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Searches and Seizures at the Border and the Fourth Amendment

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SUMMARY

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Searches and Seizures at the Border and the Fourth Amendment

Congress has broad authority to regulate persons or items entering the United States, an authority that is rooted in its power to regulate foreign commerce and to protect the integrity of the nation's borders. Exercising this authority, Congress has established a comprehensive framework that authorizes federal law enforcement officers to inspect and search persons and property at the border to ensure that their entry conforms with governing laws, including those relating to customs and immigration.

While federal statutes confer substantial authority to conduct border searches, this authority is not absolute. The Fourth Amendment to the U.S. Constitution forbids unreasonable government searches and seizures of "the people," and this limitation extends to searches conducted at the border. The touchstone of the Fourth Amendment is the reasonableness of a search. The Supreme Court has recognized that searches at the border are "qualitatively different" from those occurring in the interior of the United States, because persons entering the country have less robust expectations of privacy, given the federal government's broad power to safeguard the nation by examining persons seeking to enter its territory. While law enforcement searches and seizures within the interior of the United States typically require a judicial warrant supported by probable cause, federal officers may conduct routine inspections and searches of persons attempting to cross the international border without a warrant or any particularized suspicion of unlawful activity. But a border search that extends beyond a *routine* search and inspection may require at least reasonable suspicion. The Supreme Court has not precisely defined the scope of a routine border search, but has suggested that highly intrusive searches may fall outside that category and thus require heightened suspicion to withstand Fourth Amendment scrutiny. Thus, the Court has held that the prolonged detention of an airplane traveler pending invasive medical tests required reasonable suspicion that the traveler was a drug smuggler. Conversely, the Court has determined that the removal and disassembly of a fuel tank constituted a routine border search where reasonable suspicion of unlawful activity was not required.

The Supreme Court and lower courts have applied this border search exception not only to the physical border itself, but also to searches at the border's "functional equivalent," such as at a port of entry in the interior of the United States (e.g., an international airport). Border-related searches and seizures in areas *beyond* the border or its functional equivalent are generally subject to greater Fourth Amendment scrutiny. For example, government officers may conduct warrantless "extended border searches" of individuals found within the United States if there is both reasonable certainty of a recent border crossing and reasonable suspicion of unlawful activity. Government officers may also conduct certain warrantless searches near the border that do not require evidence of a border crossing. For instance, "roving patrol" stops of vehicles near the border to question the vehicle's occupants are permissible if there is reasonable suspicion of unlawful activity, while probable cause is required to search the vehicle for contraband or other evidence of a crime. And while vehicle stops at fixed immigration checkpoints are permissible without individualized suspicion, government officers must have probable cause to search vehicles at those checkpoints. In addition, government officers may board vessels in interior or coastal waterways to conduct routine document and safety inspections, but may require at least reasonable suspicion to conduct more intrusive searches of the vessel.

Recent years have seen legal challenges to border searches of electronic devices such as cell phones and computers, which often contain more personal and sensitive information than other items frequently searched at the border, such as a wallet or briefcase. The Supreme Court has not yet addressed this issue. Lower courts have generally held that government officers may conduct relatively limited, manual searches of such devices without a warrant or any particularized suspicion. The courts, however, are split over whether more intrusive, forensic searches require at least reasonable suspicion. Additionally, there is some debate over warrantless drone surveillance at the border and surrounding areas, given a drone's potential capability to access more information about a person than other forms of aerial surveillance. Another emerging issue concerns the use of biometrics, particularly the collection of DNA samples from detained aliens at the border. Apart from these issues, there have also been concerns about the use of "racial profiling" during investigatory stops near the border. Legislation introduced in recent Congresses would clarify the government's ability to conduct searches and seizures at the border and surrounding regions.

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There are constitutional constraints on the government's power. The Fourth Amendment to the Constitution protects against unreasonable searches and seizures by government officers.[5] Generally, the Fourth Amendment requires an officer to obtain a judicial warrant based on probable cause before arresting or searching an individual.[6] The "touchstone" of the Fourth Amendment is reasonableness, and the reasonableness of a government search may be determined by balancing an individual's privacy expectations with the legitimate government interests supporting the search.[7] Thus, courts have recognized "reasonable exceptions" where the government may engage in a warrantless arrest or search.[8] For example, the government may

[1] *See* United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (recognizing "Congress' power to protect the Nation by stopping and examining persons entering this country"); United States v. 12,200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 125 (1973) ("The Constitution gives Congress broad, comprehensive powers '(t)o regulate Commerce with foreign Nations.' Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.") (quoting U.S. CONST. art. I, § 8, cl. 3.).

[2] *See Montoya de Hernandez*, 473 U.S. at 537 ("Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."); United States v. Ramsey, 431 U.S. 606, 616 (1977) (noting that Congress recognized its "plenary customs power" by enacting the first customs statute in 1789).

[3] 14 U.S.C. § 522; 19 U.S.C. §§ 482, 1467, 1496, 1581, 1583.

[4] 8 U.S.C. § 1357.

[5] Specifically, the Fourth Amendment provides that, "[t]he 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. This limitation applies to state officers through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961) (observing that the Fourth Amendment's prohibition against unreasonable searches and seizures extends to the states through the Due Process Clause of the Fourteenth Amendment).

[6] *See* Riley v. California, 134 S. Ct. 2473, 2482 (2014) ("Such a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' ") (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)); Kentucky v. King, 563 U.S. 452, 459 (2011) ("Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured.").

[7] United States v. Knights, 534 U.S. 112, 118–19 (2001) ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' ") (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

[8] *King*, 563 U.S. at 459 ("Because 'the ultimate touchstone of the Fourth Amendment is "reasonableness" '. . . [t]he warrant requirement is subject to certain reasonable exceptions.") (quoting Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006)); Texas v. Brown, 460 U.S. 730, 735 (1983) ("Our cases hold that procedure by way of a warrant is preferred, although in a wide range of diverse situations we have recognized flexible, common-sense exceptions to this requirement.").

bypass the warrant requirement if an arrest occurs in public and is based on probable cause or if a search is incident to a lawful arrest.[9] Additionally, warrantless searches and seizures of limited duration and intrusion, such as a "stop and frisk" of a person suspected of wrongdoing, may be permitted under a less exacting standard than probable cause, instead requiring only reasonable suspicion of unlawful activity.[10]

Citing Congress's constitutionally enumerated power to regulate foreign commerce and the federal government's inherent sovereign authority to protect the nation's borders, the Supreme Court has held that federal law enforcement officers may engage in routine inspections and searches at the U.S. border without a warrant, probable cause, *or* reasonable suspicion.[11] This "border search exception" applies in circumstances when a person is attempting to enter or is suspected to have entered the United States at the international border.[12] Federal appellate courts have construed the border search exception as applying equally to searches of persons *departing* the United States.[13] The exception applies not only to the physical border itself, but also to searches at the border's "functional equivalent," such as at an international airport within the United States.[14]

Yet the Fourth Amendment places some limits on the government's border search authority. The border search exception applies at the border or its functional equivalent; searches and seizures further into the country's interior may require at least heightened suspicion or probable cause of

[9] *See* Davis v. United States, 564 U.S. 229, 232 (2011) ("[A] police officer who makes a lawful arrest may conduct a warrantless search of the arrestee's person and the area 'within his immediate control.' ") (quoting Chimel v. California, 395 U.S. 752, 763 (1969)); United States v. Watson, 423 U.S. 411, 418 (1976) ("The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.").

[10] *See* Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (requiring "stop and frisk" of suspect to be predicated on "specific and articulable facts," rather than "unparticularized suspicion or hunch," that "taken together with rational inferences from those facts, reasonably warrant that intrusion.").

[11] *See* United States v. Flores-Montano, 541 U.S 149, 152–53 (2004) ("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)); United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant[.]").

[12] *See Flores-Montano*, 541 U.S. at 152 (reasoning that the government has broad authority to conduct routine searches at the border because "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."); *Ramsey*, 431 U.S. at 619 (observing that border searches are characterized by the fact that "the person or item in question had entered into our country from outside."). *See also* D.E. v. Doe I, 834 F.3d 723, 727 (6th Cir. 2016) (search of motorist's vehicle was lawful under the border search exception, even though the motorist claimed to have arrived at the international border inadvertently and intended to turn around).

[13] *See, e.g.*, United States v. Odutayo, 406 F.3d 386, 391–92 (5th Cir. 2005) (holding border search exception applies to outgoing baggage); United States v. Boumelhem, 339 F.3d 414, 419–20 (6th Cir. 2003) (establishing that border search exception applies to outgoing cargo container); United States v. Beras, 183 F.3d 22, 26 (1st Cir. 1999) (concluding that pat down of outgoing traveler was permitted under the border search exception).

[14] *Montoya de Hernandez*, 473 U.S. at 538 (international airport); *Ramsey*, 431 U.S. at 622 (post office receiving international mail); Almeida-Sanchez v. United States, 413 U.S. 266, 272–73 (1973) (describing the border's functional equivalent to include an international airport or "an established station near the border, at a point marking the confluence of two or more roads that extend from the border"); United States v. Stewart, 729 F.3d 517, 525 (6th Cir. 2013) (international airport).

unlawful activity.[15] Moreover, a border search extending beyond a *routine* search may require at least reasonable suspicion of criminal activity to withstand Fourth Amendment scrutiny.[16]

This report examines the statutory framework for border searches and seizures and the constitutional constraints that must inform the exercise of this statutory authority. The report first surveys federal statutes and regulations authorizing government officers to conduct warrantless searches and seizures at the border and surrounding areas. The report then discusses the Fourth Amendment's general limitations on government searches and seizures. The report next examines the border search exception and the extension of that exception further into the interior of the United States, such as at immigration checkpoints on roads near the border. The report also discusses several emerging border-related Fourth Amendment issues, including electronic device searches at the border, drone surveillance, the collection of biometric data, and racial profiling. Finally, the report reviews recent legislation concerning the government's border search authority.

Constitutional Authority Over the Border

The Supreme Court has long recognized the authority of government officials to perform searches and seizures at international borders.[17] The Court has traced this federal power to two sources: (1) the United States' inherent sovereignty as a nation-state;[18] and (2) the Constitution's Foreign Commerce Clause.[19]

By establishing a federal government, the Constitution was understood to confer upon it all the powers incident to the United States' existence as a sovereign, independent nation—including unqualified authority over the nation's borders and ability to determine whether foreign nationals may come within its territory.[20] The Supreme Court has repeatedly recognized that principles of

[15] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (holding that routine checkpoint stops near the border do not require any individualized suspicion); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) ("Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."); *Almeida-Sanchez*, 413 U.S. at 273 (holding that "roving patrol" search of automobile more than 20 miles north of the U.S.-Mexico border required probable cause or consent); *Alfonso*, 759 F.2d at 734 (requiring reasonable suspicion for extended border searches occurring subsequent to a border crossing).

[16] *See Flores-Montano*, 541 U.S. at 152–54, 156 (suggesting that "highly intrusive" searches of a person or "destructive" searches of property may require a heightened level of suspicion); *Montoya de Hernandez*, 473 U.S. at 541 ("We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.").

[17] *See, e.g.*, *Montoya de Hernandez*, 473 U.S. at 537; *Ramsey*, 431 U.S. at 616; Carroll v. United States, 267 U.S. 132, 154 (1925).

[18] *See, e.g., Ramsey*, 431 U.S. at 616 ("That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."); *Carroll*, 267 U.S. at 154.

[19] *Ramsey*, 431 U.S. at 619.

[20] *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (recognizing "[t]he power of exclusion of foreigners" as "an incident of sovereignty belonging to the United States as a part of those sovereign powers delegated by the constitution"); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); *see also* United States v. Curtiss-Wright, 299 U.S. 304, 318 (1936) ("The power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to make

sovereignty include giving the federal government the power to regulate items and persons entering U.S. territory.[21] The Court has explained: "It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity."[22] The Court observed in dicta in *Carroll v. United States* that "[t]ravelers may be stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."[23]

Authority to search items and persons at international borders has also been traced to the Foreign Commerce Power, which grants Congress broad authority to regulate commerce with foreign nations.[24] The Court has described searches at the international border as "necessary to prevent smuggling and to prevent prohibited articles from entry."[25]

Federal Statutory and Regulatory Framework for Searches and Seizures at or Near the Border

Federal statutes and implementing regulations confer designated law enforcement officers with broad authority to conduct searches and seizures at the border and surrounding areas without a warrant. These searches commonly occur at designated ports of entry along the border, such as border crossing points.[26] But searches may also occur in other places along or near the border.[27] To enforce U.S. customs laws, federal law enforcement officers may inspect and search individuals, merchandise, vehicles, and vessels arriving at the border, as well as further into the interior of the United States and within U.S. waters. In addition, federal officers may detain and

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such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality.").

[21] *See, e.g.*, *Ramsey*, 431 U.S. at 616 ("That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."); *Carroll,* 267 U.S. at 154. Sovereignty, as a general principle, stems from a global recognition of international rules governing the authority of a nation-state and its interactions with other nation-states. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 15 (2002); *see also Curtiss-Wright*, 299 U.S. at 318 ("As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family.").

[21] *Ramsey*, 431 U.S. at 619.

[22] United States v. Flores-Montano, 541 U.S. 149, 153 (2004).

[23] *Carroll*, 267 U.S. at 154; *see also* Boyd v. United States, 116 U.S. 616 (1886).

[24] U.S. CONST. art. I, § 8, cl. 3 (granting Congress "the power . . . [t]o regulate Commerce with foreign Nations[.]").

[25] United States v. Montoya de Hernandez, 473 U.S. 531, 537–38 (1985) (involving an individual stopped at airport suspected of smuggling narcotics).

[26] *See* United States v. Cotterman, 709 F.3d 952, 961–62 (9th Cir. 2013) (describing a "border search" as one that occurs at ports of entry where there is an actual or attempted border crossing); U.S. CUSTOMS AND BORDER PROTECTION, *Border Security: At Ports of Entry* (last modified Apr. 2, 2018), https://www.cbp.gov/border-security/ports-entry (describing U.S. Customs and Border Protection's functions at ports of entry).

[27] *See* United States v. Villamonte-Marquez, 462 U.S. 579, 593 (1983) (recognizing the government's interest in patrolling inland or coastal waters "where the need to deter or apprehend smugglers is great"); Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973) (noting that the Border Patrol conducts inland surveillance activities "all in the asserted interest of detecting the illegal importation of aliens."); U.S. Customs & Border Prot., *Border Security: Along U.S. Borders* (Jan. 17, 2018), https://www.cbp.gov/border-security/along-us-borders (describing the Border Patrol's responsibilities along the border).

search individuals and their vehicles at or near the border to enforce federal immigration laws. Federal officers may also enforce other laws relating to the border, including federal statutes concerning transnational criminal activity (e.g., gang activity), the introduction of harmful plant or animal species, and public health requirements.[28]

Federal Customs Statutes and Regulations

Title 19 of the U.S. Code regulates commerce and the flow of goods into the United States.[29] It authorizes customs officers to inspect and search individuals and their personal belongings, merchandise, vehicles, vessels, and other means of transport for the purpose of searching for contraband and other violations of federal customs laws.[30] This authority is encompassed in various federal statutes, some of which are overlapping in scope. U.S. Customs and Border Protection (CBP), a component of the Department of Homeland Security (DHS),[31] is the federal agency mainly responsible for enforcing customs laws.[32] The U.S. Coast Guard also has customs enforcement authority.[33]

Customs Officers' Authority

Under 19 U.S.C. § 1496, a customs officer[34] may examine "the baggage of any person arriving in the United States in order to ascertain what articles are contained therein" and whether those items are subject to taxes or otherwise prohibited.[35] Similarly, 19 U.S.C. §1467 allows customs officers to inspect and search the persons, baggage, and merchandise arriving by vessel from a foreign port (including U.S. territories).[36] Federal regulations also state that "[a]ll persons,

[28] *See, e.g.*, U.S. Immigr. & Customs Enf't, *Homeland Security Investigations* (Aug. 15, 2019), https://www.ice.gov/hsi; U.S. Customs & Border Prot., *Protecting Agriculture* (June 10, 2019), https://www.cbp.gov/border-security/protecting-agriculture.

[29] *See* 19 U.S.C. §§ 1–4732.

[30] *See id.* §§ 482, 1467, 1496, 1499, 1581, 1582, 1583. Certain diplomatic officers and their families are exempted from Title 19's search authority. 19 C.F.R. § 148.82.

[31] DHS's predecessor agency, the former Immigration and Naturalization Service (INS), ceased to exist as an independent agency under the U.S. Department of Justice in 2003, and its functions were transferred to DHS. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 101, 441, 451, 471, 116 Stat. 2135, 2142, 2192, 2195, 2205 (2002).

[32] *See* 6 U.S.C. § 202 (delegating to the Secretary of Homeland Security responsibility for "administering the customs laws of the United States."); *id.* § 211(c) (authorizing the CBP Commissioner to regulate the flow of travelers and goods entering or exiting the United States, and to enforce customs and trade laws). DHS assumed responsibilities that were transferred from various federal agencies. *See id.* § 203. DHS's customs enforcement responsibilities, carried out by CBP, derive from the U.S. Customs Service of the Department of Treasury. *Id.* § 203(1). DHS's immigration enforcement functions, which are carried out by CBP and a separate component, U.S. Immigration and Customs Enforcement, derive from the former INS. *Id.* § 251.

[33] 19 U.S.C. § 1709(b).

[34] *See id.* ("The term 'officer of the customs' means any officer of the Customs Service or any commissioned, warrant, or petty officer of the Coast Guard, or agent or other person authorized by law or by the Secretary of the Treasury, or appointed in writing by a collector, to perform the duties of an officer of the Customs Service."); 19 C.F.R. § 101.1 ("The terms 'Customs' or 'U.S. Customs Service' mean U.S. Customs and Border Protection.").

[35] 19 U.S.C. § 1496; *see also id.* § 1583(a)(1) (authorizing the warrantless search of international mail).

[36] *Id.* § 1467; *see also id.* § 1499 (providing that imported merchandise subject to inspection generally shall remain in "customs custody" until it has been inspected and is found to have been "truly and correctly invoiced and found to comply with the requirements of the laws of the United States").

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baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a Customs officer."[37]

Title 19 also authorizes the boarding of vehicles and vessels.[38] Under 19 U.S.C. § 1581, customs officers may board "any vessel or vehicle at any place in the United States or within the customs waters" to "examine the manifest and other documents and papers," or to "examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board."[39] The statute defines "customs waters" to include areas within 4 leagues (i.e., 12 nautical miles) of the U.S. coast.[40] The statute also authorizes customs officers to seize any vessel or vehicle that is subject to forfeiture, fine, or penalty.[41] The statute permits the boarding of vessels found anywhere in the United States or within customs waters, even if the vessel is not believed to be coming from a foreign port.[42]

19 U.S.C. § 482 permits customs officers who have authority to board vessels to search "any vehicle, beast, or person" suspected of carrying merchandise that is subject to customs duties or that has been brought into the United States "in any manner contrary to law."[43] The statute authorizes the officers to "search any trunk or envelope" for which there is "reasonable cause to suspect there is merchandise which was imported contrary to law."[44]

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[37] 19 C.F.R. § 162.6; *see also id.* § 101.1 ("'Customs territory of the United States' includes only the States, the District of Columbia, and Puerto Rico.").

[38] *See* 19 U.S.C. § 1401(a) ("The word 'vessel' includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft."), (j) ("The word 'vehicle' includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft."); United States v. Gonzalez, 688 F. Supp. 658, 664 (D.D.C. 1988) ("In 1935, Congress passed the Anti-Smuggling Act ('Act'), which significantly amended many of the Customs Service laws to expand the agency's jurisdiction to board vessels in international waters.").

[39] 19 U.S.C. § 1581(a).

[40] *See id.* §§ 1401(j), 1709(c) ("The term 'customs waters' means, in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States.").

[41] *Id.* § 1581(e); *see also id.* § 1595(a)(1) (providing that, if the customs officer has probable cause that any of the merchandise or property is in a "dwelling house, store, or other building place," he or she may seek a judicial warrant authorizing entry into the house (during daytime only) or store or other building to search for and seize the merchandise).

[42] Federal regulations similarly provide that customs officers may board a vessel anywhere in the United States or within "customs waters"; an American vessel on the high seas; or a vessel within a "customs-enforcement area" (an area on the high seas adjacent to customs waters where a vessel is being kept to prevent the unlawful importation of persons or merchandise) to inspect the vessel and review documentation. 19 C.F.R. § 162.3(a); 19 U.S.C. § 1701(a). But "Customs officers shall not board a foreign vessel upon the high seas in contravention of any treaty with a foreign government, or in the absence of a special arrangement with the foreign government concerned." 19 C.F.R. § 162.3(a). *See also id.* § 162.5 ("A customs officer may stop any vehicle and board any aircraft arriving in the United States from a foreign country for the purpose of examining the manifest and other documents and papers and examining, inspecting, and searching the vehicle or aircraft.").

[43] 19 U.S.C. § 482(a); *see also* 19 C.F.R. § 162.7 ("A Customs officer may stop, search, and examine any vehicle, person, or beast, or search any trunk or envelope wherever found, in accordance with section 3061 of the Revised Statutes (19 U.S.C. 482).").

[44] 19 U.S.C. § 482(a). The Supreme Court has held that the statute permits customs officers to inspect incoming international mail if there is "reasonable cause" that it contains unlawfully imported merchandise. United States v. Ramsey, 431 U.S. 606, 611–12 (1977). The Court described the statute's "reasonable cause" standard as being "less stringent" that than the probable cause standard that generally applies to government searches under the Fourth

Additionally, under 19 U.S.C. § 1589a, customs officers may make warrantless arrests for any criminal offense under federal law that is committed in the officers' presence; or for any felony under federal law that is committed outside the officers' presence if the officers have reasonable grounds to believe the suspect has committed the felony.[45]

Coast Guard Authority

Title 14 of the U.S. Code sets forth powers exclusive to the Coast Guard.[46] Under 14 U.S.C. § 522, Coast Guard officers may stop and board any vessel on "the high seas and waters over which the United States has jurisdiction," so long as the vessel is "subject to the jurisdiction, or to the operation of any law, of the United States."[47] Unlike 19 U.S.C. § 1581, the statute's reach extends beyond the United States' customs waters to the "high seas," defined as "all parts of the sea that are not included in the territorial sea or in the internal waters of any nation."[48] Under the statute, Coast Guard officers may question a vessel's occupants, examine documentation, and conduct inspections and searches of the vessel to investigate potential violations of federal law.[49] The statute also permits officers to arrest for violations of federal law (including arresting an individual escaping from the vessel to shore), and to seize any vessel or merchandise involved in criminal activity.[50]

A table comparing federal statutes authorizing warrantless searches by customs officers generally, and those pertaining to the search and boarding authority specific to the Coast Guard, can be found in the Appendix at **Table A-1**.

Federal Immigration Laws and Regulations

DHS is the federal agency primarily charged with the administration and enforcement of immigration laws.[51] Within DHS, CBP is the agency component mainly responsible for immigration enforcement along the border and at designated ports of entry[52] and typically

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Amendment. *Id.* at 612–13.

[45] 19 U.S.C. § 1589a(3).

[46] *See* 14 U.S.C. Subpt. I, Ch. 5. The Coast Guard also has authority to enforce customs laws under Title 19 of the U.S. Code (discussed above). 19 U.S.C. § 1709(b). Previously part of the Department of Transportation, the Coast Guard is now an entity housed within DHS. *See* 6 U.S.C. § 468(b). During wartime, the Coast Guard can be transferred to the Department of Navy upon direction from either Congress or the President. 14 U.S.C. § 103(b). This section, however, only discusses the statutory authorities applicable to the Coast Guard in its role in maritime law enforcement, and does not address other authorities that might be applicable in a wartime context.

[47] *Id.* § 522(a). The phrase "subject to the jurisdiction, or to the operation of any law, of the United States" does not cover only American flag vessels. United States v. Williams, 617 F.2d 1063, 1076 (5th Cir. 1980). It also covers foreign vessels on the high seas that are engaged in criminal offenses that have an effect on U.S. sovereign territory (e.g., a conspiracy to violate federal narcotics laws). *Id.* (citing United States v. Cadena, 585 F.2d 1252, 1257 (5th Cir. 1978)).

[48] 33 U.S.C. § 1601. The "territorial sea" of the United States is defined as the area within 12 nautical miles of the U.S. coastline (i.e., the customs waters). *Id.* § 3507.

[49] 14 U.S.C. § 522(a).

[50] *Id.*; *see also* 46 U.S.C. § 70503(a) (prohibiting the manufacture or distribution of, or the possession with intent to manufacture or distribute, a controlled substance on board a vessel).

[51] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 101(a), 116 Stat. 2135 (2002) (codified at 6 U.S.C. § 111(a)). As discussed in this report, DHS's immigration enforcement functions derive from the former INS. 6 U.S.C. § 251.

