouds” and accessed by individual PEDs. The courts lag far behind in their understanding of the global-digital world and its lack of relationship to “territorial integrity.” It is not even discussed in the cases.<sup>60</sup> A search for child pornography on a PED is not a search related to the border but is done for the governmental interest in ordinary crime control.

Courts that have upheld searches of PEDs at the border without requiring any degree of suspicion have almost all involved searches that uncovered images of child pornography.<sup>61</sup> The courts assumed, without analysis, that this was a legitimate concern at the border and did not address whether this was an unlawful general search for evidence against citizens who happen to be traveling across the border. It is a violation of the Fourth Amendment to engage in a suspicionless search for ordinary criminal wrongdoing,<sup>62</sup> and, more importantly, allowing such discretionary searches leads to larger abuses, which can ultimately chill basic freedoms of association, travel, dissension, thought, and privacy. Allowing the government to ferret through our PEDs when we travel internationally threatens democracy.

### *C. The Degree to Which the Search Advances the Government Interest*

This brings us to the issue of *the degree* to which searches of PEDs advance important governmental interests at the border. Without requiring any suspicion toward an individual, how

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<sup>60</sup> While approving a search for child pornography at the border, the Ninth Circuit, in *Cotterman*, nonetheless recognized that “cloud computing” is problematic because the digital device is like a key to a safe deposit box, which itself “does not itself cross the border,” but “may appear as a seamless part of the digital device when presented at the border.” *United States v. Cotterman*, 709 F.3d 952, 965 (9th Cir. 2013).

<sup>61</sup> See, e.g., *Arnold*, 533 F.3d 1003; *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005); *United States v. Irving*, No. S3 03 CR.0633 (LAK), 2003 WL 22127913 (S.D.N.Y. Sept. 15, 2003); *United States v. Bunty*, 617 F. Supp. 2d 359 (E.D. Pa. 2008); *Cancel-Rios v. United States*, Civil No. 10-1386 (JAF), Crim. No. 08-369, 2010 WL 3420805 (D.P.R. Aug. 30, 2010); see also, *Cotterman*, 709 F.3d 952. While requiring reasonable suspicion for a comprehensive forensic examination that uncovered child pornography, the Court held no reasonable suspicion required for a manual, cursory search.

<sup>62</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding checkpoint invalid because primary purpose was to uncover evidence of ordinary criminal wrongdoing).

effective is searching an individual's PED for finding evidence of terrorism?<sup>63</sup>

Undoubtedly, done at random, such an approach is ineffective. As the Court said about the random spot checks for license and registration by the police officer in *Delaware v. Prouse*, “[W]e cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.”<sup>64</sup> With the number of people crossing into our borders every day, the probability of any one of them having evidence of terrorism on his or her PED is very low.

In October 2008, Deputy Commissioner of the Customs and Border Patrol (CBP) Jayson Ahern reported that of the 169 laptops searched at the border the previous month, only two were seized, and they were not seized for information—one was built to smuggle drugs and the other was contraband itself.<sup>65</sup> That was a 1.4% hit rate. In June 2008, CBP released an article purporting to demonstrate the importance of searches of PEDs by citing to discovery of three incidents of terrorist activity and one of child pornography.<sup>66</sup> There is no information in any of these cases whether CBP had actually developed suspicion before the search.

Without knowing whether any of the purported cases of “terrorism” activity found on laptops was fueled by reasonable suspicion, we have no information that searches of laptops for signs of terrorism are remotely effective. Instead, as the next section will discuss, we have an intolerable intrusion on individual liberty and privacy with little or no efficacy in meeting the government's concerns at the border. We have reports of scores of searches of the computers of persons of Arab descent, who are mistreated, hassled, detained, questioned, and ultimately let

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<sup>63</sup> While the Department of Homeland Security claims electronic devices can carry evidence of narcotics and human smuggling, alien admissibility, contraband, and child pornography, it is hard to imagine how, other than pornography, PEDs can carry such evidence except as physical vessels. See, e.g., *infra* note 64 and accompanying text.

<sup>64</sup> 440 U.S. 648, 661 (1979).