[52] *See id.* § 211(c) (listing functions of CBP).

conducts immigration inspections and arrests in border regions.[53] U.S. Immigration and Customs Enforcement (ICE)—the DHS component tasked with interior enforcement and removal—may also cooperate with CBP, such as in investigating cross-border criminal activity (e.g., human trafficking, gang activity, drug smuggling).[54]

The Immigration and Nationality Act (INA)[55] authorizes immigration officers to conduct searches and seizures.[56] This authority generally concerns the investigation of immigration violations, such as the search of aliens suspected of unlawfully entering the country, but also generally permits the arrest of persons (including U.S. citizens) who engage in certain criminal activity discovered within the course of the officer's duties.[57]

Under Section 287 of the INA, an immigration officer may conduct, under the terms of regulations prescribed by the Secretary of DHS, several types of immigration enforcement actions without a warrant,[58] including at the border and surrounding areas.[59] Under INA Section 287(a)(1), an immigration officer may, under the terms of prescribed regulations, "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."[60] DHS regulations similarly state that the officer may ask anyone questions so long as the officer "does not restrain the freedom of an individual, not under arrest, to walk away."[61]

INA Section 287(a)(3) provides that, "within a reasonable distance from any external boundary of the United States," an immigration officer may "board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle" to enforce federal immigration laws.[62]

DHS regulations define "external boundary" as "the land boundaries and the territorial sea of the United States extending 12 nautical miles (i.e., roughly 13.8 land miles) from the baselines of the United States determined in accordance with international law."[63]

"Reasonable distance" is defined as "within 100 air miles (i.e., roughly 115 land miles) from any external boundary of the United States" or "any shorter distance" set by the chief patrol agent of

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[53] Within CBP, the Office of Field Operations is the agency component that conducts inspections and enforces immigration and customs laws at designated ports of entry. *See id.* § 211(g)(3). The U.S. Border Patrol is the CBP component primarily charged with the apprehension of aliens unlawfully entering the United States or who have recently entered the country unlawfully away from a designated point of entry; as well as the interdiction of goods that are unlawfully imported into the United States. *See id.* § 211(e)(3).

[54] *See* U.S. Immigr. & Customs Enf't, *Homeland Security Investigations* (Jan. 8, 2020), http://www.ice.gov/about.

[55] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

[56] *See id.* § 287(a), (c) (codified at 8 U.S.C. § 1357(a), (c)); *see also* 8 C.F.R. §§ 287.1, 287.5 (implementing regulations).

[57] 8 U.S.C. §§ 1225(a)(3), 1225(d)(1), 1357(a), (c).

[58] Generally, an immigration officer must have an administrative "Warrant of Arrest" (Form I-200) to arrest and detain an alien who is subject to removal from the United States. 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1(b).

[59] 8 U.S.C. § 1357(a), (c); 8 C.F.R. §§ 287.1, 287.3, 287.5, 287.8.

[60] 8 U.S.C. § 1357(a)(1).

[61] 8 C.F.R. § 287.8(b)(1). But the officer may "briefly detain" an individual if he or she has reasonable suspicion that the person being questioned is committing a crime or is unlawfully present in the United States. *Id.* § 287.8(b)(2).

[62] 8 U.S.C. § 1357(a)(3); *see also id.* § 1225(d)(1) ("Immigration officers are authorized to board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States.").

[63] 8 C.F.R. § 287.1(a)(1).

CBP or special agent of ICE for a particular sector or district.[64] Factors that may be considered when setting a distance within this area include topography, confluence of arteries of transportation leading from external boundaries, density of population, potential inconvenience to the public, types of conveyances used, and reliable information about the movement of persons who are unlawfully entering the United States.[65] Additionally, the regulations provide the possibility that, in "unusual circumstances," a distance *beyond* 100 air miles from the border may be deemed "reasonable."[66] For that to occur, the chief patrol agent or special agent must "forward a complete report with respect to the matter to the Commissioner of CBP, or the Assistant Secretary for ICE, as appropriate, who may, if he determines that such action is justified, declare such distance to be reasonable."[67]

Figure 1 shows a map of the area within 100 air miles of an external boundary of the United States (shaded in pink), along with the factors considered by DHS in assessing whether a greater or shorter distance may be set for particular sectors.

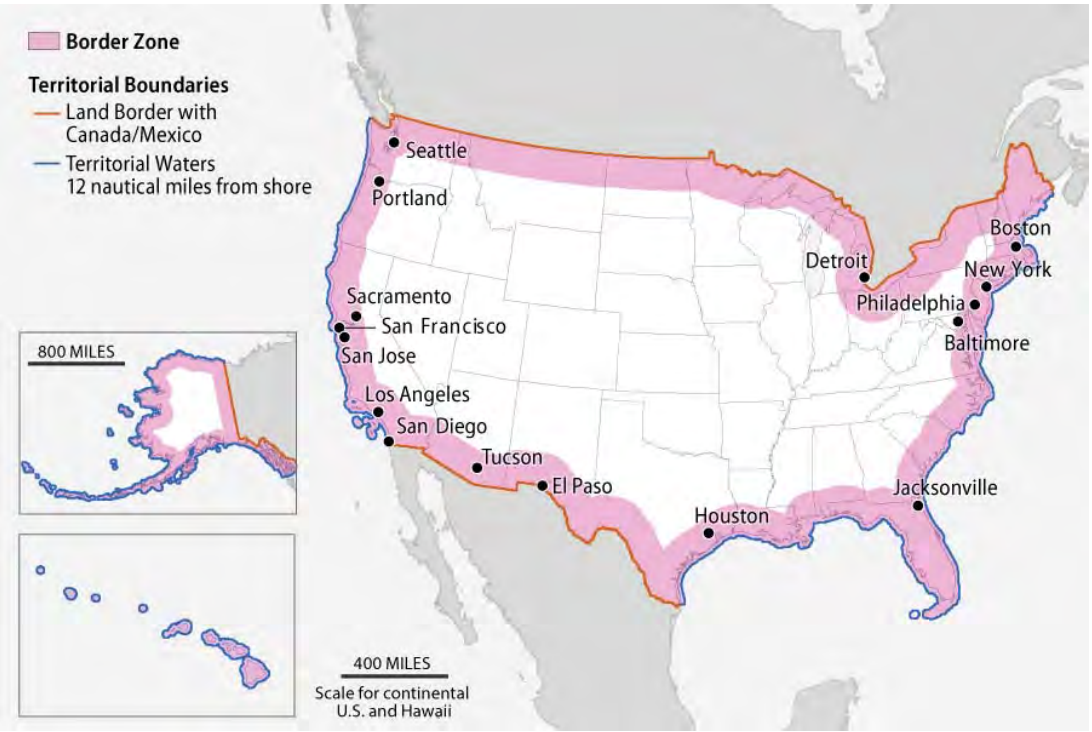
[64] *Id.* § 287.1(a)(2). For boarding and searching aircraft, agency officials may set "any distance." *Id.*

[65] *Id.* § 287.1(b).

[66] *Id.*

[67] *Id.*

Figure 1. Area Within 100 Air Miles of the U.S. Border



Factors Considered in Setting Distances Within 100-Air Mile Area*

• Topography	• Confluence of arteries of transportation leading from external boundaries	• Density of population • Possible inconvenience to the traveling public
• Types of conveyances used	• Reliable information as to movements of persons effecting unlawful entry into the United States	* Unusual circumstances (may be considered in setting distances greater than 100 air miles)

Source: Congressional Research Service; 8 C.F.R. § 287.1(a)(2), (b).

Note: This figure includes cities located within 100 miles of the country's external boundary with a population greater than 500,000 persons.

Although INA Section 287(a)(3) and implementing regulations give immigration officers broad authority to conduct warrantless searches near the border, as will be discussed later in the report, the Constitution sets limits on how this authority may be implemented.[68] For that reason, the government's search authority along the border is not unfettered, and immigration officers' ability to conduct warrantless searches near the border are informed by a number of factors, including population density and inconvenience to the public.[69] Thus, the ability to conduct warrantless searches in desolate border regions does not necessarily mean that such authority equally extends to populated metropolitan areas near the border.[70]

[68] *See infra* "Government Searches Beyond the Border and Its Functional Equivalent."

[69] 8 C.F.R. § 287.1(b).

[70] *See* Petition for Writ of Certiorari, Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (No. 71-6278) ("Despite the apparently unlimited authority the language of the statute seems to convey to board and search within a 'reasonable

Apart from authorizing searches near the border, INA Section 287(a)(3) authorizes certain designated immigration officers "to have access to private lands" (but not dwellings) within 25 miles[71] from any external boundary of the United States for the purpose of "patrolling the border."[72] Under DHS regulations, "patrolling the border" means "conducting such activities as are customary, or reasonable and necessary, to prevent the illegal entry of aliens into the United States."[73] The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit)[74] has held that INA Section 287(a)(3)'s restriction on access to "dwellings" on private lands applies to homes, including the residential curtilage (e.g., a backyard).[75] The court reasoned that if "dwellings" was narrowly interpreted to cover only a home's physical structure, immigration officers would have the "unchecked ability" to enter any private backyard near the border, so long as they did not enter the physical structure itself.[76] The court opined that it would be unreasonable to assume that Congress intended to confer such "broad and sweeping powers" given the potential constitutional issues raised by such a narrow construction of the statute.[77]

Under INA Section 287(a)(2), designated immigration officers may arrest an alien without a warrant if (1) the alien is entering or trying to enter the United States unlawfully in the presence or view of the officer; or (2) there is "reason to believe" the alien is unlawfully in the United

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distance' of the border, the statute has never been understood to permit arbitrary searches and has not been used as a pretext to search for evidence of other criminal conduct. Thus, the establishment of checkpoints within the 100-mile maximum fixed by regulation, 8 C.F.R. 287.1 (a)(2), is based upon a consideration of various factors designed to accomplish the statutory objective with the least possible intrusion upon the privacy of travelers. Hence, as illustrated by the present case, the INS has not claimed and would not claim statutory or constitutional authority to make random vehicle inspections for aliens in Times Square or in front of the Lincoln Memorial, even though technically these points are within 100 air miles of an external border. There is, quite simply, not a sufficient need for such operations to justify the inconvenience they would cause, and thus they would be 'unreasonable' in the constitutional sense. But vehicle checks conducted in areas where the incidence of illegal entry and alien smuggling is high are, if executed in good faith and with minimum inconvenience to the traveling public, reasonable within the Fourth Amendment.").

[71] The statutory provision setting forth immigration officers' ability to have access to private lands within a distance of 25 miles from an external U.S. boundary, 8 U.S.C. § 1357(a)(3), does not specify whether this measurement is in statute miles (5,280 feet) typically used in land measurement or air/nautical miles (roughly 6,076.115 feet). *Compare Mile, Statute Mile, and Nautical Mile*, BLACK'S LAW DICTIONARY (11th ed. 2019). The provision's application to searches arising on land would support construing "twenty-five miles" to mean 25 statute miles. *Cf.* Buttimer v. Detroit Sulphite Transp. Co., 39 F. Supp. 222, 227 (E.D. Mich. 1941) (provision of Seamen's Act concerning voyages of less than "600 miles" meant nautical miles, because "it is presumed, unless otherwise specified, that distances on water refer to nautical rather than land miles"). Related regulations concerning the powers and duties of immigration officers do not provide further guidance, though two other terms used in the same statutory provision, relating to the "external boundary" of the United States and a "reasonable distance" from that external boundary, are defined using air/nautical mileage. 8 C.F.R. § 287.1(a)-(b).

[72] 8 U.S.C. § 1357(a)(3); 8 C.F.R. § 287.5(b). Under CBP policy, the officer must inform the owner or occupants of the private lands that he or she intends to access those lands. *See* U.S. CUSTOMS & BORDER PROT., INSPECTOR'S FIELD MANUAL § 18.6(d).

[73] 8 C.F.R. § 287.1(c).

[74] This report references a number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Ninth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[75] United States v. Romero-Bustamente, 337 F.3d 1104, 1110 (9th Cir. 2003).

[76] *Id.* at 1109 ("Nonetheless, there are good reasons to eschew the plain meaning interpretation here, because it would indeed work an absurd result. Excluding only dwellings, in the most restricted literal sense, from the Border Patrol's warrantless search authority would provide its agents the unchecked ability to enter every backyard in metropolitan San Diego, Detroit, Buffalo, and El Paso, all of which are well within 25 miles of external borders of the United States. Aside from the obvious constitutional implications of such an interpretation, we seriously doubt that Congress intended to give the Border Patrol such unique and sweeping powers.").

[77] *Id.*

States and likely to escape before a warrant can be obtained.[78] INA Section 287(a) also permits designated immigration officers to make warrantless arrests for criminal offenses in specified circumstances (e.g., when the offense is committed in the officer's presence, or there is "reason to believe" the suspect committed a felony and would likely escape).[79]

INA Section 287(c) authorizes designated immigration officers to conduct a warrantless search of a person who is seeking admission to the United States (and his or her personal belongings).[80] There must be "reasonable cause" to suspect there are grounds for denying the person's admission that the search would disclose.[81]

A table listing INA provisions that authorize warrantless searches and seizures by immigration officers can be found in **Table A-2**.

Border Searches and the Fourth Amendment

Although federal statute and implementing regulations provide designated government officers with broad authority to conduct warrantless searches and seizures along or near international borders for specified purposes, including to deter immigration and customs violations, there are constitutional constraints to the exercise of this authority—the most notable being the Fourth Amendment.[82] This section provides a brief overview of Fourth Amendment concepts and then examines how these concepts apply to searches and seizures conducted at or near the border. Besides discussing the scope and reach of the border search exception, this section also briefly identifies several other exceptions to generally applicable warrant requirements that may be relevant to law enforcement encounters near the border.

General Overview of the Fourth Amendment

The Fourth Amendment protects against unreasonable searches and seizures by government actors.[83] It provides:

> 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… and particularly describing the place to be searched, and the persons or things to be seized.[84]

[78] 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.5(c)(1). Courts have viewed the "reason to believe" standard as equivalent to probable cause. *See* Morales v. Chadbourne, 793 F.3d 208, 216 (1st Cir. 2015); United States v. Quintana, 623 F.3d 1237, 1239 (8th Cir. 2010); Tejeda-Mata v. INS, 626 F.2d 721, 725 (9th Cir. 1980); United States v. Cantu, 519 F.2d 494, 496 (7th Cir. 1975); Au Yi Lau v. INS, 445 F.2d 217, 222 (D.C. Cir. 1971).

[79] 8 U.S.C. § 1357(a)(4), (5); 8 C.F.R. § 287.5(c)(2)-(4).

[80] 8 U.S.C. § 1357(c); 8 C.F.R. § 287.5(d).

[81] 8 U.S.C. § 1357(c).

[82] *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 882–83 (1975) (statute giving immigration officers the power to conduct warrantless searches within a "reasonable distance" of the border must be construed against the backdrop of the Fourth Amendment); United States v. Nichols, 142 F.3d 857, 864–68 (5th Cir. 1998) (observing that statutory authority of immigration officers to conduct searches within a "reasonable distance" of the border are subject to the Fourth Amendment's reasonableness requirements, and describing circuit case law as recognizing that searches occurring more than 50 miles from the border are usually considered as being a "substantial distance" from the border) (internal citation omitted).

[83] U.S. CONST. amend. IV.

[84] *Id.*

The first portion of the Fourth Amendment, sometimes called the Reasonableness Clause, enumerates what the amendment seeks to prohibit. It specifies that "the people" are protected; that "persons, houses, papers, and effects" are covered; and the nature of the protection ("to be secure . . . against unreasonable searches and seizures"). The second portion, sometimes called the Warrant Clause, sets forth the requirements for a warrant to be issued, including "probable cause" that a search will uncover evidence of wrongdoing.[85]

"The People" Protected by the Fourth Amendment

The Fourth Amendment secures the right of "the people" to be free from unreasonable searches and seizures. At times, the Supreme Court has suggested that the category of individuals protected by the Fourth Amendment is not coextensive with the category protected by the Fifth Amendment, which applies to every "person" in the United States.[86] In *United States v. Verdugo-Urquidez*, the Supreme Court held that a foreign national arrested at his residence in Mexico and involuntarily brought to the United States to stand trial did not come within the protective scope of the Fourth Amendment.[87] Writing for the Court, Chief Justice Rehnquist observed:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." *See also* U.S. CONST., Amdt. 1 ("Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble") (emphasis added); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*") (emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. . . .The language of these Amendments contrasts with the words "person" and "accused" used in the Fifth and Sixth Amendments regulating procedure in criminal cases.[88]

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[85] *Id*. *See generally* Illinois v. Gates, 462 U.S. 213, 231–38 (1983).

[86] U.S. CONST. amend. V (providing that no "person" may be denied due process and other enumerated protections); United States v. Verdugo-Urquidez, 494 U.S. 259, 265–66 (1990). *See also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

[87] *Verdugo-Urquidez*, 494 U.S. at 274–75.

[88] *Id.* at 265. Chief Justice Rehnquist's opinion was joined by Justices Kennedy, O'Connor, Scalia, and Thomas. But Justice Kennedy, who provided a critical vote to make the majority, also issued a concurring opinion indicating some disagreement with the Chief Justice's analysis. *Id*. at 275 (Kennedy, J.). While Justice Kennedy wrote that he "joined the opinion of the Court" and believed "no violation of the Fourth Amendment occurred" in the present case, he explained that he did not "place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections." *Id*. at 275–276. Instead, Justice Kennedy believed the case turned primarily on the Fourth Amendment's extraterritorial application, which he characterized as a context-specific inquiry. *Id* at 277–78. This has prompted some to describe Chief Justice Rehnquist's opinion in *Verdugo-Urquidez*, at least with respect to its analysis of "the people" protected by the Fourth Amendment, as reflecting the views of a plurality of the Court rather than a five-Justice majority. *See, e.g.,* The Hon. Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 808 (2013) ("[A] plurality led by Chief Justice Rehnquist declared that the expression '"the people" seems to have been a term of art employed in select parts of the Constitution' that extends certain rights to 'a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.' ") (quoting *Verdugo-Urquidez*, 494 U.S. at 265). In any event, later courts have generally viewed

In the years since *Verdugo-Urquidez* was decided, there appears to be little dispute that U.S. citizens and lawfully present, resident aliens fall within the Fourth Amendment's protective scope.[89] And in 2020, citing *Verdugo-Urquidez* and other cases, the Court declared that "it is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution."[90] But there is less clarity regarding the Fourth Amendment's application to other categories of aliens, particularly those who are unlawfully present in the United States.[91]

Some Supreme Court cases prior to *Verdugo-Urquidez* suggest that unlawfully present aliens are among "the people" protected by the Fourth Amendment.[92] For instance, Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* acknowledged that in *INS v. Lopez-Mendoza* "a majority of Justices assumed that the Fourth Amendment applied to illegal aliens in the United States."[93] But the Chief Justice characterized that assumption as nonbinding dicta,[94] and described earlier Court decisions as "not dispositive on how the Court would rule on a Fourth Amendment claim" brought by an unlawfully present alien.[95]

In the years since *Verdugo-Urquidez*, it appears that the majority of reviewing courts have held or assumed that the Fourth Amendment applies to at least some unlawfully present aliens within the United States.[96] But some courts have concluded that some unlawfully present aliens do not

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the framework set forth by the Chief Justice as controlling. *See, e.g.,* United States v. Mesa-Rodriguez, 798 F.3d 664, 670 (2d Cir. 2015) ("At a minimum, *Verdugo–Urquidez* governs the applicability of the Fourth Amendment to noncitizens. For Fourth Amendment rights to attach, the alien must show 'substantial connections' with the United States."); United States v. Portillo-Muñoz, 643 F.3d 437, 440 (5th Cir. 2011).

[89] *See, e.g.*, United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995) (reasoning that "the people" for purposes of Fourth Amendment protection includes citizens at home and abroad and lawful resident aliens within U.S. borders, but declining to decide on whether a resident alien is entitled to constitutional protections once he or she steps outside of U.S. territory).

[90] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020).

[91] *Compare* Perez Cruz v. Barr, 926 F.3d 1128, 1145 (9th Cir. 2019) (considering Fourth Amendment challenge to the detention of an unlawfully present alien who had resided in the United States for many years); Martinez-Aguero v. Gonzalez, 459 F.3d 618, 625 (5th Cir. 2006) (ruling that alien present within the United States had "developed substantial connections" for purposes of bringing a Fourth Amendment challenge because she had regularly and lawfully visited the country on prior occasions); *with* Castro v. Cabrera, 742 F.3d 595, 600–01 (5th Cir. 2014) (holding that "excludable" aliens detained at the border could not bring a Fourth Amendment challenge to their detention by immigration authorities); United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259, 1272 (D. Kan. 2008) ("[T]he court is examining the Fourth Amendment rights of a previously deported, aggravated felonious illegal alien who chose to reenter the United States knowing that the sovereign country, by due process of law, had recently ordered him to leave and stay out of the country. Simply put, such persons are not entitled to the same Fourth Amendment protections as are ordinary citizens."). *See generally* Moore, *supra* note 88, at 834–42 (discussing uncertainty regarding the Fourth Amendment's application to unlawfully present aliens in the years following *Verdugo-Urquidez*).

[92] *See* Moore, *supra* note 88, at 834–35, 841–42 (discussing the relationship between *Verdugo-Urquidez* and other cases where alienage did not appear to be a deciding factor in the Court's Fourth Amendment analysis).

[93] *Verdugo-Urquidez*, 494 U.S. at 272.

[94] *Id.*

[95] *Id.*

[96] *See, e.g., Perez Cruz*, 926 F.3d at 1145 (holding that suspicionless detention of unlawfully present alien, who had resided in the United States for more than a decade violated the Fourth Amendment); Yanez-Marquez v. Lynch, 789 F.3d 434, 445 (4th Cir. 2015) (considering Fourth Amendment claim raised by alien in removal proceedings); Cotzojay v. Holder, 725 F.3d 172, 181 (2d Cir. 2013) ("[I]t is uncontroversial that the Fourth Amendment applies to aliens and citizens alike."); Martinez Carcamo v. Holder, 713 F.3d 916, 921 (8th Cir. 2013) ("We have observed that the Fourth Amendment . . . applies as much to illegal aliens inside this country as it does to citizens."); *Martinez-Aguero*, 459 F.3d at 625 (observing in an excessive force case brought against a Border Patrol agent by a Mexican national with an expired visa, and who had previously made monthly trips to the United States, that although "[t]here may be cases in

receive protection under the Fourth Amendment because they lack the sufficient connections with this country to be part of a "national community."[97] One district court, for example, rejected a criminal defendant's Fourth Amendment challenge to a search and seizure at the U.S.-Canada border because, citing *Verdugo-Urquidez*, the defendant had not established a "significant voluntary connection with the United States" to entitle him to Fourth Amendment protections.[98] And some district courts, when applying *Verdugo-Urquidez*'s substantial connections test, have held that previously deported felons are not entitled to Fourth Amendment protections because their presence in the United States is prohibited by law.[99]

In short, whether aliens located within the interior of the United States who lack lawful immigration status must satisfy the substantial connections test or a less stringent standard to invoke Fourth Amendment protections remains unresolved by the courts.[100] While many courts have recognized that Fourth Amendment protections may apply to at least some unlawfully present aliens, the circumstances of the aliens' presence in the United States, including the nature and length of their stay in the country, may be relevant.

There is some uncertainty regarding the application of the Fourth Amendment to nonresident aliens seeking initial entry into the United States. Under *Verdugo-Urquidez*, such aliens arguably lack Fourth Amendment protections because they lack substantial connections to the United States. And courts have long held that aliens seeking to enter the United States have less robust constitutional protections because they are deemed to be outside the country.[101] But some courts

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which an alien's connection with the United States is so tenuous that he cannot reasonably expect the protection of its constitutional guarantees; the nature and duration of [the Mexican national's] contacts with the United States, however, are sufficient to confer Fourth Amendment rights"); *see also* Moore, *supra* note 88, at 834–35 ("Given the prior discussion of aliens' Fifth and Sixth Amendment rights, it is perhaps not surprising that, generally speaking, aliens, just as citizens, are entitled to the Fourth Amendment's protections and to the exclusion, in domestic criminal proceedings, of evidence obtained in violation of the Fourth Amendment. The Supreme Court implicitly endorsed this proposition in 1973 in *Almeida-Sanchez v. United States*, where the Court held that the warrantless search and seizure of a Mexican citizen legally present in the United States violated the Fourth Amendment. In fact, the *Almeida-Sanchez* Court did not even consider the impact of alienage on the analysis; instead, Justice Stewart, writing for the plurality, focused on whether the search was properly encompassed within the administrative border-search exception.").

[97] *See, e.g.*, United States v. Portillo-Muñoz, 643 F.3d 437, 440 (5th Cir. 2011) ("[N]either this court nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally."); *Gutierrez-Casada*, 553 F. Supp. 2d at 1272 (holding that a previously deported criminal alien who had unlawfully reentered the United States did not receive Fourth Amendment protections); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1271–73 (D. Utah 2003) (same); United States v. Ullah, No. 04-CR-30A(F), 2005 WL 629487, at *30 (W.D.N.Y. Mar. 17, 2005) ("The record in the instant case, however, is devoid of any evidence demonstrating that Ullah, an alien, had lawfully entered and resided in this country for a sufficient period to trigger the application of Fourth or Fifth Amendment protections to the challenged border inspections to which he was subjected.").

[98] *Ullah*, 2005 WL 629487, at *29.

[99] *Gutierrez-Casada*, 553 F. Supp. 2d at 1272 (holding that, in light of *Verdugo-Urquidez*, a previously deported, felonious, unlawfully present alien was not entitled to Fourth Amendment protections); *Esparza-Mendoza*, 265 F. Supp. 2d at 1271 (holding that "previously deported alien felons, such as [defendant], are not covered by the Fourth Amendment").

[100] *See* Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, 86 U. CIN. L. REV. 923, 950 (2018) ("A question that has gained increasing relevance since 1990, when the Court decided *United States v. Verdugo-Urquidez*, is whether undocumented noncitizens are part of 'the people' protected by the Fourth Amendment."); D. Carolina Nuñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 108 (2011) (noting that "there is no consensus on which classes of undocumented immigrants are outside the Fourth Amendment's ambit").

[101] *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States

have ruled that these constitutional limitations pertain only to challenges to procedures arising in the context of immigration, and do not foreclose Fourth Amendment claims that implicate certain fundamental rights, including when raised by nonresident aliens at the border.[102]

Searches

As discussed earlier, the Fourth Amendment protects against unreasonable searches and seizures. Searches potentially affronting the Fourth Amendment tend to fall into two categories: (1) searches of premises and other effects; and (2) searches of the person. A search of an area where there is a reasonable expectation of privacy generally implicates the Fourth Amendment. Whether a search has occurred is often determined by a two-part test set forth in Justice Harlan's concurring opinion to the Supreme Court's decision in *Katz v. United States*: "first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[103] A search may also occur on a trespass theory, that is, where the government obtains information by physically intruding on a constitutionally protected area, such as a home.[104]

The Fourth Amendment also protects against unreasonable searches of the person.[105] The Supreme Court has found that intrusions on the body—whether by, for example, an external pat

requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (declaring that "an alien on the threshold of initial entry stands on a different footing" than those who have "passed through our gates" for purposes of receiving due process protections); Alvarez-Garcia v. Ashcroft, 378 F.3d 1094, 1097 (9th Cir. 2004) ("Aliens 'standing on the threshold of entry' are 'not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States.' ") (quoting Ma v. Ashcroft, 257 F.3d 1095, 1107 (9th Cir.2001)). *Cf.* DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982–83 (2020) (An alien arriving at a U.S. port of entry, whether at a land border or an international airport, is a "treated for due process purposes as if stopped at the border" despite being on U.S. soil; this principle also extends to the treatment of an alien apprehended 25 yards from the border following his unlawful entry.).

[102] *See* Castro v. Cabrera, 742 F.3d 595, 600 (5th Cir. 2014) ("Therefore, if these detainees are excludable aliens stopped before entry into the United States and their claims arise in the context of immigration, the entry fiction applies and there is no violation of the Fourth Amendment. If, however, they were subject to wanton or malicious infliction of pain or gross physical abuse, the doctrine does not apply, and we consider whether Cabrera was entitled to qualified immunity."); Martinez-Aguero v. Gonzalez, 459 F.3d 618, 623 (5th Cir. 2006) (holding that alien detained near the border could be considered within the United States for purposes of asserting a Fourth Amendment claim because she sought to challenge an officer's use of excessive force outside the context of her immigration detention); Kwai Fun Wong v. INS, 373 F.3d 952, 971 (9th Cir. 2004) ("The entry fiction thus appears determinative of the *procedural* rights of aliens with respect to their applications for admission. The entry doctrine has not, however, been applied, by the Supreme Court or by this court, to deny all constitutional rights to non-admitted aliens.") (emphasis in original); Tungwarara v. United States, 400 F. Supp. 2d. 1213, 1220 (N.D. Cal. 2005) (holding that the Fourth Amendment requires "some level of suspicion" to conduct strip searches of non-admitted aliens because "intrusive searches of the person implicate important dignity and privacy interests," and "[t]hese interests are fundamental to all human beings, not just admitted aliens and citizens") (citing United States v. Flores-Montano, 541 U.S. 149, 152 (2004)).

[103] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (ruling that the bugging of a phone booth violated Katz's Fourth Amendment right to be free from unreasonable search).

[104] United States v. Jones, 565 U.S. 400, 406–07 (2012) (holding that the attachment of a GPS tracking device to a vehicle and tracking of the vehicle's movements was a search under the Fourth Amendment).

[105] U.S. CONST. amend. IV (providing that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . shall not be violated").

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down of a person[106] or a surgical procedure to remove a bullet allegedly stemming from an attempted robbery[107]—constitute searches for purposes of the Fourth Amendment.[108]

Once a search subject to Fourth Amendment scrutiny has occurred, a determination must be made on whether it is "reasonable."[109] Reasonableness depends on the context. The Court has explained that "the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"[110]

Seizures

The Fourth Amendment also protects against unreasonable seizures of persons or property by law enforcement. A seizure of property subject to Fourth Amendment scrutiny occurs when governmental action meaningfully interferes with the suspect's possessory interests.[111] Such items are typically stolen property and other "fruits" of criminal conduct, instrumentalities used in committing a crime, contraband, and items that may constitute evidence of the commission of a crime or of someone's guilt.[112] In most cases there must be probable cause to effect a seizure.[113]

The Fourth Amendment guards against seizures of the person.[114] A person has been seized if, in view of all the circumstances surrounding the incident, that person has an objective reason to believe that he or she is not free to leave.[115] As the Supreme Court has explained, an arrest—"the quintessential 'seizure of a person'"[116]—"requires *either* physical force ... *or*, where that is absent, *submission* to the assertion of authority."[117]

Other forms of detention, such as field detentions for investigation, may also be subject to Fourth Amendment scrutiny.[118] Courts generally conclude that if an individual is approached by an

[106] *See, e.g.,* Terry v. Ohio, 392 U.S. 1, 25 (1968) (reasoning that a search incident to an arrest and a limited search for weapons on the person can justify a "relatively extensive exploration of a person").

[107] Winston v. Lee, 470 U.S. 753 (1985).

[108] *See* Schmerber v. California, 384 U.S. 757, 768 (1966).

[109] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

[110] *Id.* at 652–53.

[111] United States v. Jacobsen, 466 U.S. 109, 113 (1984).

[112] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967) (ruling that the Fourth Amendment permitted the seizure of evidence "which would aid in apprehending and convicting criminals"); *see also* FED. R. CRIM. P. 41(c) (authorizing issuance of a warrant to seize "evidence of a crime"; "contraband, fruits of crime, or other items illegally possessed"; "property designed for use, intended for use, or used in committing a crime"; or "a person to be arrested or a person who is unlawfully restrained").

[113] *See* Arizona v. Hicks, 480 U.S. 321, 326–27 (1987) (holding seizure in plain view must be supported by probable cause).

[114] U.S. CONST. amend. IV.

[115] Michigan v. Chesternut, 486 U.S. 567, 573 (1988); *see also* United States v. Mendenhall, 446 U.S. 544, 553–54 (1980) ("We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained.").

[116] California v. Hodari D., 499 U.S. 621, 624 (1991).

[117] *Id.* at 626 (rejecting argument that an arrest "effected by the slightest application of physical force, despite the arrestee's escape" constitutes a seizure). The Supreme Court has also held that the use of deadly force to apprehend a person (e.g., shooting a fleeing suspect) constitutes a seizure. Tennessee v. Garner, 471 U.S. 1, 7 (1985).

[118] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 4–6 (1968). In the seminal stop-and-frisk case, *Terry v. Ohio*, an officer observed that multiple persons were "hover[ing] about a street corner for an extended period of time," were not waiting for anyone or anything to happen, paced along an identical route, and regularly conferred. *Id.* Suspecting the individuals of criminal activity, the officer approached the individuals to investigate. *Id.* at 7. The Court held that a brief investigatory stop and search constituted a seizure and search subject to the reasonableness requirement of the

officer and asked questions without the use of force, the individual is only "seized" if a reasonable person would not feel free to disregard the police and walk away.[119] An example of a common "seizure" is the stopping of an automobile and its passengers, even if the stop is brief and limited in scope.[120]

Once there has been a "seizure," the Fourth Amendment requires an appraisal of whether that seizure was a reasonable "invasion of a citizen's personal security."[121]

Standards of Suspicion: Probable Cause and Reasonable Suspicion

Typically, a government officer must have probable cause before he or she may make an arrest, conduct a search, or obtain a warrant.[122] The probable cause standard stems from the Fourth Amendment's requirement that "no Warrants shall issue, but upon *probable cause*."[123] This requirement "protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while giving fair leeway for enforcing the law in the community's protection."[124] The Supreme Court has recognized that probable cause is a concept that is imprecise, fluid, and dependent on the context of the search or seizure.[125] Generally, there must be an objectively reasonable basis for believing (1) a crime was committed (for an arrest)[126] or (2) evidence of the crime is present in the place to be searched (for a search).[127] Mere suspicion is not enough to satisfy this standard, but probable cause requires less than evidence which would justify a conviction.[128]

Although probable cause is generally required, some warrantless searches and seizures may be based on "reasonable suspicion"—a less demanding standard—depending on the "totality of the

Fourth Amendment, even though the brief detention fell short of an arrest. *Id.* at 16.

[119] *Mendenhall*, 446 U.S. at 553–54.

[120] Delaware v. Prouse, 440 U.S. 648, 654 (1979) (explaining that the "permissibility of a particular law-enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"); *see also* Mich. Dep't. of State Police v. Sitz, 496 U.S. 444, 450 (1990) (holding that a seizure subject to the constraints of the Fourth Amendment occurs when a vehicle is stopped at a temporary sobriety checkpoint conducted by police).

[121] *Terry*, 392 U.S. at 19.

[122] *See, e.g.*, Kentucky v. King, 563 U.S. 452, 459 (2011) ("[A] warrant may not be issued unless probable cause is properly established[.]"); Brigham City, Utah v. Stuart, 547 U.S. 398, 402 (2006) (explaining exigent circumstance search exception to the warrant requirement requires probable cause); Maryland v. Pringle, 540 U.S. 366, 370 (2003) (requiring probable cause for warrantless arrest in a public place for a felony).

[123] U.S. CONST. amend. IV (emphasis added).

[124] *Pringle*, 540 U.S. at 370 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)) (internal quotation marks omitted)).

[125] *See* Illinois v. Gates, 462 U.S. 213, 232 (1983) ("Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a 'practical, nontechnical conception.' *Brinegar v. United States*, 338 U.S. 160 (1949) . . . [P]robable cause is a fluid concept—turning on the assessment of the probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.").

[126] *Pringle*, 540 U.S. at 371 ("To determine whether an officer had probable cause for an arrest, the court examines the events leading up to the arrest, and then decides whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.").

[127] *See Gates*, 462 U.S. at 230–31 (applying totality of circumstances approach).

[128] Dunaway v. New York, 442 U.S. 200, 212 (1979); Wong Sun v. United States, 371 U.S. 471, 479 (1963) (citation omitted) ("It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, though the arresting officer need not have in hand evidence which would suffice to convict.").

circumstances" surrounding the search or seizure.[129] For instance, Fourth Amendment jurisprudence allows for brief investigative stops when a law enforcement officer has "a particularized and objective basis for suspecting the particular person of criminal activity."[130] Although a mere "hunch" does not create reasonable suspicion,[131] the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause."[132]

Warrantless Searches and Seizures

To satisfy the Fourth Amendment's reasonableness requirement, searches and seizures typically require a government official to obtain a warrant based on probable cause.[133] Searches and seizures conducted without a warrant are presumptively unreasonable.[134] But there are situations in which a warrantless search may be reasonable under the Fourth Amendment including, as discussed below, searches at international borders.

Searches at International Borders

Fourth Amendment jurisprudence recognizes searches and seizures at international borders as exceptional cases for Fourth Amendment purposes.[135] Under what is known as the *border search exception*, searches performed at international borders do not generally require a warrant, probable cause, or reasonable suspicion.[136] This exception to the warrant and probable cause requirements applies to outgoing as well as incoming travelers.[137] The Supreme Court has stated that searches at the border "are reasonable simply by virtue of the fact that they occur at the border."[138] Citing a lower expectation of privacy at the border, the Court has articulated that "[t]he Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border."[139] That said, not

[129] *See* Alabama v. White, 496 U.S. 325, 330–31 (1990).

[130] Naverette v. California, 572 U.S. 393, 396 (2014).

[131] Terry v. Ohio, 392 U.S. 1, 27 (1968).

[132] *Navarrete*, 572 U.S. at 397 (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)).

[133] *See, e.g.*, Skinner v. Railway Labor Execs.' Ass'n., 489 U.S. 602, 621–22 (1989).

[134] *See* Horton v. California, 496 U.S. 128, 133 (1990). "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, [the Supreme] Court has said that reasonableness generally requires the obtaining of a judicial warrant." Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

[135] United States v. Ramsey, 431 U.S. 606, 617–19 (1977).

[136] *Id.*

[137] *See* United States v. Seljan, 547 F.3d 993, 999 (9th Cir. 2008) (noting that "searches at the international border of both inbound and outbound persons or property" are subject to the border search doctrine); United States v. Odutayo, 406 F.3d 386, 392 (5th Cir. 2005) ("[W]e join our sister circuits in holding that the border search exception applies for all outgoing searches at the border."); United States v. Boumelhem, 339 F.3d 414, 420 (6th Cir. 2003) ("Notwithstanding Boumelhem's arguments, the border search exception applies to the search of the outgoing cargo container here."); United States v. Oriakhi, 57 F.3d 1290, 1297 (4th Cir. 1995) ("[W]e join the several other circuit courts which have held that the *Ramsey* border search exception extends to all routine searches at the nation's borders, irrespective of whether persons or effects are entering or exiting from the country."); United States v. Ezeiruaku, 936 F.2d 136, 143 (3d Cir. 1991) (holding that "the traditional rationale for the border search exception applies as well in the outgoing border search context."); *see also* D.E. v. Doe I, 834 F.3d 723, 727 (6th Cir. 2016) (border search of motorist's vehicle was lawful under the border search exception, even though the motorist claimed to have arrived at the international border inadvertently and intended to turn around).

[138] *Ramsey*, 431 U.S. at 616.

[139] United States v. Montoya de Hernandez, 473 U.S. 531, 539–40 n.4 (1985).

all searches at the border are per se reasonable under the Fourth Amendment. Some border searches conducted in a particularly offensive manner—such as a body cavity search—may still be limited by the Fourth Amendment.[140] Simply stated, the reasonableness of a border search depends on the circumstances of the search itself.[141]

The border search exception does not necessarily apply to each and every encounter between law enforcement and persons at or near an international border. For example, as will be discussed later, courts have held that "roving patrol" stops of vehicles near the border to question the vehicle's occupants must be justified by reasonable suspicion of unlawful activity.[142] Rather, the border search exception applies to searches occurring in the context of a border crossing, such as when an individual arrives at a U.S. port of entry.

The Border and Its Functional Equivalent

Searches may potentially take place along any segment of the United States' international border. Government officials may perform searches at or near the land borders shared with Mexico and Canada.[143] Stops and searches may also be conducted at the "functional equivalent" of the border.[144] Because people can enter the country at points other than along the border, courts have concluded that stops and searches conducted at the first point at which an entrant may practically be detained to be the functional equivalent of the border.[145] This includes an airport where an international flight lands[146] or the port where a ship docks after traveling from a foreign port.[147] For instance, lower courts have determined that a pat-down of a passenger on a jetway departing on an international flight took place at the functional equivalent of the border[148] and the search of a passenger arriving from a nonstop international flight at the Chicago O'Hare airport occurred at the functional equivalent.[149] Additionally, post offices receiving international airmail are the

[140] *See id*; *see also* United States v. Irving, 452 F.3d 110, 123 (2d Cir. 2006) (explaining that reasonable suspicion would be required for a more invasive search); United States v. Whitted, 541 F.3d 480, 485–86 (3d Cir. 2008) (contrasting "routine" "patdowns, frisks, luggage searches, and automobile searches" with "nonroutine" "body cavity searches, strip searches, and x-ray examinations" that require reasonable suspicion).

[141] *See Montoya de Hernandez*, 473 U.S. at 538 (noting that the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior).

[142] *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (requiring reasonable suspicion for roving patrol stops near the border)

[143] *See, e.g.*, United States v. Chase, 503 F.2d 571 (9th Cir. 1974) (Mexico); United States v. Mastberg, 503 F.2d 465 (9th Cir. 1974) (Canada).

[144] Almeida-Sanchez v. United States, 413 U.S. 266, 272–73 (1973).

[145] *See, e.g.*, United States v. Cardenas, 9 F.3d 1139, 1147 (5th Cir. 1993); United States v. Beras, 183 F.3d 22, 26 (1st Cir. 1999). *See also* United States v. Bareno–Burgos, 739 F. Supp. 772, 778 (E.D.N.Y. 1990) ("Case law reflects that the functional equivalent of the border need bear no particular time or space relationship to the actual border.").

[146] *See, e.g.*, United States v. Yang, 286 F.3d 940, 944 (7th Cir. 2002) (explaining "even though Chicago is not an international border, searches at customs at O'Hare are permissible under the functional equivalent doctrine."); *Beras*, 183 F.3d at 26; United States v. Johnson, 991 F.2d 1287, 1290 (7th Cir. 1993) (search of passenger arriving on nonstop international at O'Hare International Airport was at the functional equivalent to an international border). In other words, passengers and cargo arriving on an international flight may be subject to an inspection, but passengers arriving on a domestic flight are not subject to an inspection.

[147] *See, e.g.*, United States v. Prince, 491 F.2d 655 (5th Cir. 1974); United States v. LaFroscia, 485 F.2d 457 (2d Cir. 1973); *Cardenas*, 9 F.3d at 1147; United States v. Victoria-Peguero, 920 F.2d 77, 80 (1st Cir. 1990) (explaining that a warrantless search at the functional equivalent of the sea border was consistent with Fourth Amendment).

[148] *Beras*, 183 F.3d at 26.

[149] *Johnson*, 991 F.2d at 1290.

functional equivalent of the border.[150] Importantly, these locations are treated as the functional equivalent of the border only to the extent that a search at that location pertains to persons or items believed to be traveling to or from the United States.[151]

Searches and Seizures: Routine and Nonroutine

Under the border search exception, federal officers may generally conduct warrantless searches of persons and things upon their entry into the United States, without needing reasonable suspicion or probable cause of wrongdoing.[152] But, depending on the level of intrusion, some searches performed at the international border may require reasonable suspicion.[153] When determining whether a search is reasonable, Fourth Amendment jurisprudence generally categorizes searches at the border into two categories: routine searches and nonroutine searches—with the latter requiring a level of particularized suspicion of illegal activity.

Routine Searches and Seizures

The Supreme Court has discussed what constitutes a nonroutine search;[154] it has not explicitly defined the scope of searches that may be categorized as routine. According to lower courts, routine searches generally include searches of automobiles, baggage, and other goods entering the country.[155] Additionally, an individual seeking to enter the country may be required to submit to a search of his or her outer clothing,[156] which may include an examination of the contents of a purse, wallet, or pockets and a canine sniff.[157] While this is ongoing, the individual may be subject to a brief detention.[158]

As explained by the Seventh Circuit, a routine search is one that does "not pose a serious invasion of privacy" and "embarrass or offend the average traveler."[159] For instance, the removal and

[150] United States v. Ramsey, 431 U.S. 606, 620 (1977) (rejecting any distinction between items mailed to the United States and items carried into the United States).

[151] *See, e.g.*, United States v. Jackson, 825 F.2d 853, 876 (5th Cir. 1987) (en banc). In that case, the Fifth Circuit held that a highway checkpoint 14 miles from the international border did not constitute the functional equivalent of the border because it did not contain traffic "'international' in character." *Id.* The court explained that the equivalent of the border must not "intercept no more than a negligible number of domestic travelers." *Id.* at 860.

[152] *See* United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985); United States v. Lincoln, 494 F.2d 833, 837 (9th Cir. 1974); United States v. King, 485 F.2d 353, 358 (10th Cir. 1973); United States v. Beck, 483 F.2d 203, 207 (3d Cir. 1973); United States v. Stornini, 443 F.2d 833, 835 (1st Cir. 1971).

[153] *See Montoya de Hernandez*, 473 U.S. at 537–38 (discussing Fourth amendment reasonableness requirement at the border).

[154] *See generally id.*

[155] *See, e.g.*, United States v. Sandoval Vargas, 854 F.2d 1132 (9th Cir. 1988) (car); United States v. Flores, 594 F.2d 438 (5th Cir. 1979) (car); United States v. Lafroscia, 485 F.2d 457 (2d Cir. 1973) (car); United States v. Gonzalez, 483 F.2d 223 (2d Cir. 1973) (baggage); United States v. Stornini, 443 F.2d 833 (1st Cir. 1971) (baggage).

[156] *See, e.g.*, United States v. Braks, 842 F.2d 509 (1st Cir. 1988) (holding that requiring a female suspect to lift her dress somewhat in a private room with a female inspector present was part of routine border search); United States v. Nieves, 609 F.2d 642 (2d Cir. 1979) (holding that requiring a person to remove a shoe is part of routine border search but drilling into shoes is not routine border search); United States v. Flores, 477 F.2d 608 (1st Cir. 1973).

[157] *See, e.g.*, United States v. Kelly, 302 F.3d 291, 294–95 (5th Cir. 2002) (canine sniff was routine border search, reasoning a canine sniff "is no more intrusive than a frisk or a pat-down, both of which clearly qualify as routine border searches").

[158] *See, e.g.*, United States v. Nava, 363 F.3d 942 (9th Cir. 2004) (individual was not subject to an "arrest" when officer asked him to exit truck, handcuffed him, escorted him to security office to be patted down, and was required to wait while officer inspected pickup truck).

[159] United States v. Johnson, 991 F.2d 1287, 1291 (7th Cir. 1993) (conducting a "scratch test," "flex test," and "weight

examination of a suitcase's contents, including through the use of an x-ray, by a customs inspector constitutes a routine search.[160] Similarly, the Fifth Circuit has defined a "routine" search as "one that does not 'seriously invade a traveler's privacy,'" thereby requiring a reviewing court to evaluate "'the invasion of the privacy and dignity of the individual.'"[161] The Fifth Circuit has classified "ordinary pat-downs or frisks, removal of outer garments or shoes, and emptying of pockets, wallets, or purses" as routine.[162] Likewise, the Second Circuit has described routine searches as to include searches of outer clothing, luggage, a purse, wallet, pockets, or shoes, "which, unlike strip searches, do not substantially infringe on a traveler's privacy rights."[163]

In *United States v. Braks*, the First Circuit set forth several factors relevant to assessing whether a search was routine.[164] In that case, a customs official had searched a foreign national by taking her into a private room and conducting a search of her garments by gesturing without physical contact, resulting in the foreign national raising her garment.[165] In determining the degree of invasiveness of any particular search, the First Circuit set forth several factors to consider:

> (i) whether the search results in the exposure of intimate body parts or requires the suspect to disrobe; (ii) whether physical contact between Customs officials and the suspect occurs during the search; (iii) whether force is used to effect the search; (iv) whether the type of search exposes the suspect to pain or danger; (v) the overall manner in which the search is conducted; and (vi) whether the suspect's reasonable expectations of privacy, if any, are abrogated by the search.[166]

The court concluded that the search was a justified and routine search on the rationale that the foreign national did not have to actually remove her clothing or expose herself; no physical contact or force was used; the search did not include any pain or danger; and the search was conducted in a private room by a female customs official.[167] The First Circuit explained that this list of factors is not exhaustive, stressing that "each case must turn upon its particularized facts."[168]

Nonroutine Searches and Seizures Requiring Reasonable Suspicion

A court may determine a nonroutine search has occurred once a search goes beyond a limited intrusion. Nonroutine border searches—such as prolonged detentions, strip searches, body cavity searches, or involuntary x-ray searches—require reasonable suspicion.[169]

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test" on baggage).

[160] *Id.* at 1293–94 (during routine inspection, customs official developed reasonable suspicion that she was smuggling contraband into the country).

[161] *Kelly*, 302 F.3d at 294 (quoting United States v. Cardenas, 9 F.3d 1139, 1148 n.3 (5th Cir 1993); United States v. Sandler, 644 F.2d 1163, 1167 (5th Cir. 1981)).

[162] *Id.*

[163] Tabbaa v. Chertoff, 509 F.3d 89, 98 (2d Cir. 2007).

[164] *See* United States v. Braks, 842 F.2d 509, 511–12 (1st Cir. 1988).

[165] *Id.* at 510–11.

[166] *Id.* at 511–12.

[167] *Id.* at 512–13.

[168] *Id.* at 513.

[169] United States v. Montoya de Hernandez, 473 U.S. 531, 541 n.4 (1985). *See, e.g.*, United States v. Garcia-Garcia, 319 F.3d 726, 730 (5th Cir. 2003) (alert by drug sniffing dog constituted reasonably suspicion supporting detention of bus for time reasonably necessary to investigate the cause of the alert).

Inspections of Persons. The 1985 Supreme Court decision *United States v. Montoya de Hernandez* offers insight into what searches and detentions at the border may be classified as nonroutine searches and therefore require reasonable suspicion.[170] In that case, an airline traveler arrived at the Los Angeles International Airport from Bogotá, Colombia.[171] Upon questioning by customs inspectors, the traveler revealed that she did not speak English, did not have family or other connections in the United States, was planning to purchase goods for her husband's store in Bogotá, possessed $5,000 in cash, and had no hotel reservations.[172] Based on this information, her frequent traveling to the United States, and firm abdomen, the customs inspectors suspected she was smuggling narcotics through her alimentary canal and detained her until her bowels passed—taking around 16 hours.[173] In a challenge to criminal convictions for unlawful possession and importation of cocaine, the Supreme Court ruled that her detention did not violate the Fourth Amendment because—even though it went beyond the scope of a routine customs inspection—it was based on reasonable suspicion that she was smuggling contraband.[174]

This decision articulated a few important principles when it comes to the constitutionality of prolonged detentions and nonroutine searches. *Montoya de Hernandez* seemingly mandates that searches beyond a routine search and detention at the border must be supported by reasonable suspicion.[175] Furthermore, *Montoya de Hernandez* suggests that detentions, even extended delays of 16 or more hours, may be constitutionally permissible if the detention "was reasonably related in scope to the circumstances which justified it initially."[176] There, the Court held that the detention lasting 16 or more hours was reasonable under the circumstances because the time of detention corresponded to the time it took for the defendant's bowels to pass and therefore was "necessary to either verify or dispel the suspicion was not unreasonable."[177]

There are no bright-line rules on when a routine search or detention transforms into nonroutine. In another Supreme Court decision, *United States v. Flores-Montano*, the Supreme Court held that a one-hour delay incident to a border search did not render the search nonroutine and therefore did not require suspicion, reasoning that "delays of one to two hours at international borders are to be expected."[178] The Fourth Amendment does not "shield[] entrants from inconvenience or delay at the international border."[179] Rather, the focus is on whether the detention was reasonable in light of the circumstances.[180]

A lower court's opinion suggests that even searches and detentions lasting several hours may not require reasonable suspicion. In *Tabaa v. Chertoff*, the Second Circuit considered whether a search and a detention lasting four to six hours at the U.S.-Canada border violated the plaintiffs' Fourth Amendment rights.[181] The U.S. citizen plaintiffs claimed the combined effect of the

[170] 473 U.S. 531 (1985).