<sup>65</sup> James, *supra* note 59, at 225 (citing Greg Nojeim, *Laptop Search Hit Rate: Only 1.4%*, CENTER FOR DEMOCRACY & TECH. (Oct. 30, 2008), <https://www.cdt.org/blogs/greg-nojeim/laptop-search-hit-rate-only-14>).

<sup>66</sup> *Id.* at 224-25 (citing Jayson Ahern, *CBP Laptop Searches*, DEP'T OF HOMELAND SEC. LEADERSHIP J. ARCHIVE (June 30, 2008), [http://ipv6.dhs.gov/journal/leadership/2008\\_06\\_01\\_archive.html](http://ipv6.dhs.gov/journal/leadership/2008_06_01_archive.html)).



across the border.<sup>67</sup> The intrusion on individual liberty, given the undue discretion, far outweighs any purported efficacy of this method of stopping terrorism.

*D. Putting It All Together: Why Motive Matters*

The government's stated interests at the border are extremely important, but they are not sufficiently advanced by suspicionless and discretionary searches of PEDs to make the search reasonable. Not only is it likely the case that a chosen person's PED will not contain anything implicating border concerns, but it is also certainly the case that it will contain a depth and breadth of information, including politically sensitive material, to which the government is otherwise not entitled. Not only do our PEDs carry reams of confidential and private information but they often contain our passwords to clouds of information not even stored on the PED that is crossing the border. The balance is against suspicionless searches of PEDs.

The balance is also skewed in another way. The lack of minimization of discretion allows for improper targeting of persons precisely so government agents can mine their PEDs for information to use against them. The targeted search is even more dangerous than the random search. David House persuasively argues that the search of his computer was not pursuant to legitimate governmental interests at the border but that it was a pretext, or cover, for singling him out for his political activities. The district court rejected a consideration of subjective motive at the border with the simple citation of *Whren v. United States*.<sup>68</sup>

*Whren* is inapposite in the secondary searches done at the border. In the typical Fourth Amendment context, *Whren* means that while an officer may have an illegitimate basis for an intrusion (e.g., the occupants of the car are young, black men, and he has a hunch they have something illegal in their car), he may search or seize as long as there is an adequate, legitimate reason to support the level of intrusion (e.g., a traffic violation allows a lawful stop of the car's occupants).<sup>69</sup> With the usual non-border

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<sup>67</sup> See Sinnar, *supra* note 11, at 52-55 (describing cases collected by watch groups).

<sup>68</sup> House v. Napolitano, No. 11-10852-DJC, 2012 WL 1038816, at \*8 (D. Mass. Mar. 28, 2012).

<sup>69</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996).

administrative or special needs search, however, in return for allowing a suspicionless search, the government must show regularized procedures that minimize discretion.

The initial procedures that everyone undergoes at the border fulfill the primary purpose of border searches and minimize discretion because everyone must endure this process. We all must show adequate identification and papers for lawful entry, declare items brought in from abroad, and allow a physical search of our luggage for contraband or other illegal items. In this initial set of procedures, if the border agents harbor a pretextual reason for any one search, it is immaterial under *Whren*.

The serious problem comes when, without any particularized suspicion, the police use their unbridled discretion to target a person for a secondary search of her PEDs.<sup>70</sup> There is no backstop to pretext here. Unlike in *Whren*, or the typical Fourth Amendment search or seizure, there is no objective basis for the secondary search. Unlike the initial procedures at the border where everyone has to undergo the search, there is no guard against pretextual searches. Here, at the stage of a secondary, suspicionless search, the motives of border patrol agents in perusing a person's PEDs do and must matter in the "reasonableness" of the search.<sup>71</sup> In David House's case, there was no other purpose than to interfere with his unpopular political activity.

The confluence of maximum discretion, no required suspicion, and overly broad searches of the stores of an individual's life on a PED make a mockery of the courts' border search doctrine. The convenient formula has been that any search but a body or strip search at the border is "routine," not requiring individualized suspicion. That has left us with no Fourth Amendment protection at the border. This has left a gaping hole in our protection as

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<sup>70</sup> By "secondary search," we do not mean to imply a forensic examination, although that may also occur. We simply mean the singling out of a person for a search of their PED, no matter how that is accomplished.