[171] *Id.* at 532–33.

[172] *Id.* at 533.

[173] *Id.* at 534.

[174] *Id.* at 541.

[175] *See id.* at 541–42.

[176] *Montoya de Hernandez*, 473 U.S. at 542.

[177] *Id.* at 544.

[178] United States v. Flores-Montano, 541 U.S. 149, 155 n.3 (2004).

[179] *Id.*

[180] *Montoya de Hernandez*, 473 U.S. at 542.

[181] Tabbaa v. Chertoff, 509 F.3d 89, 95 (2d Cir. 2007) (involving U.S. citizen plaintiffs who were returning from an Islamic conference in Canada).

measures used—intrusive questioning, photographing, and fingerprinting—was not routine and therefore required some level of suspicion.[182] The court held that the combined effect of routine elements did not transform the stop into a nonroutine search because each of the individual elements themselves were routine.[183] The court also rejected the plaintiffs' contention that the threat of detention until they complied transformed the search into a nonroutine search, reasoning that "border crossers cannot, by their own non-compliance, turn an otherwise routine search into a nonroutine one."[184] Lastly, the Second Circuit held that the detention was routine because "common sense and ordinary human experience suggest that it may take up to six hours for CBP to complete the various steps at issue here, including vehicle searches, questioning, and identity verification, all of which [were] already found to be routine."[185]

Searches of Vehicles. As discussed previously, government officials may search automobiles seeking entry to the United States without reasonable suspicion.[186] But in *United States v. Flores-Montano*, the Supreme Court considered whether a more intrusive search of a car—involving the removal, disassembly, and reassembly of a fuel tank—constituted a search requiring suspicion of illegal activity.[187] Noting the government's "paramount interest in protecting the border," the Court held that the government's authority to conduct suspicionless border inspections includes the authority to remove, disassemble, and reassemble a fuel tank.[188] But the *Flores-Montano* court declined to address whether and under what circumstances a search of a vehicle at the international border would "be deemed unreasonable because of the particularly offensive manner in which it is carried out."[189]

Still, there is no hard-and-fast rule for when a search of a vehicle becomes so intrusive as to require reasonable suspicion. Before *Flores-Montano*, several circuit courts held that the government must have reasonable suspicion before drilling into an individual's property in search of contraband.[190] The Supreme Court distinguished *Flores-Montano* from these circuit decisions because the fuel tank was reassembled, unlike "potentially destructive drilling."[191]

Several Ninth Circuit decisions post *Flores-Montano* support the notion that destruction to a vehicle or its components might not require suspicion of illegal activity (other circuit courts have not weighed in since *Flores-Montano*[192]). In *United States v. Cortez-Rocha*, the Ninth Circuit held that cutting open a spare tire did not require reasonable suspicion.[193] Although the court

[182] *Id.* at 98.

[183] *Id.* at 99.

[184] *Id.* at 100.

[185] *Id.* (internal quotation marks omitted).

[186] *See* Carroll v. United States, 267 U.S. 132, 154 (1925).

[187] United States v. Flores-Montano, 541 U.S. 149, 151 (2004).

[188] *Id.* at 155.

[189] *Id.* at 155 n.2 (internal citation and quotation marks omitted).

[190] *See, e.g.*, United States v. Rivas, 157 F.3d 365, 367 (5th Cir. 1998) (holding drilling into the body of a trailer required reasonable suspicion); Untied States v. Robles, 45 F.3d 1 (1st Cir. 1995) (drilling into machine part required reasonable suspicion); United States v. Carreon, 872 F.2d 1436 (10th Cir. 1989).

[191] *Flores-Montano*, 541 U.S. at 155 n.2.

[192] *But see* United States v. De Jesus-Viera, 655 F.3d 52 (1st Cir. 2011). In that case, the First Circuit held that a drilling by CBP into a vehicle did not violate the Fourth Amendment. *Id.* at 58. The trial court had concluded that the drilling was a routine border search. *Id.* at 57–58. But on appeal, the First Circuit declined to weigh in on whether the search was a routine search or a nonroutine search because, even if it was nonroutine, there was reasonable suspicion to justify the drilling. *Id.* at 58.

[193] United States v. Cortez-Rocha, 394 F.3d 1115, 1119–20 (9th Cir. 2006) (concluding that the search and disabling of

acknowledged the damage to the tire, the court observed that the destruction of the spare tire did not interfere with the operation of the vehicle or hinder the traveler's immediate ability to continue his travels using that automobile.[194] In another decision, the Ninth Circuit held that the drilling of a single small-diameter hole in a pickup truck did not require reasonable suspicion because it did not significantly damage the truck.[195] But in *United States v. Guzman-Padilla*, the Ninth Circuit held that the deflating of tires required reasonable suspicion because the vehicle was rendered inoperable.[196] *Guzman-Padilla* clarified the factors for determining whether a search of a vehicle required reasonable suspicion: "(1) Did the search damage the vehicle in a manner that affected the vehicle's safety or operability, and (2) Was the search conducted in a particularly offensive manner."[197] In other words, damage to a vehicle does not transform a border search into a nonroutine search; the severity of that damage to the vehicle's functionality may be a key consideration in assessing whether reasonable suspicion is required.

Other Exceptions to the Fourth Amendment's Warrant Requirement That May Be Relevant to Encounters Near the Border

In addition to the border search exception, courts have recognized other circumstances where a warrantless search may be permitted under the Fourth Amendment. Some of these exceptions may be relevant to law enforcement encounters at or near the international border or its functional equivalent:

- ***Search Incident to Lawful Arrest.*** A government officer who lawfully arrests an individual may conduct a warrantless search of the arrestee's person and the area "within his immediate control" from which the suspect might gain possession of a weapon or destructible evidence.[198] This exception stems from interests in officer safety and evidence preservation following an arrest.[199]
- ***Stop and Frisk.*** A law enforcement officer may detain an individual briefly upon reasonable suspicion of criminal activity, and conduct a frisk when the officer is "justified in believing that the individual . . . is armed and presently dangerous to the officer or to others."[200] A frisk is limited to a search for weapons[201] and cannot be justified by a need to prevent the destruction of evidence (but in the event a search for weapons leads to the discovery of contraband, that finding may

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a vehicle's spare tire "does not in any way hinder the operation of the vehicle or impede the traveler's immediate ability to continue his travels using the vehicle").

[194] *Id.* at 1120.

[195] United States v. Chaudhry, 424 F.3d 1051, 1053 (9th Cir. 2005).

[196] United States v. Guzman-Padilla, 573 F.3d 865, 879 (9th Cir. 2009).

[197] *Id.*; *see also* United States v. Hernandez, 424 F.3d 1056 (9th Cir. 2005) (holding no reasonable suspicion as required where the government removed the interior door panels with a screwdriver so that doors could be put back together without damage, causing no significant damage nor did it undermine the safety of the vehicle).

[198] Davis v. United States, 564 U.S. 229, 232 (2011).

[199] Arizona v. Gant, 556 U.S. 332, 338 (2009).

[200] Adams v. Williams, 407 U.S. 143, 145 (1972) (citing Terry v. Ohio, 392 U.S. 1, 22 (1968)).

[201] *Terry*, 392 U.S. at 29; *see also* Michigan v. Long, 463 U.S. 1032 (1983) (holding that protective search of a vehicle's passenger compartment during a lawful stop did not affront the Fourth Amendment where the circumstances were such that a person would reasonably believe that his safety or the safety of others was at risk); Ybarra v. Illinois, 444 U.S. 85, 93–94 (1979) ("Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons."); *Adams*, 407 U.S. at 146–47 (1972) (explaining a search of weapons must be "limited in scope to this protective purpose").

permit the officer to seize the item under the plain view exception discussed below, and the discovery of contraband may lead to a criminal arrest).[202] If a search exceeds these bounds, it must be justified by a warrant or another exception to the warrant requirement.[203]

- ***Emergency Aid, Exigent Circumstances, or Hot Pursuit.*** A warrantless search may be permissible if the "exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment."[204] Examples of exigent circumstances include providing emergency assistance in a residence or engaging in a "hot pursuit" of a fleeing suspect.[205]
- ***Plain View.*** Government officers may seize an item of an incriminating nature in "plain view" without a warrant.[206] Examples of when such a seizure may be permissible include when an officer comes across some other article of an incriminating nature while performing a search of an area for certain objects pursuant to a lawful warrant; when an officer finds an incriminating article while the officer is engaged in a hot pursuit; or when an officer comes across an incriminating object while conducting a search incident to a lawful arrest.[207]
- ***Searches in Open Fields.*** The Fourth Amendment does not protect against searches in "open fields," such as rural farmland, even if the intrusion onto the lands is a common-law trespass.[208] Open fields are distinct from a property owner's curtilage, "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" which fall under the scope of the Fourth Amendment's protections.[209]
- ***Search Following Consent.*** A search to which an individual consents satisfies Fourth Amendment requirements.[210]
- ***Roadblock-type Stops Unrelated to Border Crossings.*** As discussed later, checkpoints may be established at or near the border to detect unlawful border crossings.[211] Government officers may also briefly stop and question individuals without any suspicion of criminal activity at checkpoints to advance certain law enforcement objectives.[212] The Supreme Court has held that a sobriety checkpoint was reasonable under the Fourth Amendment, given the state's

[202] *See* Minnesota v. Dickerson, 508 U.S. 366, 374–75 (1993) (explaining that a search is no longer valid and its fruits will be suppressed if a *Terry* protective search goes beyond what is necessary to determine whether the suspect is armed).

[203] *See id*. at 374–75.

[204] Missouri v. McNeely, 569 U.S. 141, 148–49 (2013) (quoting Kentucky v. King, 563 U.S. 452, 460 (2011)).

[205] *Id.* at 148–49.

[206] Horton v. California, 496 U.S. 128, 134 (1990).

[207] Coolidge v. New Hampshire, 403 U.S. 443, 465–66 (1971).

[208] Hester v. United States, 265 U.S. 57, 58 (1924). An example of the open fields exception is found in *Oliver v. United States*, 466 U.S. 170 (1984), in which police officers entered a farm in rural Kentucky without a search warrant. They investigated the property and came upon a marijuana field surrounded on all sides by woods, fences, and embankment and hidden from public view. *Id*. at 173.

[209] *Id.* at 180 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[210] Katz v. United States, 389 U.S. 347, 358 n.22 (1967).

[211] *See infra* "Fixed Immigration Checkpoints."

[212] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37–38 (2000).

interest in preventing driving under the influence of alcohol, the extent the checkpoint advanced that interest, and the minimal intrusion on individuals who were briefly stopped.[213] In another decision, the Court held that a highway checkpoint program with a primary purpose of discovering illegal narcotics affronted the Fourth Amendment.[214] In short, whether a checkpoint survives Fourth Amendment scrutiny depends on a balancing of the competing interests at stake and the effectiveness of the program.[215]

Warrantless Arrests

Although the Fourth Amendment generally requires law enforcement officers to obtain an arrest warrant, an officer may lawfully arrest persons if the officer observes the arrestee committing an offense or if the officer has probable cause to believe the arrestee has committed any felony.[216] Indeed, INA Section 287(a) authorizes immigration officers to arrest aliens without a warrant in certain circumstances—those in the act of unlawfully entering the country; those who an immigration officer has "reason to believe" are unlawfully present in the United States and are likely to escape before an arrest warrant can be obtained; and those reasonably suspected to have committed a felony.[217]

Government Searches Beyond the Border and Its Functional Equivalent

The Fourth Amendment's warrant requirement generally does not apply to routine searches and seizures at the border or its functional equivalent of persons arriving in the United States. The government may conduct routine searches in these circumstances without probable cause or any suspicion of unlawful activity. But the government's border enforcement activities are not confined to the physical border or its functional equivalent. For example, the government may conduct searches and seizures in areas *beyond* the border to prevent unlawfully present aliens who have evaded detection from traveling further into the interior of the United States, or to prevent the importation of drugs and other contraband.[218]

In some circumstances, searches away from the border may be conducted without a judicial warrant. For instance, courts have recognized that "extended border searches" can be conducted of persons believed to have recently crossed the border and to be engaged in illegal activity.

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[213] Michigan v. Sitz, 496 U.S. 444, 455 (1990).

[214] *Edmond*, 531 U.S. at 48. The Court distinguished the narcotics checkpoint from the sobriety checkpoint in *Sitz*, reasoning that the narcotics checkpoint program was indistinguishable from the general interest in crime control. *Id.* at 41–42.

[215] *Id.* at 47.

[216] Michigan v. DeFillippo, 443 U.S. 31, 36 (1979) (holding that arrest by officer who observed conduct violating a presumptively valid ordinance was not in violation of the Fourth Amendment).

[217] *See* 8 U.S.C. § 1357(a) (conferring arrest authority to officers designated under prescribed regulations).

[218] *See* United States v. Villamonte-Marquez, 462 U.S. 579, 593 (1983) (recognizing the government's interest in patrolling inland or coastal waters "where the need to deter or apprehend smugglers is great"); United States v. Martinez-Fuerte, 428 U.S. 543, 552 (1976) ("Although the Border Patrol maintains personnel, electronic equipment, and fences along portions of the border, it remains relatively easy for individuals to enter the United States without detection.") (citing United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975)); Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973) (noting that the Border Patrol conducts inland surveillance activities "all in the asserted interest of detecting the illegal importation of aliens").

Additionally, government officers may conduct other types of searches beyond the border that do not necessarily require a physical entry into the United States. These searches include the boarding of vessels along coastal waterways, "roving patrols" near the border, fixed immigration checkpoints, and transportation checks.

Given their physical distance from the actual border, some of these searches may require at least heightened suspicion or probable cause of unlawful activity to withstand Fourth Amendment scrutiny.[219]

A table comparing the different types of warrantless searches and seizures that may occur at the border and surrounding areas, including searches at the border or its functional equivalent, immigration checkpoints, roving patrols, extended border searches, and the boarding of vessels, can be found in **Table A-3**.

Extended Border Searches

While the doctrine has not been endorsed or applied by the Supreme Court, several lower courts have concluded that the government may conduct warrantless, "extended border searches" of certain individuals beyond the border or its functional equivalent.[220] Courts have reasoned that immigration and customs officials may not learn of criminal activity until after a vehicle or person has physically crossed the border, and that the government has a strong interest in preventing importation of narcotics and contraband.[221] Thus, unlike searches at a border's functional equivalent (e.g., an international airport), an extended border search occurs at some point after an individual could have been first stopped from entering the United States.[222]

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[219] *See, e.g.,* United States v. Singh, 415 F.3d 288, 294 (2d Cir. 2005) ("Border Patrol operations along inland routes—not at the border or its functional equivalent—including permanent checkpoints, temporary checkpoints, and roving patrols are held to a higher standard.").

[220] *See* United States v. Cardenas, 9 F.3d 1139, 1148 (5th Cir. 1993) (noting that "the border search doctrine has been extended to allow government officials to conduct a warrantless search and seizure *beyond* the border or its functional equivalent"); United States v. Caicedo-Guarnizo, 723 F.2d 1420, 1422 (9th Cir. 1984) ("The 'extended border' doctrine is an expansion of this rule; it permits the Government to conduct border searches some time after the border has been crossed.").

[221] *See Cardenas*, 9 F.3d at 1149 ("The major impetus behind the extended border search doctrine is 'the government interest in stopping drug traffic.' ") (quoting WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS, § 15.3 (Supp. 1993)); United States v. Alfonso, 759 F.2d 728, 734 (9th Cir. 1985) ("Customs agents may learn or realize the significance of suspicious circumstances only after a vehicle or person has crossed the border.") (citing Jones v. United States, 326 F.2d 124 (9th Cir. 1963)); United States v. Bilir, 592 F.2d 735, 740 (4th Cir. 1979) ("The many difficulties that attend the attempt to intercept contraband and to apprehend increasingly mobile and sophisticated smugglers at the very borders of the country have of course given birth to the doctrine."). Additionally, "the agents may delay a search in a reasonable effort to sweep in associates of suspected smugglers." *Alfonso*, 759 F.2d at 734 (citing United States v. Espericueta-Reyes, 631 F.2d 616, 619–20 (9th Cir. 1980)).

[222] United States v. Guzman-Padilla, 573 F.3d 865, 878 (9th Cir. 2009) (citing United States v. Niver, 689 F.2d 520, 526 (5th Cir. 1982)); *see also* United States v. Stewart, 729 F.3d 517, 526 (6th Cir. 2013) ("Courts typically apply the doctrine in situations where customs agents returned custody of an item, or where customs agents never took custody of the item at the border, but conducted a subsequent search of that item after the custodian and the items had cleared customs."); United States v. Glaziou, 402 F.2d 8, 12–13 (2d Cir. 1969) (describing the "border area" as being "elastic" and extending to the area "in the immediate vicinity of any entry point"). Courts have distinguished extended border searches from functional border searches, particularly in criminal cases where the defendant argued that the government search should have been subject to heightened scrutiny because it occurred away from the border. *See, e.g., Stewart*, 729 F.3d at 525–26 (concluding that defendant was not subject to an extended border search, even though one of his laptop computers was examined at a CBP field office 20 miles from the airport, because his computer had not been "cleared" for entry, and thus there was "no attenuation" between his border crossing and the search of his computer); United States v. Cotterman, 709 F.3d 952, 961–62 (9th Cir. 2013) (holding that extended border search

Pocket Constitution

The Declaration of Independence
The Constitution of the United States
The Bill of Rights
Amendments XI–XXVII
Gettysburg Address

TheCapitolNet
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Yet because extended border searches occur after a person has entered the United States (and potentially has already been inspected at the border), they intrude more upon a searched individual's privacy expectations than searches at the border or its functional equivalent, where the government's authority is more pronounced.[223] Thus, lower courts have adopted a three-part test to determine whether an extended border search is reasonable under the Fourth Amendment.[224] Under this test, an extended border search must meet these criteria:

1. "Reasonable certainty" (or a "high degree of probability") that a border crossing has occurred;
2. "reasonable certainty" that no change in the condition of the person or vehicle being searched has occurred since the border crossing, and that any contraband found was present when the person or vehicle crossed the border; and
3. reasonable suspicion of criminal activity.[225]

Courts have applied the three-pronged test when considering Fourth Amendment challenges to extended border searches. For instance, in one case, the Ninth Circuit held that Border Patrol agents lawfully searched a vehicle spotted near the U.S.-Mexico border.[226] The court found there was reasonable certainty that the driver had just crossed the border because his vehicle was encountered in a remote area less than two miles from the border, accessible only through a valley originating in Mexico.[227] The Ninth Circuit concluded that the agents had reasonable suspicion for the search because the vehicle was in a known smuggling route, had Mexican license plates, drove erratically, and contained a black tarp covering in the back.[228]

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doctrine did not apply to forensic examination of laptop computer at laboratory 170 miles from the border because the computer "never cleared customs so entry was never effected").

[223] *See Cotterman*, 709 F.3d at 961 ("The key feature of an extended border search is that an individual can be assumed to have cleared the border and thus regained an expectation of privacy in accompanying belongings."); United States v. Yang, 286 F.3d 940, 946 (7th Cir. 2002) ("The constitutional concern of extending the border in this manner is that it potentially permits searches with less than probable cause at significant distances from our national borders."); United States v. Cardenas, 9 F.3d 1139, 1148 (5th Cir. 1993) ("An extended border search, however, entails a greater intrusion on an entrant's legitimate expectations of privacy than does a search conducted at the border or its functional equivalent.").

[224] *Yang*, 286 F.3d at 946 ("Because an extended border search entails greater intrusion on an entrant's legitimate expectations of privacy than does a search conducted at the border or its functional equivalent, courts have instituted the three-part test to ensure that the search is reasonable.") (citing *Cardenas*, 9 F.3d at 1148).

[225] *See Stewart*, 729 F.3d at 525; *Guzman-Padilla*, 573 F.3d at 878–79; *Yang*, 286 F.3d at 945; *Cardenas*, 9 F.3d at 1148; United States v. Caminos, 770 F.2d 361, 364 (3d Cir. 1985); *Alfonso*, 759 F.2d at 734; United States v. Garcia, 672 F.2d 1349, 1364 (11th Cir. 1982). To determine whether there was "reasonable certainty" of a border crossing (or "reasonable certainty" that the condition of the person or vehicle remained unchanged since the crossing), courts consider the "totality of the surrounding circumstances," such as the time and distance from the original entry and the manner and extent of any surveillance. *Guzman-Padilla*, 573 F.3d at 879 (quoting Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966)). The "reasonable certainty" standard is higher than probable cause, but does not require proof beyond a reasonable doubt. *Id.* at 880 (citing United States v. Corral-Villavicencio, 753 F.2d 785, 788 (9th Cir. 1985)); United States v. Espinoza-Seanez, 862 F.2d 526, 531 (5th Cir. 1988) (citing United States v. Driscoll, 632 F.2d 737, 739 (9th Cir. 1980)). Instead, "the totality of the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information [must] be sufficient in the light of their experience to warrant a firm belief that a border crossing has occurred." United States v. Tilton, 534 F.2d 1363, 1366–67 (9th Cir. 1976) (alteration added). Thus, the officers are not required to show an absolute certainty of a border crossing. *Guzman-Padilla*, 573 F.3d at 880.

[226] *Guzman-Padilla*, 573 F.3d at 880–82.

[227] *Id.* at 881.

[228] *Id.* at 882.

In another case, the Fifth Circuit ruled that agents lawfully searched a woman encountered in El Paso, Texas, just a block from a pedestrian border crossing.[229] The court determined there was reasonable certainty that the woman had just crossed the border because a checkpoint search of her companion suggested they had been traveling together.[230] The Fifth Circuit also found there was reasonable certainty that there was no changed condition of the woman or her belongings given the brief time and distance that had passed since she crossed the border and was searched.[231] The court further ruled there was reasonable suspicion to search the woman because evidence seized from her companion indicated they were trafficking narcotics.[232]

Courts have upheld extended border searches on many other occasions.[233] In a few cases, though, courts have concluded that the challenged search did not meet the extended border search criteria. For instance, the Ninth Circuit held that Border Patrol agents unlawfully searched a truck suspected of carrying narcotics because they did not first see the truck until it was three miles north of the border in the middle of a busy border town, and the Border Patrol agents could not have been reasonably certain the truck or its cargo had recently crossed the border.[234] Although the agents learned afterward that the truck had been in the United States for only 90 minutes before being spotted, "[t]he 90-minute gap in surveillance was enough to change the contents of the truck, and therefore, the customs agents could not be reasonably certain any contraband found

[229] *Cardenas*, 9 F.3d at 1151–53.

[230] *Id.* at 1151. In concluding there was a reasonable certainty that the woman had recently crossed the border, the court observed that evidence of a border crossing "may be inferred from circumstantial evidence." *Id.* at 1150 (internal citation omitted).

[231] *Id.* at 1152–53. The court held that the Border Patrol does not have to show there was "continuous surveillance" to establish a reasonable certainty of an individual's unchanged condition from the time of the border crossing, noting that the court had previously upheld extended border searches where individuals were unobserved for up to 30 minutes or close to an hour. *Id.* at 1152.

[232] *Id.* at 1153. *See also* United States v. Alfonso, 759 F.2d 728, 735 (9th Cir. 1985) ("The fact that some search occurred at the time of the initial border crossing simply does not prevent later searches from coming under the rules of border searches.") (citing United States v. Caicedo-Guarnizo, 723 F.2d 1420, 1422–23 (9th Cir. 1984)).

[233] *See, e.g.,* United States v. Villasenor, 608 F.3d 467, 472–74 (9th Cir. 2010) (ruling that search of individual's vehicle was proper because ICE agents had surveilled vehicle after it crossed the border, and they had received a tip that the vehicle was being used for a drug trafficking operation); United States v. Yang, 286 F.3d 940, 947–49 (7th Cir. 2002) (upholding search of individual who had already passed through customs where it was undisputed that he had just arrived at Chicago O'Hare International Airport; it was reasonably certain there was no change in the condition of his luggage because it had been out of his control for a significant period of time; and there was reasonable suspicion that he was trafficking narcotics); United States v. Espinoza-Seanez, 862 F.2d 526, 531–32 (5th Cir. 1988) (concluding that search of automobile was reasonable because agents had noticed tracks leading to and from the border in an area where the vehicle had previously been seen, the agents had followed the vehicle both by helicopter and on the ground, and there was reasonable suspicion of criminal activity); United States v. Alfonso, 759 F.2d 728, 736–37 (9th Cir. 1985) (holding that search of Colombian ship in Los Angeles harbor was permissible because it occurred within a day-and-a-half after its arrival in U.S. waters and after an initial cursory search); United States v. Garcia, 672 F.2d 1349, 1367 (11th Cir. 1982) (upholding search of plane that had been under continuous surveillance after crossing the border where there was reasonable suspicion that it was involved in drug smuggling); United States v. Bilir, 592 F.2d 735, 741 (4th Cir. 1979) (holding that agents reasonably searched individual some seven hours after an observed border crossing, where the search had been delayed to confirm developing suspicion that the individual was engaged in drug smuggling).