<sup>71</sup> We are emphasizing electronic storage devices here and not other secondary property searches, because discretion is dangerous in this context and threatens privacy in a significant way that is different from, say, a search of a vehicle's fuel tank. *See, e.g., United States v. Flores-Montano*, 541 U.S. 149 (2004) (holding that dismantling of fuel tank at secondary search "routine" not requiring suspicion).

average citizens who now regularly travel abroad with PEDs in our possession.

As a reminder of how the Fourth Amendment was intended to protect us, recall the infamous English case of *Wilkes v. Wood*.<sup>72</sup> John Wilkes, a Member of Parliament, published a series of pamphlets that were critical of the King.<sup>73</sup> Pursuant to a general warrant—lacking in particularity or a showing of probable cause—British officers searched Wilkes’s home, seized his papers, and arrested him.<sup>74</sup> An outraged jury took no time to acquit Wilkes.<sup>75</sup> The Fourth Amendment’s inclusion of the word “papers” derived from these kinds of experiences.<sup>76</sup>

Now imagine John Wilkes is returning to the U.S. from his monthly trip to England. Border agents could pick him out for the very same reasons and search his laptop with no Fourth Amendment violation. Although the Founding Fathers believed in a border exception to the Fourth Amendment, this is not what they had in mind.

### III. THE CASE FOR A SECONDARY BORDER SEARCH DOCTRINE

Because there is no limit put on the discretion of authorities to target someone for an intrusive search of his or her PED at the border, it is easily transformed into a law enforcement tool for gathering information or evidence outside of the constraints of the warrant clause. The rare search that is allowed to occur outside those constraints, and without individualized suspicion, is an administrative or special needs search. The purpose must be for safety or other non-law-enforcement-related purposes and must be pursuant to standardized procedures. The initial border search fits this mold; the secondary border search does not.

To ensure the security of our border, Customs and Border Patrol may legitimately require all of us to go through the initial screening of identification, travel documents and luggage. The

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<sup>72</sup> *Wilkes v. Wood*, 98 Eng. Rep. 489, 498 (K.B. 1763).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See Daniel J. Solove, *The First Amendment As Criminal Procedure*, 82 N.Y.U. L. REV. 112, 134 (2007) (describing the *Wilkes* case and other seditious libel cases as influencing the passage of the First, Fourth, and Fifth Amendments).

Fourth Amendment does not require individualized suspicion for that administrative needs search and seizure. However, once Customs and Border Patrol uses its discretion to detain an individual for a search of his or her PED, the warrant clause and its exceptions become relevant again. According to the Department of Homeland Security, PEDs are searched for signs of terrorist activity or child pornography or other criminal activity. Individualized suspicion is relevant and appropriate for this secondary search.

While the courts have thus far acceded to the government claim that reasonable suspicion is not required for PED searches at the border, the facts of many of the cases indicate that the border patrol in those cases actually had something approaching reasonable suspicion.<sup>77</sup> Making reasonable suspicion a requirement is not onerous and will ensure that the David Houses and the Zakariya Reeds have Fourth Amendment protection from government overreaching. It means that when we return to the United States from this conference in Istanbul, where we are presenting this Paper, border patrol agents cannot decide today is our unlucky day and randomly scroll through private, personal, and privileged information on the very laptops on which we write this Paper.

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<sup>77</sup> See, e.g., *Cancel-Rios v. United States*, Civil No. 10-1386 (JAF), Crim. No. 08-369, 2010 WL 3420805 (D.P.R. Aug. 30, 2010) (before searching cellphone, border official had information defendant's travel was to engage in sexual activities with underage female); *United States v. Furukawa*, No. 06-145 (DSD/AJB), 2006 WL 3330726 (D. Minn. Nov. 16, 2006) (customs officer had reasonable suspicion to search laptop for child pornography); *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005) (routine search of van revealed photo album of child pornography leading to search of computer); *United States v. Irving*, No. S3 03 CR.0633 (LAK), 2003 WL 22127913 (S.D.N.Y. Sept. 15 2003) (defendant already subject of investigation before border search inspecting computer diskettes).

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