[234] United States v. Perez, 644 F.2d 1299, 1302 (9th Cir. 1981).

in the truck had crossed the border."[235] Thus, the legality of an extended border search turns on the specific facts and circumstances in each case.[236]

Boarding and Inspection of Vessels Within Interior and Coastal Waterways

Government searches beyond the border are not strictly limited to land searches and seizures. The federal government may also inspect vessels encountered within interior and coastal waterways. Under federal statutes, customs officers may board vessels found "at any place in the United States" or the "customs waters" (i.e., within 12 nautical miles from the coastline), to examine documents, conduct inspections, and search the vessel and its cargo for contraband and other potential federal customs violations.[237] Additionally, Coast Guard officers (who also have customs enforcement powers) have authority to board certain vessels in U.S. waters and the high seas to examine documentation and conduct inspections and searches for potential violations of federal law.[238] For purposes of the Fourth Amendment, courts have treated the stopping of waterborne vessels near the border differently than the stopping of automobiles on land, given a vessel's access to the open sea and the impracticability of establishing maritime checkpoints.[239] Thus, courts have interpreted the Fourth Amendment as permitting government officials, acting under lawful authority, to board vessels without a warrant, probable cause, or any suspicion of unlawful activity, so long as the boarding is limited in nature. But some courts have held that government officers may not conduct more intrusive searches of the vessel without particularized suspicion of a crime.

United States v. Villamonte-Marquez

In *United States v. Villamonte-Marquez*, the Supreme Court considered whether the Fourth Amendment limits the government's authority under federal statutes to board and inspect vessels in U.S. waters further into the interior of the United States.[240] In that case, customs officials

[235] *Id.* The court determined, moreover, that "government agents will not be allowed to justify an extended border search with information which was not available to the agents at the time of the search." *Id.* (citing United States v. Ramos, 473 F. Supp. 1109, 1111 (S.D. Fla. 1979)). Given the inapplicability of the extended border search doctrine, the court determined that the government failed to show that there was probable cause or consent for the vehicle search. *Id.* at 1302–03; *see also* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (holding that Border Patrol agents on "roving patrol" must have probable cause to search a vehicle).

[236] The Supreme Court has not addressed the concept of extended border searches. But, as discussed in this report, the Court has addressed other types of interior enforcement activities occurring near the border that—unlike extended border searches—do not necessarily require the physical crossing of the border. *See* United States v. Villamonte-Marquez, 462 U.S. 579 (1983); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

[237] 19 U.S.C. §§ 482(a), 1581(a).

[238] 14 U.S.C. § 522(a). The statute requires the vessel to be "subject to the jurisdiction, or to the operation of any law, of the United States." *Id*.

[239] *See* United States v. Villamonte-Marquez, 462 U.S. 579, 589 (1983) ("But no reasonable claim can be made that permanent checkpoints would be practical on waters such as these where vessels can move in any direction at any time and need not follow established 'avenues' as automobiles must do. Customs officials do not have as a practical alternative the option of spotting all vessels which might have come from the open sea and herding them into one or more canals or straits in order to make fixed checkpoint stops."); Cross v. Mokwa, 547 F.3d 890, 900 (8th Cir. 2008) ("The Supreme Court expressly distinguished searches of such sea vessels from those of automobiles on land.").

[240] *Villamonte-Marquez*, 462 U.S. at 581 ("We are asked to decide whether the Fourth Amendment is offended when Customs officials, acting pursuant to this statute and without any suspicion of wrongdoing, board for inspection of

boarded a sailboat 18 miles inland from the Gulf coast to inspect documents, and they discovered marijuana inside the vessel.[241] The owners of the sailboat argued that boarding their vessel without reasonable suspicion violated the Fourth Amendment.[242] The government argued that 19 U.S.C. § 1581 authorized the boarding without suspicion.[243]

The Court rejected the Fourth Amendment challenge, reasoning that, since 1790, Congress has authorized the suspicionless boarding of vessels, "reflecting its view that such boardings are not contrary to the Fourth Amendment."[244] Additionally, the Court reasoned, although the Court has required reasonable suspicion for "roving patrol" stops of *vehicles* near the border,[245] "[t]he nature of waterborne commerce in waters providing ready access to the open sea" made the boarding of vessels distinguishable.[246] The Court observed that, unlike vehicle stops, there is no practical alternative of stopping all vessels at permanent water checkpoints.[247] The Court concluded that the government's interest in assuring compliance with vessel documentation requirements, particularly in heavy drug trafficking areas, outweighed any "modest intrusion" from boarding a vessel.[248] The Court thus held that government officers may board vessels on inland waters with ready access to the open sea for routine document checks without suspicion of unlawful activity.[249]

Lower Courts' Decisions on Boarding of Vessels

Lower courts have also recognized the government's broad authority to board vessels and conduct routine inspections without a warrant or any individualized suspicion.[250] Courts have

documents a vessel that is located in waters providing ready access to the open sea.").

[241] *Id.* at 583.

[242] *Id.* at 585.

[243] *Id.*

[244] *Id.* at 592. The Court described a 1790 statute authorizing the boarding of vessels as a "lineal ancestor" to 19 U.S.C. § 1581. *Villamonte-Marquez*, 462 U.S. at 584. According to the Court, "the enactment of this statute by the same Congress that promulgated the constitutional amendments that ultimately became the Bill of Rights gives the statute an impressive historical pedigree." *Id.* at 585.

[245] *See* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (requiring reasonable suspicion for roving patrol stops near the border); *compare with* United States v. Martinez-Fuerte, 428 U.S. 543, 562, 566 (1976) (holding that fixed checkpoint stops near the border require no reasonable suspicion). For additional discussion about roving patrols and immigration checkpoints in the interior of the United States, *see infra* "Roving Patrols" & "Fixed Immigration Checkpoints."

[246] *Villamonte-Marquez*, 462 U.S. at 588–89.

[247] *Id.* at 589. In addition, "[t]he system of prescribed outward markings used by States for vehicle registration is also significantly different than the system of external markings on vessels, and the extent and type of documentation required by federal law is a good deal more variable and more complex than are the state vehicle registration laws." *Id.* at 593.

[248] *Id.* at 592. The Court described the routine customs inspections as "a brief detention where officials come on board, visit public areas of the vessel, and inspect documents." *Id.*

[249] *Id.* at 593.

[250] *See, e.g.,* United States v. Albano, 722 F.2d 690, 695 (11th Cir. 1984) ("Customs officers may board a vessel in Customs waters to check its documents even if the boarding serves merely as a pretext for the officers' desire to look for signs of contraband."); United States v. Helms, 703 F.2d 759, 762–63 (4th Cir. 1983) ("Customs officers are, by express statute, authorized to stop and board for a documentary examination any vessel within the 'customs waters,' . . . with or without any suspicion of criminal activity."); United States v. Watson, 678 F.2d 765, 771 (9th Cir. 1982) (declaring that "the Coast Guard has plenary authority to stop vessels for document and safety inspections" without any suspicion); United States v. Hilton, 619 F.2d 127, 131 (1st Cir. 1980) ("We believe the limited intrusion represented by a document and safety inspection on the high seas, even in the absence of a warrant or suspicion of wrongdoing, is reasonable under the fourth amendment."); United States v. Freeman, 579 F.2d 942, 946 (5th Cir. 1978) ("The

held that, during the inspection, the officers may visit public areas of the vessel and observe anything in plain view.[251] But officers must have at least reasonable suspicion to conduct a more intrusive search of the vessel, and probable cause for an exhaustive "stem to stern" search.[252]

While the government's ability to conduct warrantless searches of vessels within interior or coastal waterways is generally limited to routine safety and document inspections (unless there is particularized suspicion of unlawful activity), the authority to board and search vessels *crossing the international border* is less restrained.[253] Lower courts have recognized that, if a vessel is believed to have recently crossed the border into the United States, customs officials generally may stop and search the vessel beyond the scope of a routine document inspection with no suspicion that a crime is afoot.[254]

Roving Patrols

The U.S. Border Patrol frequently conducts "roving patrols" near the border to enforce federal immigration and drug laws.[255] A roving patrol occurs when Border Patrol agents traverse certain

reasonableness and constitutionality of brief stops of vessels in Customs waters by Customs agents for the purpose of routine document and safety checks is beyond question.").

[251] *See* United States v. Cardona-Sandoval, 6 F.3d 15, 23 (1st Cir. 1993) (stating that the inspection "must be confined to areas reasonably incident to the purpose of the inspection"); United States v. Humphrey, 759 F.2d 743, 746 (9th Cir. 1985) (concluding that routine Coast Guard inspection was limited to publicly exposed deck area and did not extend to living quarters below deck); United States v. Herrera, 711 F.2d 1546, 1550 n.6 (11th Cir. 1983) ("At a minimum, it allows Customs officers to view those non-private areas of the vessel which are in the plain view of a lawful boarding party."); United States v. Garcia, 598 F. Supp. 533, 537 (S.D. Fla. 1984) ("Once properly aboard a vessel, officers are given a considerable opportunity to detect illegal activity. They may visit public areas of the boat and observe anything in plain view.").

[252] *See Cardona-Sandoval*, 6 F.3d at 23 (stating that reasonable suspicion authorizes only a "limited intrusion" of vessel); United States v. Roy, 869 F.2d 1427, 1430 (11th Cir. 1989) ("A full stem to stern search is permissible on probable cause that a crime has been, or is being, committed."); *Herrera*, 711 F.2d at 1550 ("We hold today that where Customs officers have a reasonable suspicion that Customs violations exist, they may board a vessel to conduct a limited 'search' of the non-private areas of the vessel."); *Hilton*, 619 F.2d at 131 ("A more extensive search is permissible only if there is consent or probable cause to believe a crime has been or is being committed."); United States v. Williams, 617 F.2d 1063, 1087 (5th Cir. 1980) (holding that the Fourth Amendment requires at least reasonable suspicion to search a vessel); *Garcia*, 598 F. Supp. at 537 ("Once properly aboard a vessel, officers cannot conduct an exhaustive search unless by the time their limited inspection is complete their suspicions have ripened into probable cause.").

[253] *See* United States v. Alfonso, 759 F.2d 728, 734 (9th Cir. 1985) ("The rules of the 'border search' extend to crossings of ocean boundaries as well as the land boundaries with Mexico and Canada."); *Blair*, 665 F.2d at 505 ("The requirements that the fourth amendment's reasonableness standard imposes upon a vessel seizure vary greatly according to that vessel's geographic location.").

[254] *See* United States v. Alfaro-Moncada, 607 F.3d 720, 732 (9th Cir. 2010) (holding that customs officers could search living quarters inside foreign cargo ship docked at a port of entry without any suspicion); United States v. Pickett, 598 F.3d 231, 235 (5th Cir. 2010) ("Our precedent establishes that a border crossing occurs whenever a vessel crosses from international waters into the United States, regardless of the defendant's departure point."); United States v. Dobson, 781 F.2d 1374, 1376 (9th Cir. 1986) ("Customs officials may thus conduct a border search of any ship arriving in port which is known to have sailed from international waters."); *Herrera*, 711 F.2d at 1552 ("Our cases have clearly distinguished between border searches which are reasonable because they occur at the border and limited Customs searches in the maritime context which are reasonable if based on a reasonable suspicion of Customs violations."); United States v. Helms, 703 F.2d 759, 763 (4th Cir. 1983) (explaining that stopping and boarding a vessel in inland or coastal waterways is deemed to occur at the border's functional equivalent if the vessel had recently crossed the border).

[255] *See Martinez-Fuerte*, 428 U.S. at 552 (noting that "roving patrols are maintained to supplement the [immigration] checkpoint system"). While such patrols normally take place in the vicinity of the border, there are some instances when they have been conducted at more considerable distances. *See* United States v. Venzor-Castillo, 991 F.2d 634,

areas near the border and stop vehicles suspected of carrying unlawfully present aliens or illegal narcotics, even if there is not necessarily an indication the vehicle had crossed the border.[256] Unlike immigration checkpoints discussed later in this report—which occur at established points on roads near the border and may require all drivers to stop for brief questioning[257]—roving patrols do not occur at fixed locations and only target those suspected of engaging in unlawful activity.[258] Additionally, unlike extended border searches, roving patrols may stop vehicles regardless of whether the vehicle and its occupants had crossed the border, and regardless of whether the condition of the vehicle and its occupants had changed since a border crossing.

As discussed below, the Supreme Court and lower courts have addressed the constitutional limitations on roving patrols, concluding that Border Patrol officers may randomly stop vehicles near the border so long as they have reasonable suspicion that the occupants are engaged in unlawful activity (e.g., smuggling aliens). But the officers may not search the vehicle in the absence of probable cause or consent.

Almeida-Sanchez v. United States

In *Almeida-Sanchez v. United States*, the Supreme Court addressed the constitutionality of roving patrols under the Fourth Amendment.[259] In that case, the Border Patrol had stopped a motorist some 25 air miles north of the U.S.-Mexico border and found marijuana inside his vehicle.[260] The motorist, who was convicted of illegally transporting marijuana, argued that the officers lacked probable cause and that the search of his vehicle therefore violated the Fourth Amendment.[261] In response, the government argued that the vehicle search was permissible under INA Section 287(a)(3), which authorizes warrantless searches of vehicles and other conveyances within a "reasonable distance" of the border.[262]

The Supreme Court held that the search of the vehicle violated the Fourth Amendment.[263] Recognizing the federal government's authority to conduct routine inspections and searches at the border without a warrant or probable cause, the Court determined that roving patrol searches of

634–35, 639–40 (10th Cir. 1993) (holding that a Border Patrol stop of a vehicle some 235 miles from the border did not occur within a reasonable distance permitted under statute).

[256] *See* United States v. Ortiz, 422 U.S. 891, 894 (1975) (noting that roving patrols "often operate at night on seldom-traveled roads" and "look for criminal activity, both alien smuggling and contraband smuggling").

[257] *See Martinez-Fuerte*, 428 U.S. at 558–60 (describing the "regularized manner" of routine checkpoint stops).

[258] *See Moving the Line of Scrimmage: Re-Examining the Defense-In-Depth Strategy, Hearing Before the Subcomm. on Border and Maritime Sec. of the H. Comm. on Homeland Sec.*, 114th Cong. (2016) (written testimony of U.S. Border Patrol Chief Mark Morgan) ("Generally, Border Patrol agents employ two means to stop vehicles driven by smugglers using side roads to circumvent a checkpoint: additional checkpoints and roving patrols. USBP may establish and coordinate tactical checkpoints on circumvention routes, so as to ensure the effectiveness of checkpoints on main thoroughfares. USBP may also conduct roving patrols, an acceptable and effective means to stop vehicles driven by smugglers using side roads to circumvent an immigration checkpoint. Border Patrol agents on roving patrol may stop a vehicle only if they have reasonable suspicion, based upon specific articulable facts and rational inferences from those facts, that the vehicle contains individuals who may have illegally entered the United States.").

[259] Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973).

[260] *Id.* at 267–68.

[261] *Id.*

[262] *Id.* at 268; *see also* 8 U.S.C. § 1357(a)(3) (authorizing immigration officers to engage in warrantless search of vehicle "within a reasonable distance from any external boundary of the United States"); 8 C.F.R. § 287.1(a)(2) (defining "reasonable distance" as "within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by" the Border Patrol).

[263] *Almeida-Sanchez*, 413 U.S. at 272–73.

vehicles at points *removed* from the physical border or its functional equivalent "was of a wholly different sort."[264] The Court reasoned that the government's interests at the border are less potent in the interior of the United States, where individuals have greater Fourth Amendment protections against governmental intrusion.[265] The Court concluded that such searches required either probable cause or consent to the search.[266]

United States v. Brignoni-Ponce

The *Almeida-Sanchez* Court considered whether roving patrol searches, in which Border Patrol agents search vehicles for evidence of illegal activity, were permissible under the Fourth Amendment. In *United States v. Brignoni-Ponce*, the Court considered the constitutionality of roving patrol *stops*, in which agents stop vehicles for the more limited purpose of questioning the occupants about immigration status and any suspicious circumstances.[267] In that case, Border Patrol agents stopped a vehicle because the occupants appeared to be of Mexican descent.[268] Upon questioning the driver and his two passengers, the agents learned they had entered the United States unlawfully and arrested them.[269] The driver, who was convicted of illegally transporting aliens,[270] argued that he was subject to an unlawful seizure.[271] The government argued that it had authority to conduct the stop without a warrant or any particularized suspicion under the INA.[272] The government further argued that preventing the unlawful entry of aliens into the United States warranted roving patrols near the border.[273]

The Supreme Court determined that suspicionless roving patrol stops would risk "potentially unlimited interference" with border-area residents' use of the highways.[274] The Court determined that the "reasonable suspicion" standard should apply to roving patrol stops given their "modest

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[264] *Id.* at 273.

[265] *Id.* at 274–75.

[266] *Id.* The Court observed that, although it had previously held that the government may stop and search an automobile without a warrant, *see, e.g.*, Carroll v. United States, 267 U.S. 132 (1925), that exception "does not declare a field day for the police in searching automobiles." *Almeida-Sanchez*, 413 U.S. at 269. "Automobile or no automobile, there must be probable cause for the search." *Id.* The Court also determined that, although it had previously ruled that the government may conduct certain types of administrative inspections on less than probable cause, *see* Camara v. Municipal Ct., 387 U.S. 523 (1967), United States v. Biswell, 406 U.S. 311 (1972), Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), those decisions were inapposite because they still required the government inspector to obtain a warrant before conducting the search; and they involved inspections of federally licensed and regulated commercial enterprises. *Almeida-Sanchez*, 413 U.S. at 270–71.

[267] United States v. Brignoni-Ponce, 422 U.S. 873, 874 (1975).

[268] *Id.* at 875.

[269] *Id.*

[270] *See* 8 U.S.C. § 1324(a)(2) (prohibiting a person from knowingly or recklessly bringing into the United States an alien who has not received authorization to enter the country).

[271] *Brignoni-Ponce*, 422 U.S. at 875.

[272] *Id.* at 876–77; *see* 8 U.S.C. § 1357(a)(1) (authorizing an immigration officer "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States" without a warrant) and (a)(3) (authorizing warrantless boarding and searching of vehicles and other conveyances "within a reasonable distance" from the border).

[273] *Id.* at 878–79.

[274] *Id.* at 882. The Court observed that "[r]oads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well," and that there are metropolitan areas near the U.S.-Mexico border with significantly large populations, such as San Diego, California. *Id.* The Court warned that if there were no restrictions on the Border Patrol's ability to conduct roving patrol stops, its agents "could stops motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law." *Id.* at 883.

intrusion."[275] Thus, the Court held, "officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."[276] According to the Court, the stop must be limited to asking about citizenship or immigration status, and any suspicious circumstances.[277] "[A]ny further detention or search must be based on consent or probable cause."[278]

The Court listed the criteria to determine whether there is reasonable suspicion for a roving patrol stop, including the characteristics of the area in which the vehicle is found; the vehicle's proximity to the border; the usual traffic patterns on the particular road where the vehicle is encountered; the driver's behavior (e.g., erratic driving or attempts to evade the officers); recent unlawful border crossings in the area; aspects of the vehicle itself (e.g., if it contains large compartments, appears to be heavily loaded, or carries a large number of passengers); and the physical characteristics or appearance of the persons inside the vehicle.[279]

The Court ruled that the Border Patrol agents lacked reasonable suspicion because they relied solely on the apparent Mexican ancestry of the vehicle's occupants.[280] The Court stated that the occupants' Mexican ancestry in itself failed to provide a reasonable belief that they were aliens or that the vehicle concealed unlawfully present aliens.[281] While the Court suggested that ethnic appearance is a "relevant factor" in the reasonable suspicion calculus, "standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."[282]

United States v. Cortez

The Supreme Court has applied *Brignoni-Ponce's* reasonable suspicion test in other roving patrol cases. In *United States v. Cortez*, the Court considered whether Border Patrol agents in a remote part of Arizona lawfully stopped a camper believed to be smuggling aliens into the United

[275] *Id.* at 879–81. The Court cited its prior decisions in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Adams v. Williams*, 407 U.S. 143 (1972), which applied the reasonable suspicion standard to brief investigatory stops, and stated that those cases "establish that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime." *Brignoni-Ponce*, 422 U.S. at 881. The Court concluded that applying this standard "allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." *Id.* at 883.

[276] *Id.* at 884; *see also* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding that the police may not randomly stop an automobile to check driver's license and registration unless there is reasonable suspicion that the motorist is unlicensed or that the automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law). While the Court concluded that roving patrol stops require reasonable suspicion that a vehicle is carrying unlawfully present aliens, the Court did not decide whether, more generally, immigration officers may stop individuals who are reasonably believed to be aliens, when there is no reasonable suspicion of their unlawful presence. *Brignoni-Ponce*, 422 U.S. at 884 n.9.

[277] *Id.* at 881.

[278] *Id.* at 882; *see also* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (holding that a roving patrol *search* of an automobile requires probable cause or consent to the search).

[279] *Brignoni-Ponce*, 422 U.S. at 884–85.

[280] *Id.* at 885–86.

[281] *Id.* at 886. The Court noted that many U.S. citizens have physical characteristics associated with Mexican ancestry, and that even in border areas a relatively small number of those with Mexican ancestry are aliens. *Id.*

[282] *Id.* at 887. For more discussion about the use of race or ethnic appearance in making roving patrol stops ("racial profiling"), *see infra* "Racial Profiling."

States.[283] The Court clarified that reviewing courts should look to the "totality of the circumstances" to determine whether the agents have reasonable suspicion.[284] The Court held there was reasonable suspicion for the stop because the agents had previously uncovered clues of alien smuggling activity in the area, and knew where the suspects would likely appear.[285] The Court's decision in *Cortez* signaled that no single factor is dispositive in analyzing the reasonableness of a roving patrol stop. Instead, courts must consider whether all the factors relied upon by the agent—including any reasonable inferences drawn from those facts—collectively establish reasonable suspicion.

United States. v. Arvizu

In *United States v. Arvizu*, the Supreme Court held that a Border Patrol agent in Arizona had reasonable suspicion to stop a minivan found to be carrying more than 100 pounds of marijuana.[286] The agent had observed the van on a remote road often used by smugglers and noticed the van suddenly slow down upon approaching him.[287] The agent also observed that the van had five occupants, the driver failed to acknowledge him, and two children were seated as though propped up on concealed cargo.[288] In addition, the van was registered to an address in an area known for alien and drug smuggling.[289] The Court concluded that the officer's observations, when "taken together," raised a reasonable inference of criminal activity.[290] The Court's decision in *Arvizu* reinforced that courts must consider the totality of the circumstances in assessing whether facts relied upon by Border Patrol agents demonstrate reasonable suspicion.

[283] United States v. Cortez, 449 U.S. 411, 412–13 (1981).

[284] *Id.* at 417–18; *see also* United States v. Moreno-Chaparro, 180 F.3d 629, 631–32 (5th Cir. 1998) ("No single factor is determinative; the totality of the particular circumstances must govern the reasonableness of any stop by roving border patrol officers."). According to the Supreme Court, there must be consideration of "all the circumstances" in the case, including the officers' objective observations, information from police reports, the suspect's patterns of criminal behavior, and the reasonable inferences and deductions drawn from those facts. *Cortez*, 449 U.S. at 418. In addition, the circumstances "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id.*

[285] *Cortez*, 449 U.S. at 413–15, 417, 419–21.

[286] United States v. Arvizu, 534 U.S. 266, 277–78 (2002).

[287] *Id.* at 269–70.

[288] *Id.* at 270.

[289] *Id.* at 271.

[290] *Id.* at 277–78. The Ninth Circuit had determined that most of the factors the Border Patrol officer relied upon to make the vehicle stop carried little or no weight, and that the remaining factors failed to establish reasonable suspicion. *Id.* at 272–73. The Supreme Court held that the Ninth Circuit erroneously evaluated these factors "in isolation from each other" rather than considering the "totality of the circumstances." *Id.* at 274. Although the factors, by themselves, may have been "consistent with innocent travel," they *collectively* established a "particularized and objective basis" for the vehicle stop. *Id.* at 275, 277–78.

Lower Court Decisions on Roving Patrols

Lower courts, when applying the *Brignoni-Ponce* factors to roving patrol stop challenges,[291] have generally concluded that the challenged stops were supported by reasonable suspicion.[292] In a few cases, however, reviewing courts determined that Border Patrol agents lacked reasonable suspicion for the stop. For instance, the Fifth Circuit has ruled that reasonable suspicion was absent when a truck was stopped more than 200 miles from the border, there was a piece of brush under the truck that could have been picked up "in myriad unsuspicious ways," and the vehicle occupants avoided eye contact but engaged in no other suspicious behavior.[293] Similarly, the Ninth Circuit held that Border Patrol agents tailgating a vehicle failed to establish reasonable suspicion when the driver of the vehicle changed lanes and pulled off the main road, and tried to shield his face from the patrol car's headlights.[294] As these cases show, the reasonable suspicion determination is a fact-intensive inquiry that depends on the circumstances in each case.[295]

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[291] With regard to the proximity to the border factor, the U.S. Court of Appeals for the Fifth Circuit has held that this element is satisfied if a vehicle is spotted less than 50 miles from the border (even if it was later stopped more than 50 miles from the border). United States v. Freeman, 914 F.3d 337, 343 (5th Cir. 2019). Vehicles traveling more than 50 miles from the border, on the other hand, are considered to be a "substantial distance" from the border. United States v. Garza, 727 F.3d 436, 441 (5th Cir. 2013) (citing United States v. Inocencio, 40 F.3d 716, 722 n.7 (5th Cir. 1994)). Thus, in the Fifth Circuit, roving patrols occurring less than 50 miles from the border implicate the proximity factor, and "this 'vital element' contributes significantly to the reasonableness of the Border Patrol agents' suspicion." United States v. Nichols, 142 F.3d 857, 867 (5th Cir. 1998).

[292] *See, e.g.,* United States v. Raygoza-Garcia, 902 F.3d 994, 1000–01 (9th Cir. 2018) (officers had reasonable suspicion where vehicle was encountered 70 miles from the border, the vehicle had changed drivers since it was observed earlier in the day, the driver rapidly slowed down and became rigid upon noticing the officers, and the driver focused on the officers as they followed him close behind); United States v. Garza, 727 F.3d 436, 440–42 (5th Cir. 2013) (officer had reasonable suspicion to stop truck because it was traveling along a well-known smuggling route, it contained a sheet of plywood over the truck bed, and the driver became excited and nervous upon noticing the patrol car); United States v. Cheromiah, 455 F.3d 1216, 1221–22 (10th Cir. 2006) (stop was permissible because van was encountered 85 miles from border in area frequented by smugglers, the van had a temporary license plate, the van's driver and front passenger stiffened up and avoided eye contact with the agent, and the agent saw one passenger in the back of the van "diving" down); United States v. Singh, 415 F.3d 288, 295 (2d Cir. 2005) (reasonable suspicion established where vehicle in rural area known for alien smuggling activity drove very slowly and tapped its brakes in a manner commonly used to signal a car's availability to pick up aliens, and vehicle later contained passengers just minutes after motion sensors had alerted to a border crossing); United States v. Cruz-Hernandez, 62 F.3d 1353, 1355–56 (11th Cir. 1995) (agent lawfully stopped van because the driver appeared nervous and quickly averted his gaze when the agent approached, the agent knew that many "undocumented aliens" lived in a nearby trailer park, and the driver was wearing clothes typically worn by "undocumented aliens" working in the local fields).

[293] United States v. Olivares-Pacheco, 633 F.3d 399, 402–05 (5th Cir. 2011).

[294] United States v. Sigmond-Ballesteros, 285 F.3d 1117, 1122–26 (9th Cir. 2002).

[295] *Compare, e.g.,* United States v. Cervantes, 797 F.3d 326, 338–39 (5th Cir. 2015) (holding that there was reasonable suspicion when a vehicle appeared to be sagging in the rear; the vehicle suddenly changed lanes and decelerated when officers approached; the driver did not respond to the officers' attempt to get their attention; the rear passengers were dirty and unshaven; and one of the passengers sat in the rear cargo area of the vehicle); United States v. Valdes-Vega, 738 F.3d 1074, 1079–80 (9th Cir. 2013) (concluding that reasonable suspicion was present when a truck was traveling on a highway frequently used by smugglers; the truck had Mexican license plates; and agents saw the truck speeding, changing lanes frequently, and cutting off other traffic); *with* United States v. Rangel-Portillo, 586 F.3d 376, 380–83 (5th Cir. 2009) (fact that vehicle passengers leaving a Wal-Mart parking lot all wore seatbelts, sat rigidly, refrained from talking to each other, had no shopping bags, and did not make eye contact with agent did not establish reasonable suspicion even though stop occurred just 500 yards from the border); United States v. Garcia-Camacho, 53 F.3d 244 (9th Cir. 1995) (reasonable suspicion not shown based on mere fact that motorists appeared Hispanic, happened to be traveling on a highway used by "illegal aliens," looked straight ahead and did not acknowledge the agent, drove a truck that appeared "heavily ladened," and engaged in other common behavior that matched many law-abiding users of the highway); United States v. Martinez-Cigarroa, 44 F.3d 908, 911 (10th Cir. 1995) (no reasonable suspicion to stop vehicle based on evidence that driver appeared to show an interest in a passing van and a Border Patrol car following

Fixed Immigration Checkpoints

The Border Patrol also establishes immigration checkpoints near the border. An immigration checkpoint, unlike a roving patrol, occurs at stationary points on major highways.[296] The Border Patrol operates two types of checkpoints: permanent checkpoints, which "are maintained at or near intersections of important roads leading away from the border"; and temporary (or "tactical") checkpoints which "operate like permanent ones, [and] occasionally are established in other strategic locations."[297] In some checkpoints, Border Patrol officers may require all drivers to stop for brief questioning.[298] In other checkpoints, officers may stop only some motorists and refer them to a "secondary inspection" area for questioning.[299]

Immigration checkpoints are distinguishable from *border* checkpoints, which are located in areas where passing traffic has likely crossed the international border, and which are considered the border's functional equivalent.[300] Immigration checkpoints, in contrast, are typically located on roads leading *away* from the border where traffic has not necessarily crossed the border.[301] Consequently, because immigration checkpoints occur in places beyond the point at which a person could have entered the United States, they are distinguishable from stops at the border or its functional equivalent. Immigration checkpoints are also distinct from extended border searches, which may also occur in the interior of the United States, because they do not require evidence of a border crossing.

In reviewing constitutional challenges to immigration checkpoints, the Supreme Court and lower courts have generally considered whether such stops are permissible under the Fourth Amendment. Courts have generally determined that checkpoint stops are reasonable without a

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that van).

[296] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 558–60 (1976) (describing the "regularized manner" of routine checkpoint stops); United States v. Ortiz, 422 U.S. 891, 892 (1975) (noting that traffic checkpoints "differ from roving patrols in several important respects.").

[297] *Martinez-Fuerte*, 428 U.S. at 552.

[298] *See id.* at 550 (describing checkpoint near Sarita, Texas, where "the officers customarily stop all northbound motorists for a brief inquiry."); United States v. Ortiz, 422 U.S. 891, 894 (1975) (noting that in checkpoints where traffic is light "officers can stop all vehicles for questioning and routinely inspect more of them" than in other checkpoints).

[299] *See Martinez-Fuerte*, 428 U.S. at 546 (describing checkpoint near San Clemente, California, where most motorists "are allowed to resume their progress without any oral inquiry or close examination," but some may be directed to a "secondary inspection" area for questioning about their citizenship and immigration status); *Ortiz*, 422 U.S. at 893–94 ("If anything about a vehicle or its occupants leads an officer to suspect that it may be carrying aliens, he will stop the car and ask the occupants about their citizenship.").

[300] *See* United States v. Jackson, 825 F.2d 853, 860 (5th Cir. 1987) (noting that "border equivalent checkpoints intercept no more than a negligible number of domestic travelers").

[301] *Id.* at 859 (explaining that vehicles on roads leading away from the border may not have crossed the border). The location of an immigration checkpoint is based on various factors, including whether the location is (1) distant enough from the border to avoid interference with traffic in populated areas near the border (e.g., to avoid repeated checking of commuter or urban traffic); (2) near the confluence of two or more major roads leading away from the border; (3) in terrain that restricts passage of vehicles around the checkpoint (e.g., mountains); (4) in a stretch of highway that ensures safe operation of the checkpoint (e.g., having an unrestricted view of oncoming traffic, avoiding congestion); and (5) located more than 25 miles from the border. *Martinez-Fuerte*, 428 U.S. at 553. The 25-mile factor is based on DHS regulations that allow Mexican nationals who have been issued Border Crossing Cards to enter the United States without obtaining an I-94 "Arrival/Departure Record" so long as their visit is limited to within 25 miles of the U.S.-Mexico border (currently 75 miles if the alien is visiting Arizona, and 55 miles if the alien is visiting New Mexico). *See* 8 C.F.R. §§ 212.1(c)(1), 235.1(h)(1)(iii), (v). The checkpoints are established beyond this 25-mile zone "in order to control the unlawful movement inland of such visitors." *United States v. Baca*, 368 F. Supp. 398, 406 (S.D. Fla. 1973).

warrant or any individualized suspicion of unlawful activity given the regularized and limited nature of such stops. But courts have determined that more intrusive checkpoint stops (e.g., an extended detention or vehicle search) may require reasonable suspicion or probable cause.

United States v. Martinez-Fuerte

In *United States v. Martinez-Fuerte*, the Supreme Court held that immigration checkpoint stops require no individualized suspicion under the Fourth Amendment.[302] The Court reasoned that there is a strong public interest for routine checkpoints "because the flow of illegal aliens cannot be controlled effectively at the border."[303] The Court also observed that routine checkpoint stops are typically brief detentions that are "limited to what can be seen without a search."[304]

The Court recognized that, in *Brignoni-Ponce*, it had imposed a reasonable suspicion standard for *roving patrol* stops, but determined that immigration checkpoints are less intrusive.[305] Given the "regularized manner" of immigration checkpoints, the Court reasoned, motorists "are not taken by surprise" when they see them, and can be reasonably certain that the stops are authorized.[306] Additionally, at immigration checkpoints, "there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops."[307]

The Court thus held that the Border Patrol may stop and briefly question motorists at "reasonably located" checkpoints.[308] The Court also determined that Border Patrol agents may, while conducting checkpoints, selectively refer motorists to a "secondary inspection" area based on criteria that would not justify a roving patrol stop, including ethnic appearance.[309] Because the checkpoint stop's minimal intrusion requires no particularized suspicion, the Court reasoned, "officers must have wide discretion" to "divert" motorists for questioning.[310] The Court cautioned

[302] *Martinez-Fuerte*, 428 U.S. at 545.

[303] *Id.* at 556. The Court noted that checkpoints deter smugglers and aliens who had surreptitiously entered the United States from traveling farther into the interior. *Id.* at 557. The Court determined that requiring reasonable suspicion for routine checkpoint stops "would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens." *Id.*

[304] *Id.* at 557–58.

[305] *Id.* at 558–59.

[306] *Id.* at 559. The Court explained that "[t]he location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class." *Id.*; *see also* United States v. Ortiz, 422 U.S. 891, 894–95 (1975) ("At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and his is much less likely to be frightened or annoyed by the intrusion.").

[307] *Martinez-Fuerte*, 428 U.S. at 559. The Court also rejected the claim that checkpoints that refer only some motorists to a "secondary inspection" area for questioning are more intrusive, noting that such referrals are limited to relatively routine inquiries "that cannot feasibly be made of every motorist where the traffic is heavy." *Id.* at 560. In short, because "selective referrals" do not require all passing motorists to be questioned, they "tend to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public." *Id.*

[308] *Id.* at 562, 566. The Court stated that the reasonableness of checkpoint stops depends on factors such as the location of the checkpoint and its method of operation. *Id.* at 565. But "the choice of checkpoint locations is an administrative decision that must be left largely within the discretion of the Border Patrol." *Id.* at 562 n.15. The motorists in *Martinez-Fuerte* had challenged one of the checkpoint locations (San Clemente), but the Court determined that it was reasonable given the high number of alien apprehensions in the area, and the fact that the checkpoint was in an area between San Diego and Los Angeles where traffic was relatively light. *Id.*

[309] *Id.* at 563.

[310] *Id.* at 563–64.

that a checkpoint stop must be limited in scope and duration, and any further intrusion requires heightened suspicion or consent.[311]

United States v. Ortiz

The Supreme Court has also considered the constitutionality of warrantless vehicle searches at immigration checkpoints.[312] In *United States v. Ortiz*, Border Patrol agents had stopped a vehicle at a southern California checkpoint, and discovered three aliens inside the trunk.[313] The driver, Ortiz, argued that the search of his car violated the Fourth Amendment.[314] The government asserted that probable cause was not needed to search a vehicle at an immigration checkpoint because the Border Patrol agent's discretion in deciding which cars to search was limited by the location of the checkpoint.[315] The government also claimed that a checkpoint stop is less intrusive than roving patrol stops.[316]

The Supreme Court determined that the routine nature of a checkpoint stop "does not mitigate the invasion of privacy that a search entails."[317] The Court also observed that Border Patrol agents have virtually unlimited discretion whether to search a vehicle at a checkpoint.[318] The Court stated that "[t]his degree of discretion to search private automobiles is not consistent with the Fourth Amendment," and "[a] search, even of an automobile, is a substantial invasion of privacy."[319] Thus, citing *Almeida-Sanchez*, the Court held that "at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause."[320] The Court held that the agents' search of Ortiz's vehicle was unconstitutional because they lacked probable cause that it contained unlawfully present aliens.[321]As *Ortiz* reflects, while Border Patrol agents have broad authority to conduct suspicionless checkpoint stops for brief questioning, there are constitutional constraints on the agents' ability to engage in more intrusive actions at those checkpoints.

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[311] *Id.* at 567. *See also* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451–53 (1990) (holding that state's highway sobriety checkpoint program, in which all passing vehicles are stopped to determine if the drivers are intoxicated, did not violate the Fourth Amendment); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (suggesting that police officers may, without articulable suspicion, use roadblocks to conduct "spot checks" and question all oncoming traffic).

[312] United States v. Ortiz, 422 U.S. 891, 892 (1975).

[313] *Id.* at 891–92.

[314] *Id.* at 892.

[315] *Id.* at 894.

[316] *Id.*

[317] *Id.*

[318] *Id.* at 895–96.

[319] *Id.* at 896.

[320] *Id.* at 896–97. The Court noted that not every aspect of a vehicle inspection at a checkpoint (e.g., looking beneath the chassis) is a "search" for purposes of the Fourth Amendment. *Id.* at 897 n.3. But the Court declined to specify the exact scope of an automobile "search." *Id.* The Court also cautioned that probable cause is not necessarily required for all vehicle inspections, and that potentially "different considerations would apply to routine safety inspections required as a condition of road use." *Id.* With regard to establishing probable cause, the Court stated that Border Patrol officers may consider various factors, including the number of persons in the vehicle; the appearance and behavior of the driver and passengers; their inability to speak English; the responses the driver and passengers give to the officers' questions; the nature of the vehicle; and indications that the vehicle may be heavily loaded. *Id.* at 897. Additionally, the officers may draw "reasonable inferences" from those facts based on their knowledge and prior experience. *Id.*

[321] *Id.* at 897–98.

Lower Court Decisions on Immigration Checkpoints

Lower courts have also addressed legal challenges to immigration checkpoint stops, including temporary checkpoints. Generally, courts have recognized the Border Patrol's authority to briefly detain and question motorists about citizenship or immigration status without a warrant or individualized suspicion of unlawful activity.[322] Some courts have also held that Border Patrol agents may ask about the driver's vehicle (e.g., ownership, number of occupants), travel plans, and any "suspicious circumstances."[323] Courts have extended agents' authority to visual inspections of the vehicle (including the undercarriage),[324] requesting immigration-related documents,[325] and secondary inspection referrals for further questioning.[326] Additionally, agents at checkpoints may conduct exterior "canine sniffs" of vehicles so long as they do not unreasonably

[322] *See, e.g.,* United States v. Tello, 924 F.3d 782, 786 (5th Cir. 2019) ("At a fixed checkpoint, however, which has as its primary purpose identifying illegal immigrants, vehicles may be briefly detained in furtherance of that purpose, and the occupants questioned, without either a warrant or any individualized reasonable suspicion.") (citing United States v. Jaime, 473 F.3d 178, 181 (5th Cir. 2006)); United States v. Forbes, 528 F.3d 1273 (10th Cir. 2008) ("[O]ur jurisprudence holds that 'border patrol agents may stop, briefly detain, and question individuals [at permanent border checkpoints] without any individualized suspicion that the individuals are engaged in criminal activity.' ") (quoting United States v. Massie, 65 F.3d 843, 847 (10th Cir. 1995)) (alteration in original); United States v. Machuca-Barrera, 261 F.3d 425, 435 (5th Cir. 2001) (holding that checkpoint stop was permissible where agent asked only a few questions about immigration status and the stop lasted for no more than a few minutes); United States v. Soto-Camacho, 58 F.3d 408, 411 (9th Cir. 1995) ("[A] stop conducted at a clearly visible temporary checkpoint pursuant to a routine inspection of all vehicles for illegal aliens is not unreasonable under the Fourth Amendment.").

[323] *See Tello*, 924 F.3d at 787 ("As we have stated, 'questions about travel including origin and destination would be commonplace for an agent to ask during an immigration inspection.' ") (quoting United States v. Alvarez, 750 F. App'x 311, 313 (5th Cir. 2018)); United States v. Rascon-Ortiz, 994 F.2d 749, 752 (10th Cir. 1993) ("[A] few brief questions concerning such things as vehicle ownership, cargo, destination, and travel plans may be appropriate if reasonably related to the agent's duty to prevent the unauthorized entry of individuals into this country and to prevent the smuggling of contraband."); United States v. Preciado, 966 F.2d 596, 598 (10th Cir. 1992) ("This court has held that border patrol agents may question individuals regarding suspicious circumstances, in addition to citizenship matters, when those individuals are stopped at permanent checkpoints.") (citing United States v. Benitez, 899 F.2d 995, 998 (10th Cir. 1990)). The Tenth Circuit has stated that "[w]hile there is no single definition of what constitutes a 'suspicious circumstance,' border patrol agents are given deference in relying upon their law enforcement training and past experience in deciding whether a suspicious circumstances exists." *Rascon-Ortiz*, 994 F.2d at 753 (citing United States v. Sanders, 937 F.2d 1495, 1500 (10th Cir. 1991)). Thus, for instance, the court has determined that an agent's observation that a motorist's hands were shaking nervously constituted suspicious circumstances. *Id.*; *see also id.* at 753 n.6 (stating that "suspicious circumstances" is not equivalent to the reasonable suspicion standard).

[324] *See* United States v. Gonzalez-Acosta, 989 F.2d 384, 388 (10th Cir. 1993) ("[W]e conclude the undercarriage inspection of defendant's vehicle did not constitute a 'search' within the meaning of the Fourth Amendment."); United States v. Price, 869 F.2d 801, 804 (5th Cir. 1989) ("Because the items observed were in plain view, the visual inspection was not a search within the meaning of the Fourth Amendment."); United States v. White, 766 F.2d 1328, 1329 (9th Cir. 1985) (noting that "the Supreme Court approved routine stops for brief questioning and visual inspection of vehicles") (citing United States v. Martinez-Fuerte, 428 U.S. 543, 562 n.15 (1976)).

[325] *See* United States v. Garcia-Garcia, 319 F.3d 726, 731 (5th Cir. 2003) ("[Ag]ents at a fixed checkpoint may only question the passengers briefly (and request documentation) about their immigration status absent reasonable suspicion of illegal activity that arises before the immigration status of the passengers has been verified."); *Massie*, 65 F.3d at 847–48 ("During a routine fixed-checkpoint stop, border patrol agents may question individuals in the absence of individualized suspicion about their citizenship and immigration status and request documentation."); United States v. Preciado-Robles, 964 F.2d 882, 884 (9th Cir. 1992) (observing that a routine checkpoint stop includes "the production of immigration documents").

[326] *See* United States v. Chacon, 330 F.3d 323, 326 (5th Cir. 2003) ("Referral of vehicles to a secondary inspection area is also permissible under the Fourth Amendment, even in the absence of any individualized suspicion.") (citations omitted); United States v. Soyland, 3 F.3d 1312, 1314 (9th Cir. 1993) (observing that "reasonable suspicion is not necessary" for a referral to secondary inspection); United States v. Maestas, 2 F.3d 1485, 1495 (10th Cir. 1993) ("In short, Border patrol agents may stop *any* car at the fixed border checkpoint, and may refer *any* car for secondary inspection.") (emphasis in original).

prolong the checkpoint stop.[327] Agents at checkpoints may also board commercial buses, question the passengers, and inspect the bathrooms, open spaces, and exterior luggage compartments, so long as the inspection is brief.[328]

In short, the checkpoint stop must be limited to the time reasonably necessary to determine the immigration or citizenship status of those passing through the checkpoint.[329] For that reason, lower courts have held that checkpoint stops exceeding the scope of a routine immigration inspection require at least reasonable suspicion that unlawful activity is afoot.[330] In some cases, checkpoint stops that went beyond a routine inspection were ruled unconstitutional.[331]

Transportation Checks

Apart from stopping vehicles at fixed highway checkpoints, the Border Patrol sometimes conducts "transportation checks" in certain areas near the border, such as bus and train stations.[332] During these checks, Border Patrol agents board buses, trains, or other conveyances and ask

[327] *See Tello*, 924 F.3d at 787 ("Border Patrol agents may conduct a canine sniff to search for drugs or concealed aliens at immigration checkpoints so long as the sniff does not lengthen the stop beyond the time necessary to verify the immigration status of a vehicle's passengers.") (citing United States v. Ventura, 447 F.3d 375, 378 (5th Cir. 2006)); *Forbes*, 528 F.3d at 1277 ("At the border, canine inspections are permissible even in the absence of individualized suspicion and even without the consent of the vehicle's driver or occupants.") (citing *Massie*, 65 F.3d at 848); United States v. Taylor, 934 F.2d 218, 221 (9th Cir. 1991) (concluding that a dog sniff at an immigration checkpoint "did not exceed the boundaries of reasonableness"). A canine alert to a vehicle produces probable cause to search the interior of that vehicle. United States v. Thomas, 726 F.3d 1086, 1096 (9th Cir. 2013); *Forbes*, 528 F.3d at 1277; United States v. Williams, 69 F.3d 27, 28 (5th Cir. 1995).

[328] *See Ventura*, 447 F.3d at 380–81 ("We perceive no constitutional violation in the routine brief inspections of a bus's restrooms and undercarriage luggage bins for concealed aliens, so long as such sweeps do not unduly prolong the checkpoint stop. To hold otherwise would encourage illegal aliens and alien smugglers to conceal themselves and others in luggage, luggage compartments, engine compartments, and other unsafe places in commercial buses in an effort to circumvent the checkpoint inspection."); United States v. Hernandez, 7 F.3d 944, 946 (10th Cir. 1993) ("When a bus enters the checkpoint and is referred to the secondary inspection location, border patrol agents are permitted to board the bus, question its passengers regarding citizenship and immigration status, make a brief visual inspection of their surroundings, and question the passengers regarding suspicious circumstances."); *cf.* Florida v. Bostick, 501 U.S. 429, 434–36 (1991) (holding that the police can board a bus and ask passengers questions without reasonable suspicion).

[329] *See* United States v. Machuca-Barrera, 261 F.3d 425, 433 (5th Cir. 2001) ("The permissible duration of the stop is limited to the time reasonably necessary to complete a brief investigation of the matter within the scope of the stop.").

[330] *See id.* at 434 ("[I]f the initial, routine questioning generates reasonable suspicion of other criminal activity, the stop may be lengthened to accommodate its new justification."); United States v. Rascon-Ortiz, 994 F.2d 749, 753 (10th Cir. 1993) ("Border Patrol Agents must limit their inspection to a routine checkpoint stop unless consent, probable cause or reasonable suspicion arises during the stop.").

[331] *See, e.g.,* United States v. Ellis, 330 F.3d 677, 680–81 (5th Cir. 2003) (holding that Border Patrol agent impermissibly extended detention of bus passengers by "squeezing and sniffing" their baggage for drugs without reasonable suspicion); United States v. Portillo-Aguirre, 311 F.3d 647, 656–58 (5th Cir. 2002) (ruling that agent who had completed routine immigration inspection of a bus unlawfully extended the detention by investigating, without reasonable suspicion, whether a passenger aboard was carrying drugs); United States v. Jackson, 825 F.2d 853, 854 (5th Cir. 1987) (holding that "plenary searches" at permanent checkpoint were unreasonable under the Fourth Amendment); United States v. Maxwell, 565 F.2d 596, 596–98 (9th Cir. 1977) (holding that checkpoint violated the Fourth Amendment because it was in a remote area with no buildings or houses nearby, it was marked only by small stop signs and traffic cones, and it imposed a "sudden, unexpected, and somewhat traumatic" intrusion); United States v. Summers, 153 F. Supp. 3d 1261, 1267–70 (S.D. Cal. 2015) (ruling that search of automobile trunk at checkpoint violated the Fourth Amendment because there was no consent or probable cause for the search).

[332] U.S. Customs & Border Prot., *U.S. Border Patrol Transportation Check Operations* (May 11, 2018), https://www.cbp.gov/document/publications/us-border-patrol-transportation-check-operations.

passengers about immigration status, travel plans, and luggage.[333] The agents may also request consent to search a passenger or his or her luggage.[334] As authority for these transportation checks, the Border Patrol cites INA Section 287, which authorizes immigration officers to search vehicles within a reasonable distance of the border and interrogate individuals about immigration status.[335] The Border Patrol argues that trafficking activity at transportation hubs warrants the use of transportation checks.[336]

The Supreme Court has not addressed the constitutionality of Border Patrol transportation checks under the Fourth Amendment. But in *Florida v. Bostick*, the Court considered whether police officers engaged in drug interdiction may board buses at scheduled stops, question passengers, and ask permission to search their luggage.[337] Observing that law enforcement officers generally do not violate the Fourth Amendment by asking people questions on the street or in public places,[338] the Court determined that bus encounters were permissible so long as a reasonable person "would feel free to decline the officers' requests or otherwise terminate the encounter."[339]

Then, in *United States v. Drayton*, the Supreme Court reaffirmed the principle that the police generally may board buses to ask questions, ask for identification, and request consent to search luggage.[340] The Court also held that the police need not inform passengers of their right not to cooperate and to refuse to consent to a search.[341] Citing *Bostick*, some lower courts have ruled that Border Patrol agents engaged in transportation checks lawfully boarded buses and questioned passengers without a warrant or any suspicion of unlawful activity.[342] *Drayton* would appear to lend further support to these holdings. Even so, some argue that the Border Patrol's practice of boarding buses, trains, or other forms of transportation is intimidating and coercive and may infringe upon those passengers constitutional rights.[343] In 2020, Greyhound, the largest bus

[333] *Id.*

[334] *Id.*

[335] *Id.*; *see* 8 U.S.C. § 1357(a)(1), (3).

[336] U.S. Customs & Border Prot., *U.S. Border Patrol Transportation Check Operations* (May 11, 2018), https://www.cbp.gov/document/publications/us-border-patrol-transportation-check-operations.

[337] Florida v. Bostick, 501 U.S. 429, 431 (1991).

[338] *Id.* at 434 (citing California v. Hodari D., 499 U.S. 621, 628 (1991); Florida v. Rodriguez, 469 U.S. 1, 5–6 (1984); INS v. Delgado, 466 U.S. 210, 216 (1984); Florida v. Royer, 460 U.S. 491, 497 (1983); United States v. Mendenhall, 446 U.S. 544, 557–58 (1980)).

[339] *Id.* at 436. The Court rejected the contention that a police encounter on a bus is more intimidating than other public encounters because a reasonable person would not feel free to leave a bus that is scheduled to depart. *Id.* at 435–36. The Court reasoned that, when freedom of movement is "restricted by a factor independent of police conduct" (e.g., being a passenger on a bus), the appropriate inquiry is not whether a reasonable person would feel free to leave, but whether such person would feel free to decline the officers' requests or otherwise terminate the encounter. *Id.* at 436.

[340] United States v. Drayton, 536 U.S. 194, 203–04 (2002).

[341] *Id.* at 206–07.

[342] *See, e.g.,* United States v. Angulo-Guerrero, 328 F.3d 449, 451 (8th Cir. 2003) (holding that a bus passenger was not subject to a Fourth Amendment seizure when he answered Border Patrol agent's questions on the bus); United States v. Gonzales, 979 F.2d 711, 713–14 (9th Cir. 1992) (holding that a "routine bus sweep" by Border Patrol agents was permissible under the Fourth Amendment); United States v. Mendieta-Garza, 254 F. App'x 307 (5th Cir. Nov. 9, 2007), 2007 WL 3340822, at *5–6 (concluding that no seizure occurred where Border Patrol agents boarded bus without making any intimidating movements or show of force); United States v. Montano, No. B-11-482, 2011 WL 13157358, at *3 (S.D. Tex. Sept. 14, 2011) ("As *Florida v. Bostick* made clear, a law enforcement officer is allowed to approach any individual and ask questions. That case dealt with an officer's questioning of bus passengers when they were already on the bus, which was permissible.").

[343] *See* Letter from Jennie Pasquarella, Dir. of Immigrants' Rights, ACLU Founds. of Cal. et al. to David Leach, Pres. & CEO of Greyhound Lines, Inc., *Re: Immigration Raids on Greyhound Buses* (Mar. 21, 2018), https://www.aclumaine.org/sites/default/files/aclu_affiliate_letter_to_greyhound_-_final.pdf (contending that CBP's

company in the United States, announced it would no longer allow Border Patrol agents to board its buses away from checkpoints or enter nonpublic areas of its terminals without its consent or a warrant.[344] DHS updated its boarding policy by requiring Border Patrol agents to gain access to the bus with the consent of the company's owner or one of the company's employees.[345]

Select Legal Issues

The federal government has broad authority to conduct warrantless searches and seizures at the border or its functional equivalent, but that authority is not unfettered. The government's authority is generally limited to *routine* border searches, such as the inspection of luggage and containers.[346] "Highly intrusive" border searches may require at least reasonable suspicion of a crime.[347] In recent years, lower courts have considered whether searches of electronic devices (e.g., cell phones) exceed a routine border search given the amount of private information that might be stored within them. And DHS's increased use of drone surveillance and biometric collection at the border has also prompted debate over whether these activities should receive greater constitutional scrutiny and, even if constitutionally permissible, whether there should be more statutory limitations on their use. Apart from the government's ability to conduct these types of searches at the border, there has also been some debate about the prevalence and lawfulness of "racial profiling" by law enforcement when making investigatory stops near the border. This section explores these legal issues.

Border Searches of Electronic Devices

The Supreme Court has not yet addressed whether the Fourth Amendment's border search exception extends to warrantless searches of electronic devices such as cell phones and computers—devices that may contain more personal and sensitive information than typically found in a briefcase or automobile. Lower courts have addressed the constitutionality of border searches of electronic devices in a few notable cases. To date, lower courts have generally held that federal officers may conduct relatively limited, manual searches of such devices without a warrant or any individualized suspicion of unlawful activity, but have disagreed as to whether more intrusive searches require heightened suspicion.

Riley v. California

In the 2014 decision *Riley v. California*, the Supreme Court considered the constitutionality of warrantless electronic device searches in the *interior* of the United States.[348] The Court held that the police may not conduct a warrantless search of a cell phone seized during an arrest, even though the Fourth Amendment's warrant requirement usually does not apply to searches incident

bus boarding practices "often evince a blatant disregard for passengers' constitutional rights" and providing illustrative examples where passengers were purportedly harassed and intimidated).

[344] *See* Gene Johnson, *Greyhound to Stop Allowing Immigration Checks on Buses*, ASSOCIATED PRESS (Feb. 21, 2020), https://apnews.com/dc560c3581783c746aee1544c8ad1c85.

[345] *See* Gene Johnson, *AP Exclusive: Agency Memo Contradicts Greyhound on Bus Raids*, ASSOCIATED PRESS (Feb. 14, 2020), https://apnews.com/48960c783dd3f22af2ad320227e40b20.

[346] *See supra* "Routine Searches and Seizures."

[347] *See Flores-Montano*, 541 U.S. at 152.

[348] Riley v. California, 573 U.S. 373, 378, 385 (2014).

to a lawful arrest.[349] Noting that this exception ordinarily applies to brief physical searches of property within the immediate control of the arrestee to prevent potential harm to the police officers and the destruction of evidence, the Court determined that "[t]here are no comparable risks when the search is of digital data."[350]

The *Riley* Court also concluded that searching cell phone data raises greater privacy concerns than searching physical items typically found on a person, such as a wallet.[351] The Court observed that cell phones—unlike most other physical items—carry "immense storage capacity" and a broader range of private information, including photographs, videos, contact information, text messages, financial records, and internet browsing history.[352] For that reason, "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person."[353] The Court thus held that the police must secure a warrant before searching the contents of a cell phone seized during an arrest,[354] but it noted that "other case-specific exceptions may still justify a warrantless search of a particular phone."[355] The Court did not address whether the border search exception permits warrantless electronic device searches at the *border*.

Lower Courts' Application of the Border Search Exception to Electronic Device Searches

Lower courts have applied the border search exception to electronic device searches. For instance, in *United States v. Ickes*, the Fourth Circuit held that manually inspecting the contents of a computer and disks at the border was permissible given "the Supreme Court's insistence that U.S. officials be given broad authority to conduct border searches."[356] In *United States v. Arnold*, the Ninth Circuit similarly ruled that the search of a computer fell within the border search exception because examining a computer's files is analogous to scanning the contents of luggage.[357]

Courts have disagreed on whether *more intrusive* border searches of electronic devices require particularized suspicion of criminal activity. In *United States v. Cotterman*, the Ninth Circuit held that, while a "quick look" at computer files would not require any particularized suspicion, a forensic examination of the hard drive (i.e., using software to copy the hard drive and analyze its contents, including deleted content) exceeded a routine border search given its "comprehensive and intrusive nature."[358] The court held that the forensic examination—which it described as a

[349] *Id.* at 401 ("[A] warrant is generally required before such a search, even when a cell phone is seized incident to arrest.").

[350] *Id.* at 386.

[351] *Id.* at 393.

[352] *Id.* at 393–94.

[353] *Id.* at 393.

[354] *Id.* at 403.

[355] *Id.* at 401–02. The Court suggested, for example, that searching a cell phone without a warrant might be warranted in exigent circumstances to prevent the imminent destruction of evidence, to pursue a fleeing suspect, or to assist those who are seriously injured or threatened with imminent injury. *Id.* at 402.

[356] United States v. Ickes, 393 F.3d 501, 506 (4th Cir. 2005).

[357] United States v. Arnold, 533 F.3d 1003, 1008–10 (9th Cir. 2008).

[358] United States v. Cotterman, 709 F.3d 952, 960, 966 (9th Cir. 2013). The court explained that "[e]lectronic 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." *Id.* at 965. According to the court, "[s]uch a thorough and detailed

"computer strip search"—required reasonable suspicion.[359] In *United States v. Kolsuz*, the Fourth Circuit ruled that the forensic border analysis of a cell phone required "some form of individualized suspicion" given the exposure of "uniquely sensitive information" within the device.[360] Citing *Riley*, the court reasoned that cell phones are "fundamentally different" from objects traditionally subject to government searches, such as wallets and bags.[361]

Conversely, in *United States v. Touset*, the Eleventh Circuit held that the Fourth Amendment requires no suspicion of unlawful activity for forensic border searches of electronic devices.[362] The court observed that, although the Supreme Court has required reasonable suspicion for highly intrusive border searches of a person's body (e.g., a rectal examination), the Court has never extended this requirement to border searches of *property* "however nonroutine and intrusive."[363] The court also reasoned that *Riley*'s restrictions on warrantless cell phone searches incident to an arrest did not apply to searches at the border, where there are diminished privacy expectations.[364]

Courts have also disagreed about the proper scope of an electronic device search at the border. In *United States v. Cano*, the Ninth Circuit held that an electronic device search must be limited to a search for digital contraband within the device itself (e.g., child pornography), and does not encompass searching the device for any evidence that may lead to the discovery of a crime.[365] Thus, the court determined, border officials may conduct a forensic search of a cell phone only if there is reasonable suspicion that it physically contains contraband.[366] In *United States v. Aigbekaen*, the Fourth Circuit ruled that CBP officials may conduct a forensic border search of an electronic device so long as there is reasonable suspicion of a criminal offense that "bears some nexus" to the justifications for the border search exception (e.g., to protect national security, to block entry of unwanted persons, to exclude contraband).[367]

In sum, lower courts have generally agreed that CBP officers may conduct relatively limited, manual searches of electronic devices at the border without a warrant or any particularized

search of the most intimate details of one's life is a substantial intrusion upon personal privacy and dignity." *Id.* at 968.

[359] *Id.* at 966, 968; *see also* United States v. Cano, 934 F.3d 1002, 1016 (9th Cir. 2019), *reh'g denied*, 973 F.3d 966 (9th Cir. 2020) (holding that recording of phone numbers and text messages from cell phone for further processing exceeded routine border search and required reasonable suspicion).

[360] United States v. Kolsuz, 890 F.3d 133, 145–46 (4th Cir. 2018).

[361] *Id. See also* United States v. Saboonchi, 990 F. Supp. 2d 536, 561 (D. Md. 2014) ("It is the potentially limitless duration and scope of a forensic search of the imaged contents of a digital device that distinguishes it from a conventional computer search. The latter may take hours and delve deeply into the contents of the device, but it is difficult to conceive of a conventional search of a computer or similar device at a border lasting days or weeks.").

[362] United States. v. Touset, 890 F.3d 1227, 1233 (11th Cir. 2018). The court noted, for example, that the Supreme Court has upheld the suspicionless search of a fuel tank at the border, without imposing heightened requirements for other types of personal property. *Id.* (citing United States v. Flores-Montano, 541 U.S. 149, 155 (2004)).

[363] *Id.*

[364] *Id.* at 1234. *See also* United States v. Vargara, 884 F.3d 1309, 1312 (11th Cir. 2018) (observing that, in *Riley*, the Supreme Court "expressly limited its holding to the search-incident-to-arrest exception," and recognized that other exceptions may justify a warrantless search of a cell phone).

[365] United States v. Cano, 934 F.3d 1002, 1018–19 (9th Cir. 2019), *reh'g denied*, 973 F.3d 966 (9th Cir. 2020) ("[B]order officials are limited to searching for contraband only; they may not search in a manner untethered to the search for contraband."). The court distinguished searches of *items* that are actually being smuggled from searches of *evidence* that may reveal the importation of contraband. *Id.* at 1018.

[366] *Id.* at 1020.

[367] United States v. Aigbekaen, 943 F.3d 713, 721 (4th Cir. 2019). Thus, the court held that the warrantless forensic search of an airplane passenger's laptop computer, cell phone, and digital media player based on suspicion that he was involved in *domestic* sex trafficking of minors did not fall within the border search exception because the search "lacked the requisite nexus to the recognized historic rationales justifying the border search exception." *Id.*

suspicion. But courts have disagreed about whether more intrusive, forensic searches require at least reasonable suspicion of a crime, and whether that reasonable suspicion must be tied to evidence of contraband within the device itself, or any evidence of potential criminal activity that may be taking place.[368]

Current CBP Policies on Electronic Device Searches

As courts have considered whether electronic device searches fit within the border search exception, CBP has developed policies governing border searches of electronic devices.[369] Currently, the agency permits "basic" manual searches of electronic devices "with or without suspicion" of criminal activity, but restricts "advanced" forensic searches to cases where there is reasonable suspicion or a "national security concern."[370] CBP also permits officers to "detain" an electronic device (or copies of information from it) "for a brief, reasonable period of time to perform a more thorough border search," generally not exceeding a period of five days.[371] CBP officers may also "seize and retain" the device (or copies of information from the device) if there is probable cause that the device contains evidence of a crime.[372]

CBP's distinctions between "basic" and "advanced" electronic device searches mirror the Fourth and Ninth Circuits' differing standards between manual and forensic border searches of electronic devices. At least one court has restricted CBP's ability to conduct any *noncursory* border search of an electronic device—whether basic or advanced.[373] In *Alasaad v. Nielsen*, the U.S. District Court for the District of Massachusetts held that both basic and advanced electronic device searches "implicate the same privacy concerns" at stake in *Riley*.[374] In a basic search, the court

[368] While some courts have considered whether CBP officials must have reasonable suspicion to conduct warrantless forensic searches of electronic devices at the border, other courts have declined to reach that question, instead concluding that the evidence from a challenged forensic search need not be suppressed because the officers acted on a good faith, reasonable belief they could conduct the warrantless search. *See, e.g.,* United States v. Aguilar, 973 F.3d 445, 449–50 (5th Cir. 2020) ("Given the state of the law at the time Aguilar's phone was forensically searched, we conclude that the border agents had a good faith, reasonable belief that they could search Aguilar's phone without obtaining a warrant."); United States v. Wanjiku, 919 F.3d 472, 485–86 (7th Cir. 2019) ("Given the state of the law at the time of these searches of the contents of Wanjiku's electronic devices, the agents therefore possessed an objectively good faith belief that their conduct did not violate the Fourth Amendment because they had reasonable suspicion to conduct the searches.").

[369] The agency defines an "electronic device" to include "any device that may contain information in an electronic or digital form, such as computers, tablets, disks, drives, tapes, mobile phones and other communication devices, cameras, music and other media players." U.S. Customs & Border Prot., *Subject: Border Search of Electronic Devices* ¶ 3.2 (Jan. 4, 2018), https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf.

[370] *See id.* ¶¶ 5.1.3, 5.1.4. According to CBP, an "advanced search" occurs when an immigration officer "connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents." *Id.* ¶ 5.1.4. The agency describes a "basic search" simply as any electronic device search that is "not an advanced search" (i.e., manually examining the device and reviewing its contents). *Id.* ¶ 5.1.3.

[371] *Id.* ¶ 5.4.1.

[372] *Id.* ¶ 5.5.1.1. ICE, the DHS component primarily responsible for immigration enforcement in the interior of the United States, as well as the investigation of cross-border criminal activity, may also play a role. For example, when CBP seizes or detains an electronic device, it may turn over the device to ICE for analysis and investigation. *Id.* ¶ 2.7. Under current ICE policy, a "basic search" of an electronic device does not require any suspicion of criminal activity, while an "advanced search" requires reasonable suspicion. *See* Alasaad v. Nielsen, 419 F. Supp. 3d 142, 148 (D. Mass. 2019), *appeal filed*, No. 20-1081 (1st Cir. Jan. 29, 2020).

[373] *See id.* at 165.

[374] *Id.* at 163.

found, CBP officers can manually scan the contents of the device and access "a wealth of personal information."[375] The court noted that an advanced search reveals an even "broader range" of information, including deleted or encrypted data.[376] The court thus held that any noncursory border search of an electronic device—whether basic or advanced—requires reasonable suspicion that the device contains contraband.[377] As of the date of this report, that case is currently on appeal.

Thus, while courts have recognized the government's broad authority to conduct routine searches at the border without a warrant or any suspicion of unlawful activity, there is some disagreement among lower courts over how that authority extends to border searches of electronic devices, such as cell phones and computers.

Drone Surveillance

The Homeland Security Act of 2002 establishes an Air and Marine Operations (AMO) unit within CBP, and authorizes the agency to conduct unmanned aerial operations.[378] Additionally, the Intelligence Reform and Terrorism Prevention Act of 2004 requires DHS to implement remote aerial surveillance programs along the southwest border.[379] Annual appropriations legislation also funds and authorizes CBP operations, including remote aerial surveillance.[380]

Based on this authority, CBP's AMO uses helicopters, fixed-wing aircraft, and unmanned aircraft systems to conduct surveillance within the border region, including to intercept drug smugglers and illegal border crossers.[381] In particular, the agency uses "Predator B" drones that record high-quality videos and collect data from the ground with long-range cameras, radio transmitters, and infrared sensors.[382] The drones can identify and track persons and vehicles on the ground, as well as detect physical objects such as backpacks, signs, firearms, and license plates.[383]

In recent years, some lawmakers and commenters have expressed concern that drone surveillance might raise privacy concerns.[384] These concerns have mainly focused on the use of drone

[375] *Id.* The court stated that "even a basic search allows for both a general perusal and a particularized search of a traveler's personal data, images, files and even sensitive information." *Id.*

[376] *Id.* at 165.

[377] *Id.* According to the court, a cursory search is "a brief look reserved to determining whether a device is owned by the person carrying it across the border, confirming that it is operational and that it contains data." *Id.* at 163.

[378] Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 802, 130 Stat. 122 (2016) (amending Homeland Security Act of 2002, Pub. L. No. 107-296, § 411, 116 Stat. 2135 (2002)) (codified at 6 U.S.C. § 211(f)(3), (4), (k)).

[379] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5201(a), (c), 118 Stat. 3638 (2004).

[380] *See* Consolidated Appropriations Act of 2020, Pub. L. No. 116-93, Tit. II, 133 Stat. 2317, 2506 (2019); Continuing Appropriations Act, 2021, and Other Extensions Act, Pub. L. No. 116-159, Div. A, § 101(6), 134 Stat. 709, 710 (2020).

[381] *See* U.S. Customs & Border Prot., *Air and Marine Operations Assets* (Jan. 9, 2020), https://www.cbp.gov/border-security/air-sea/aircraft-and-marine-vessels. See also U.S. Customs & Border Prot., *Air and Marine Operations* (2018), https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/FS_2018_AMO_Fact%20Sheet.pdf ("AMO interdicts unlawful people and cargo approaching U.S. borders, investigates criminal networks and provides domain awareness in the air and maritime environments, and responds to contingencies and national taskings.").

[382] *See* Sidney Fussel, *The Endless Aerial Surveillance of the Border*, ATLANTIC (Oct. 11, 2019), https://www.theatlantic.com/technology/archive/2019/10/increase-drones-used-border-surveillance/599077/; David Bier & Matthew Feeney, *Drones on the Border: Efficacy and Privacy Implications*, CATO INST. (May 1, 2018), https://www.cato.org/publications/immigration-research-policy-brief/drones-border-efficacy-privacy-implications.

[383] *Id.*

[384] *See, e.g.*, Letter from Reps. Anna Eshoo & Bobby Rush to Christopher Wray, Dir., FBI et al. (June 9, 2020)

surveillance for domestic law enforcement purposes.[385] There may be instances where the distinction between border-related drone surveillance and domestic surveillance may be blurred. A significant portion of the U.S. populace lives near the border,[386] and CBP sometimes shares information collected through border drone surveillance with state and local entities for law enforcement purposes.[387]

That said, reviewing courts may view constitutional challenges to drone surveillance at the border with skepticism. The Supreme Court has rejected Fourth Amendment challenges to warrantless aerial surveillance of open areas in the interior of the United States, holding that there is no reasonable expectation of privacy in places visible from the public navigable airspace.[388] Citing Supreme Court precedent, some lower courts have likewise been unpersuaded by Fourth Amendment challenges to warrantless drone surveillance by domestic law enforcement.[389]

Because the range of information accessible by the drones' technology potentially exceeds what would typically be exposed from an aerial vantage point (e.g., a helicopter), some argue that remote aerial surveillance should be subject to greater Fourth Amendment scrutiny.[390] In recent

(arguing that the use of Predator B drones and certain other forms of aerial surveillance to collect information about protesters constituted "vast overreach of federal government surveillance"); Sen. Ed Markey, *Senator Markey & Rep. Welch Introduce Legislation to Ensure Transparency, Privacy for Drone Use* (Mar. 15, 2017), https://www.markey.senate.gov/news/press-releases/-senator-markey-and-rep-welch-introduce-legislation-to-ensure-transparency-privacy-for-drone-use (" 'Drones flying overhead could collect very sensitive and personally identifiable information about millions of Americans, but right now, we don't have sufficient safeguards in place to protect our privacy' said Senator Markey, a member of the Commerce, Science and Transportation Committee."); Rebecca L. Scharf, *Game of Drones: Rolling the Dice With Unmanned Aerial Vehicles and Privacy*, 2018 UTAH L. REV. 457, 461 (2018) (arguing that "drones are simply not like any other technology and their potential for wreaking havoc on the fabric of privacy in our society is too great for their use to continue without additional guidelines").

[385] *See, e.g.,* Letter, *supra* note 384, at 1–2 (describing federal law enforcement agencies' use of drone and other forms of aerial surveillance during nationwide protests in American cities).

[386] *See* Tanvi Misra, *Inside the Massive U.S. "Border Zone"* (May 14, 2018), https://www.bloomberg.com/news/articles/2018-05-14/mapping-who-lives-in-border-patrol-s-100-mile-zone.

[387] *See* Craig Whitlock & Craig Timberg, *Border-Patrol Drones Being Borrowed by Other Agencies More Often than Previously Thought*, WASH. POST (Jan. 14, 2014), https://www.washingtonpost.com/world/national-security/border-patrol-drones-being-borrowed-by-other-agencies-more-often-than-previously-known/2014/01/14/5f987af0-7d49-11e3-9556-4a4bf7bcbd84_story.html.

[388] *See* Florida v. Riley, 488 U.S. 445, 450–51 (1989) ("Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police did no more."); Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986) ("[S]uch an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras."); California v. Ciraolo, 476 U.S. 207, 213–15 (1986) ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet.").

[389] *See* Leaders of a Beautiful Struggle v. Baltimore Police Dep't, No. RDB-20-0929, 2020 WL 1975380, at *10 (D. Md. Apr. 24, 2020), *appeal docketed*, No. 20-1495 (4th Cir. Apr. 28, 2020). ("Common strands emerge from these aerial surveillance cases. Chief among these is that the Supreme Court and the Fourth Circuit have generally upheld warrantless aerial surveillance. Fourth Amendment concerns are unlikely to be implicated so long as the surveillance occurs within navigable or regularly traveled airspace, and the flight does not permit the visual observation of 'intimate details' associated with a person's home, or disturb the use of a person's property by means of 'wind, dust, or threat of injury.' ") (quoting *Riley*, 488 U.S. at 451–52, 454 (O'Connor, J., concurring); *Ciraolo*, 476 U.S. at 215; *Dow*, 476 U.S. at 238)); State v. Brossart, No. 32-2011-CR-0049, slip op. at 12 (D.N.D. July 31, 2012) (rejecting claim that the warrantless use of an unmanned aerial vehicle over criminal defendants' property in North Dakota during their arrest violated the Fourth Amendment).

[390] *See, e.g.,* Rebecca L. Scharf, *Game of Drones: Rolling the Dice With Unmanned Aerial Vehicles and Privacy*, 2018 UTAH L. REV. 457, 461 (2018) (arguing that "drones are simply not like any other technology and their potential for wreaking havoc on the fabric of privacy in our society is too great for their use to continue without additional

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years, the Supreme Court has recognized instances when technologically assisted surveillance of persons' public activities can intrude upon privacy interests protected by the Fourth Amendment.[391] The Court has indicated that the use of advanced surveillance technology to probe into "intimate details" may raise constitutional concerns.[392] But it is not clear that aerial drone surveillance would necessarily raise the same issues as other forms of advanced surveillance, such as thermal imaging, monitoring cell phone locations, or installing a tracking device on a vehicle.[393]

Some courts have rejected Fourth Amendment challenges to warrantless drone surveillance in the *interior* of the United States, citing the Supreme Court's jurisprudence permitting warrantless aerial surveillance.[394] It would seem that constitutional challenges to border drone surveillance would face even more significant challenges, given the Court's recognition that the government has broader search authority at the border, where its national security interest "is at its zenith."[395]

Biometric Data Collection at the Border

Biometric data is frequently collected from international travelers. The term *biometric data* generally refers to unique personal identifiers—such as fingerprints, DNA, iris or retinal scan, voice recording, walking gait, and facial geometry.[396] Several federal statutes address the

guidelines.); Nina Gavrilovic, *The All-Seeing Eye in the Sky: Drone Surveillance and the Fourth Amendment*, 93 U. DET. MERCY L. REV. 529, 546 (2016) ("Drones provide a cheap, effective alternative to traditional surveillance and can covertly collect a vast amount of data incomparable to any singular type of surveillance addressed by Fourth Amendment case law."); Shane Crotty, *The Aerial Dragnet: A Drone-Ing Need for Fourth Amendment Change*, 49 VAL. U. L. REV. 219, 247 (2014) ("Drone technology threatens the protections afforded by the Fourth Amendment by intruding into an individual's life and tracking every movement while on a public thoroughfare."); Timothy T. Takahashi, Ph.D., *Drones and Privacy*, 14 COLUM. SCI. & TECH. L. REV. 72, 113 (2013) ("Until the Supreme Court weighs in definitively, advances in miniaturized remote sensing technology will blur the boundaries between reasonable observation and unreasonable eavesdropping.").

[391] Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018); United States v. Jones, 565 U.S. 400, 404–05 (2012); United States v. Kyllo, 533 U.S. 27, 34 (2001).

[392] *Dow Chem. Co.*, 476 U.S. at 238–39.

[393] *See Kyllo*, 533 U.S. at 34 ("We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' " constitutes a search—at least where (as here) the technology in question is not in general public use.") (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)); *Jones*, 565 U.S. at 404 ("We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search' . . . within the meaning of the Fourth Amendment when it was adopted."); *Carpenter*, 138 S. Ct. at 2217 ("Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell-site location information]."). For instance, in one case, a federal district court held that a that a police department's use of remote aerial surveillance to capture imagery data for the purpose of solving violent crimes was not a search under the Fourth Amendment because it merely showed individuals as "a series of anonymous dots," had limited location-tracking capabilities, and lacked the ability to show bodily movements, record in real time, zoom-in on suspicious activities, or reveal "intimate details" from inside or near a home. *Leaders of a Beautiful Struggle*, 2020 WL 1975380 at *11–13. The court, in fact, determined that the surveillance "is far less invasive than the feats of aerial surveillance permitted in *Riley*, *Ciraolo*, and *Dow*." *Id.* at *11.

[394] *See id.* at *10; State v. Brossart, No. 32-2011-CR-0049, slip op. at 12 (D.N.D. July 31, 2012).

[395] United States v. Flores-Montano, 541 U.S. 149, 152 (2004); *see also* United States v. Montoya de Hernandez, 473 U.S. 531, 539–40 (1985) ("But not only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck more favorably to the Government at the border.").

[396] Carra Pope, *Biometric Data Collection in an Unprotected World: Exploring the Need for Federal Legislation Protecting Biometric Data*, 26 J.L. & POL'Y 769, 773–74 (2018).

collection and use of biometric data by government entities. Most of these statutes involve the screening of arriving or departing international travelers and other border security measures, rather than the collection of biometric data in the interior of the United States.[397] For example, 8 U.S.C. § 1365b requires DHS to establish an integrated, automated biometric entry and exit system that records the arrival and departure of foreign nationals, collects biometric data of foreign nationals to verify their identity, and authenticates travel documents through the comparison of biometrics.[398] Another statute, 6 U.S.C. § 1118, requires CBP and the Transportation Security Administration to consult on the deployment of biometric technologies, and further requires DHS to assess the impacts of biometric technology use and submit a report to Congress.[399]

DHS's Office of Biometric Identity Management (OBIM) maintains a biometric database called the Automated Biometric Identification System (IDENT)—holding more than 260 million unique identifiers—that is used for a variety of purposes, including "to detect and prevent illegal entry into the United States," facilitate travel, and the verification of visa applications.[400] DHS also shares biometric information "to support homeland security, defense, and justice missions."[401] DHS is in a multiyear transition to replace IDENT with the Homeland Advanced Recognition Technology System (HART). That system is to likewise store and process biometric data, including face images.[402]

The method of biometrics collection and the kinds of biometric data obtained depend on the foreign national's method of entry and immigration status.[403] Notably, CBP has, because of

[397] *See, e.g.*, 8 U.S.C. § 1379 (mandating the Attorney General or the Secretary of State to consult with Congress to "develop and certify a technology standard, including appropriate biometric identifier standards, that can be used to verify the identity of persons" applying for a visa or seeking admission using a visa); *id.* § 1731 (directing the development of an integrated entry and exit data system); *id.* § 1732 (calling for machine-readable, tamper-resistant entry and exit documents).

[398] *Id.* § 1365b.

[399] 6 U.S.C. § 1118(c).

[400] DHS, *Biometrics*, https://www.dhs.gov/biometrics (last visited Sept. 24, 2020).

[401] *Id.*

[402] *See generally* DHS, PRIVACY IMPACT ASSESSMENT FOR THE HOMELAND ADVANCED RECOGNITION TECHNOLOGY SYSTEM (HART) INCREMENT 1 PIA, DHS/OBIM/PIA-004 (Feb. 24, 2020), https://www.dhs.gov/sites/default/files/publications/privacy-pia-obim004-hartincrement1-february2020_0.pdf.

[403] Ordinarily, an alien seeking entry with a visa must apply for a U.S. visa abroad and supply a digital photograph and electronic fingerprints during the application process, which is verified upon arrival. *Safety and Security of U.S. Borders: Biometrics*, U.S. DEP'T. OF STATE, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/border-biometrics.html (last visited June 15, 2020); *see also* 8 U.S.C. § 1732 (requiring machine-readable, tamper-resistant entry and exit documents for visa applicants). For many travelers holding a passport from a country participating in the Visa Waiver Program, this application process is not required, and the foreign national may present a passport without a visa to visit the United States. For information regarding the Visa Waiver Program (VWP) and to see a list of participating countries, see CRS Report R46300, *Adding Countries to the Visa Waiver Program: Effects on National Security and Tourism* (Apr. 1, 2020). For a country to qualify to participate in the VWP, it must comply with certain biometric requirements. *See id*. The participating country must issue electronic, machine-readable passports that contain a biometric identifier (i.e., e-passports) and certify that it is developing a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers that are verifiable at the country's port of entry. *Id.* Then, when seeking admission into the United States, a traveler's identity is verified using the electronic fingerprint data and digital photographs. *Id*. For further information on arrival and departure inspections for travelers entering the country under the VWP, see CRS Report RL32221, *Visa Waiver Program* (June 29, 2020). Certain individuals are exempt from the biometric requirements: Canadian citizens who are not required to present a visa or be issued Form I-94 or Form I-95 for admission or parole into the United States; aliens younger than 14 or older than 79 on the date of admission; aliens admitted in certain immigration categories; classes of aliens to whom the Secretary of Homeland Security and the Security of States jointly determine it shall not apply; or other individual alien to whom the Security of

rapidly changing technology, started to adopt other manners of collecting biometric data at airports, seaports, and land ports of entry—with the most notable being facial recognition technology.[404] CBP has deployed facial recognition technology, known as Traveler Verification Service (TVS), at air, sea, and land environments.[405] CBP is also using facial recognition and iris-scanning technology for pedestrian travelers at some land ports of entry, as well as facial recognition of occupants in moving vehicles as they enter and exit the United States.[406] In addition, CBP collects biometric information of persons interdicted when illegally crossing the international border.[407]

Some have raised privacy concerns over the collection and use of biometric identifiers by DHS.[408] Although the Supreme Court has not considered a Fourth Amendment challenge to the collection of biometric data at the border or its functional equivalent, jurisprudence suggests that minimally intrusive collection of biometric data at the border does not affront the Fourth Amendment. The Court has repeatedly stressed that individuals at the border have a lower expectation of privacy and that the "[t]he Fourth Amendment balance between the interests of the Government and the privacy right of the individual is [] struck much more favorably to the Government . . . ."[409] The Second Circuit has noted that collecting fingerprints, a type of biometric identifier, at a land port of entry was a routine search, meaning that no reasonable suspicion was required.[410] In addition, the collection of other biometric information, such as facial geometry or walking gait, likely does not raise constitutional concerns. The Supreme Court has observed that persons generally do not have a Fourth Amendment interest in "physical characteristics ... constantly exposed to the public," such as the tone of their voice or facial features.[411] In short, current jurisprudence

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Homeland Security, the Secretary or States, or the Director of Central Intelligence determines it shall not apply. 8 C.F.R. § 235.1(f)(iv).

[404] *See, e.g.*, *Test to Collect Facial Images from Occupants in Moving Vehicles at the Anzalduas Port of Entry (Anzalduas Biometric Test)*, 83 Fed. Reg. 56,862 (Nov. 14, 2018).

[405] DHS, PRIVACY IMPACT ASSESSMENT FOR TRAVELER VERIFICATION SERVICE, DHS/CBP/PIA-056 (Nov. 14, 2018), https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp056-tvs-january2020_0.pdf.

[406] *See, e.g., Agency Information Collection Activities: Biometric Identity*, 83 Fed. Reg. 24,326 (Mar. 25, 2018); *Test to Collect Biometric Information at the Otay Mesa Port-of-Entry*, 80 Fed. Reg. 70,241 (Nov. 13, 2015); *see also Test to Collect Facial Images from Occupants in Moving Vehicles at the Anzalduas Port of Entry (Anzalduas Biometric Test)*, 83 Fed. Reg. 56,862 (Nov. 14, 2018).

[407] DHS, PRIVACY IMPACT ASSESSMENT FOR THE AUTOMATED BIOMETRIC IDENTIFICATION SYSTEM (IDENT), DHS/NPPD/PIA-002, at 2-5 (Dec. 7, 2012), (discussing the data shared and stored in DHS's biometric database IDENT); DHS, PRIVACY IMPACT ASSESSMENT FOR THE HOMELAND ADVANCED RECOGNITION TECHNOLOGY SYSTEM (HART) INCREMENT 1 PIA, DHS/OBIM/PIA-004, at 16-17 (Feb. 24, 2020) (identifying data collected and stored in the HART system that replaces IDENT as DHS's central biometric database).

[408] *See, e.g.*, Stephanie Beasley, *Big Brother on the U.S. Border?*, POLITICO (Oct. 9, 2019), https://www.politico.com/agenda/story/2019/10/09/us-border-biometrics-001250/.

[409] United States v. Montoya de Hernandez, 473 U.S. 531, 539–40 n.4 (1985).

[410] Tabbaa v. Chertoff, 509 F.3d 89, 99 (2d Cir. 2007). *See also* Davis v. Mississippi, 394 U.S. 721, 728 (1969). The Supreme Court has held that the collection of one such identifier—fingerprints—did not raise Fourth Amendment concerns when done in the *interior* of the United States. *Id.* The Court upheld police collection of lawfully arrested persons' fingerprints, describing this practice as minimally intrusive because it "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Id.* at 727.

[411] In *United States v. Dionisio*, 410 U.S. 1 (1973), the Supreme Court held that a grand jury directive for a witness to give a voice exemplar did not constitute an infringement of the witness's Fourth Amendment rights. In so doing, the Court opined:

> In *Katz* . . . we said that the Fourth Amendment provides no protection for what a person knowingly exposes to the public, even in his own home or office. . . . The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is

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suggests that *minimally intrusive collection* of biometric data, such as the collection and comparison of facial geometry, at the border likely does not implicate the Fourth Amendment.

Still, as discussed above, depending on the level of intrusion, some searches performed at the international border may be classified as nonroutine and therefore require reasonable suspicion.[412] In the event of a challenge to a method of biometric collection as nonroutine, a reviewing court may find the Supreme Court's 2013 decision *Maryland v. King* instructive.[413] In that case, the Court considered the constitutionality of the collection of an arrestee's DNA as a part of routine booking procedure in the U.S. interior.[414] The Court observed that wiping a buccal swab on the inside tissues of a person's cheek to obtain DNA samples is a "search" subject to Fourth Amendment scrutiny because any "intrusio[n] into the human body" invades personal security.[415] The Court reasoned that the government's interest—including the "need for law enforcement officers in a safe and accurate way to process and identify the persons and possession they must take into custody"—substantially outweighed the arrestee's interest in limiting the intrusion of the cheek swab.[416] Although *King* involved a challenge to a "search" in the interior of the United States, the Court's opinion suggests that in a challenge to the collection of biometric information by designated officers at the border, a reviewing court would likely (1) consider whether the collection of the personal identifier was a "search" subject to Fourth Amendment scrutiny[417]; (2) evaluate whether the Fourth Amendment requires that the officer have some level of particularized suspicion[418]; and (3) weigh "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy."[419]

In any event, the border search exception and an officer's broad authority to conduct searches at the border suggest that constitutional challenges to the collection of biometric identifiers would face significant obstacles, at least so long as the collection was done in a minimally intrusive manner. Still, while the Constitution provides a baseline for government conduct, Congress may consider legislation to promote or constrain the collection of biometric data.

> repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.

Id. at 14 (internal quotations marks omitted).

[412] *See Montoya de Hernandez*, 473 U.S. at 537–38 (discussing Fourth amendment reasonableness requirement at the border).

[413] Maryland v. King, 569 U.S. 435 (2013).

[414] *Id.*

[415] *Id.* at 447 (quoting Schmerber v. California, 384 U.S. 757, 770 (1966)). This is contrast to the collection of other nonobtrusive forms of personal identifiers, such as the capturing of facial geometry or walking gait.

[416] *Id.* at 449.

[417] *Id.* at 447 (establishing that wiping a buccal swab on the inside tissues of a person's cheek to obtain DNA samples is a search subject to Fourth Amendment scrutiny because any "intrusio[n] into the human body" invades personal security).

[418] *See id.* at 448. The Court noted that the collection of DNA was standard booking procedure of arrestees under Maryland law, removing a need for a neutral magistrate to evaluate whether probable cause supports the search because officers do not have discretion. *Id.* Because a probable cause determination was irrelevant, the Court explained, the Fourth Amendment solely required an examination of the reasonableness—both in scope and manner of execution—of this "search." *Id.*

[419] *Id*.

Racial Profiling

As discussed in this report, immigration authorities may conduct roving patrols and set up checkpoints near the border to deter the unlawful entry of aliens and contraband further into the interior of the United States.[420] In *United States v. Brignoni-Ponce*, the Supreme Court held that Border Patrol officers could not solely consider a person's ethnic appearance when making a roving patrol stop, but suggested it can be considered with other "relevant factors" to establish reasonable suspicion.[421] In *United States v. Martinez-Fuerte*, where the Court held that immigration checkpoint stops require no reasonable suspicion, the Court opined that a person could be briefly detained at the checkpoint's "secondary inspection" area "on the basis of criteria that would not sustain a roving-patrol stop," and continued that "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation."[422]

There has been some debate as to whether the Supreme Court's reliance on ethnic appearance as a factor in border-related searches and seizures can still hold sway nearly 50 years later, given the changing demographics of the southwestern United States and its increased Hispanic population.[423] In more recent decades, some courts have limited, on Fourth Amendment grounds, the government's ability to consider race or ethnic appearance during roving patrol stops and other border-related detentions. In *United States v. Montero-Camargo*, the Ninth Circuit considered a challenge to a roving patrol stop of two individuals near the U.S.-Mexico border that was based, in part, on their Hispanic appearance.[424] The court held that the officers could not consider the individuals' ethnic appearance to establish reasonable suspicion, even if it was not the only factor considered, because the stop occurred in an area with a large Hispanic population.[425] The court described the Supreme Court's identification of ethnic appearance as a "relevant factor" in *Brignoni-Ponce* as "brief dictum" based on "now-outdated demographic information" about the Hispanic population in the United States, which had grown substantially since the Court's 1975 decision.[426] Thus, the Ninth Circuit determined, ethnic appearance serves "little or no use" in deciding whether someone should be stopped near the southern border.[427]

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[420] United States v. Arvizu, 534 U.S. 266, 277–78 (2002); United States v. Cortez, 449 U.S. 411, 417–18 (1981); United States v. Martinez-Fuerte, 428 U.S. 543, 545 (1976); United States v. Ortiz, 422 U.S. 891, 896–97 (1975); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 274–75 (1973).

[421] *Brignoni-Ponce*, 422 U.S. at 886–87 ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.").

[422] *Martinez-Fuerte*, 428 U.S. at 563.

[423] *See, e.g.*, Renata Ann Gowie, *Driving While Mexican: Why the Supreme Court Must Reexamine* United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)*, 23 HOUS. J. INT'L L. 233, 252 (2001) ("What may have been true in 1975 is no longer true today. The increased Hispanic presence in the southwestern United States and the proliferation of minivans, sport utility vehicles, and other large vehicles make much of *Brignoni-Ponce*'s analysis untenable.").

[424] United States v. Montero-Camargo, 208 F.3d 1122, 1128–29 (9th Cir. 2000).

[425] *Id.* at 1132, 1135.

[426] *Id.* at 1132–33.

[427] *Id.* at 1134; *see also id.* ("Reasonable suspicion requires *particularized* suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination.") (emphasis in original); United States v. Raygoza-Garcia, 902 F.3d 994, 1003 (9th Cir. 2018) ("[W]e have held that where a large portion of the area's population is Latino, officers cannot rely on an individual's apparent Latino appearance in making a reasonable suspicion determination because one's ethnicity or race is not sufficiently particularized to indicate the criminality of a particular person.") (citing United States v. Manzo-Jurado, 457 F.3d 928, 935 n.6 (9th Cir. 2006)).

Nevertheless, the court concluded that the stop in question was permissible because other factors relied upon by the officers independently established reasonable suspicion.[428]

In another case, a federal district court considered a constitutional challenge to the detention of two airline passengers that was based, in part, on their Arab ethnicity.[429] In response to a lawsuit challenging the detention on Fourth Amendment grounds, the government argued that, under *Brignoni-Ponce*, the passengers' ethnicity was a "relevant factor" in establishing either reasonable suspicion or probable cause that they were conducting "terrorist surveillance or probing operations."[430] The court declared that ethnicity "has no probative value in a particularized reasonable-suspicion or probable cause determination" because it has no bearing on a person's propensity to commit a crime.[431] Like the Ninth Circuit, the court determined that *Brignoni-Ponce*'s "dictum" regarding the consideration of ethnic appearance for immigration-related stops was based on demographic data that did not reflect more recent changes in the U.S. population.[432]

Some courts have allowed immigration officers to consider race or ethnic appearance in conjunction with other factors in certain circumstances. In *United States v. Manzo-Jurado*, the Ninth Circuit clarified that an individual's apparent Hispanic appearance is not a relevant factor for purposes of the Fourth Amendment "in regions heavily populated by Hispanics."[433] But the court determined that Border Patrol officers could consider the Hispanic appearance of a work crew in an area near the U.S.-Canada border that was "sparsely populated by Hispanics."[434] While the court found that this characteristic might sometimes be a relevant factor for establishing reasonable suspicion, it ultimately concluded that the cumulative factors relied upon by Border Patrol in the present case were insufficient. Specifically, the collected factors identified by Border Patrol, according to the court, included "no additional information distinguishing any group member from an ordinary, lawful immigrant."[435]

Outside the Ninth Circuit, other courts have allowed the use of race or ethnic appearance for Border Patrol stops, regardless of whether they occurred near the northern or southern border. For instance, the Tenth Circuit has stated that, although ethnic appearance alone fails to establish reasonable suspicion, "the Court in *Brignoni-Ponce* explained that 'Mexican appearance [is] a relevant factor' when the stop occurs near the United States-Mexico border."[436] Similarly, citing *Brignoni-Ponce*, the Fifth Circuit has stated that "ethnic appearance may be considered as one of the relevant factors in supporting a reasonable suspicion that a vehicle is involved in the transportation of illegal aliens."[437]

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[428] *Montero-Camargo*, 208 F.3d at 1137–39. The court observed that the individuals who were stopped made U-turns on a highway, at a place where the Border Patrol officers' view was obstructed; they stopped briefly in an area frequently used for illegal activities, before going back in the direction from which they had come; and their vehicles had Mexicali license plates. *Id.*

[429] Farag v. United States, 587 F. Supp. 2d 436, 442 (E.D.N.Y. 2008).

[430] *Id.* at 449, 460, 463.

[431] *Id.* at 464.

[432] *Id.* at 464–65; *see also* Melendres v. Arpaio, 989 F. Supp. 2d 822, 898–99 (D. Ariz. 2013) (holding that policy of sheriff's office to use race or Hispanic appearance as a factor in determining whether there was reasonable suspicion to stop a vehicle, including for an immigration investigation, violated the Fourth Amendment).

[433] United States v. Manzo-Jurado, 457 F.3d 928, 935 n.6 (9th Cir. 2006) (citing *Montero-Camargo*, 208 F.3d at 1132).

[434] *Id.*

[435] *Id.* at 940.

[436] United States v. Lopez-Martinez, 25 F.3d 1481, 1487 (10th Cir. 1994) (quoting *Brignoni-Ponce*, 422 U.S. at 886–87).

[437] United States v. Hernandez-Moya, 353 F. App'x 930, 934 (5th Cir. 2009) (citing *Brignoni-Ponce*, 422 U.S. at 886–

Although some courts have allowed Border Patrol officers to consider race or ethnicity when making investigatory stops for purposes of the Fourth Amendment, DHS more recently implemented a policy that prohibits consideration of race or ethnicity during law enforcement activities "in all but the most exceptional instances."[438] According to the agency, immigration officers may consider race or ethnicity only when there is a "compelling governmental interest" present, and the officers exercise their authority "in a way narrowly tailored to meet that compelling interest."[439] The agency's policy does not preclude consideration of race or ethnicity if that information is "specific to particular suspects or incidents" (e.g., to identify a suspect).[440]

Despite these measures, some contend that immigration officers have continued to rely on race or ethnicity when conducting immigration-related stops near the border.[441] And courts have continued to address Fourth Amendment challenges to immigration or other government authorities' consideration of race or ethnicity during border enforcement activities.[442]

While border stops based on race or ethnic appearance may raise Fourth Amendment concerns, such stops may also violate the constitutional right to equal protection.[443] The principle of equal protection serves as "the constitutional basis for objecting to intentionally discriminatory application of laws,"[444] and provides protection against discriminatory law enforcement actions

87 (1975); *see also* United States v. Morales, 191 F.3d 602, 606–07 (5th Cir. 1999) (concluding that the fact that the name on a vehicle registration was inconsistent with the Hispanic appearance of the owner of the vehicle could, in combination with other factors, establish reasonable suspicion for a Border Patrol stop).

[438] *See* Memorandum from Janet Napolitano, Sec'y of DHS to DHS Component Heads, *The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities* (Apr. 26, 2013), https://www.cbp.gov/about/eeo-diversity/policies/nondiscrimination-law-enforcement-activities-and-all-other-administered. Under the policy, racial profiling is defined as "the invidious use of race or ethnicity as a criterion in conducting stops, searches, and other law enforcement, investigation, or screening activities." *Id.* The policy notes that racial profiling "is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity." *Id. See also* U.S. Customs & Border Prot., *CBP Policy on Nondiscrimination in Law Enforcement Activities and All Other Administered Programs* (Feb. 24, 2020), https://www.cbp.gov/about/eeo-diversity/policies/nondiscrimination-law-enforcement-activities-and-all-other-administered (describing nondiscrimination policy).

[439] *See* Memorandum, *supra* note 438. According to CBP, national security "is per se a compelling interest." *See CBP Policy on Nondiscrimination in Law Enforcement Activities and All Other Administered Programs, supra* note 438.

[440] *See* Memorandum, *supra* note 438.

[441] *See, e.g.,* First Am. Compl. for Damages and Injunctive Relief and Request for Jury Trial, Suda v. U.S. Customs & Border Prot., No. CV-19-10-GF-BMM (D. Mont. Jan. 29, 2020) (claiming that a CBP officer unlawfully detained two U.S. citizens at a store in Havre, MT, solely because they were speaking Spanish); Compl., Owunna v. United States, No. 1:18-cv-00536-LMB-MSN (E.D. Va. May 3, 2018) (alleging that a U.S. citizen returning from Nigeria was unlawfully detained by CBP officials because of his perceived race or ethnicity).

[442] *See* Millan-Hernandez v. Barr, 965 F.3d 140, 149 (2d Cir. 2020) (holding that alien presented sufficient evidence that she was detained by police and CBP officers because of her race or ethnicity to warrant a hearing on whether evidence of her alienage should have been suppressed in her removal proceedings); Sanchez v. Sessions, 904 F.3d 643, 650–51 (9th Cir. 2018) (holding that Coast Guard officers violated alien's Fourth Amendment rights by detaining him based solely on his race absent reasonable suspicion of unlawful activity); Muniz-Muniz v. U.S. Border Patrol, 869 F.3d 442, 447 (6th Cir. 2017) (rejecting claim that Border Patrol agents had a policy of targeting Hispanics in making stops); Martin-Perez v. Barr, 783 F. App'x 772, 773–74 (9th Cir. 2019) (declining to suppress evidence of the identity of an alien placed in formal removal proceedings despite claim that arrest by Border Patrol officers was based solely on perceived Mexican ethnicity); Arriaga-Hernandez v. Att'y Gen., 712 F. App'x 151, 153 (3d Cir. 2017) (same).

[443] *See* U.S. CONST. amend. XIV, § 1 (providing that no state may "deny to any person within its jurisdiction the equal protection of the laws"). Although the Fourteenth Amendment applies to the states, the principles of equal protection are applied to the federal government through the Fifth Amendment's Due Process Clause. Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

[444] Whren v. United States, 517 U.S. 806, 813 (1996).

even if there is sufficient level of suspicion to justify those actions under the Fourth Amendment.[445] Thus, an otherwise lawful border stop (e.g., a checkpoint detention) that is motivated by a person's race or ethnicity could constitute an equal protection violation.[446] For that reason, apart from Fourth Amendment challenges, courts have considered equal protection challenges to border stops allegedly based on racial profiling.[447]

Recent Legislation Concerning the Government's Border Search Authority

In recent years, legislation has been introduced in Congress that would clarify the government's ability to conduct searches and seizures at the border and surrounding regions. Generally, the legislation would restrict DHS's ability to conduct warrantless searches and seizures.

Some introduced bills would change the "border zone," the area generally extending 100 miles from the border where immigration officers may stop and search vehicles and vessels without a warrant.[448] For instance, the Border Zone Reasonableness Restoration Act would amend INA Section 287(a)(3) by limiting officers' ability to board and search vehicles, trains, aircraft, vessels, and other conveyances to areas within 25 miles of the border.[449] Immigration officers also would be barred from conducting highway immigration checkpoints more than 10 miles from the border unless there is reasonable suspicion that a person in the vehicle "is inadmissible or otherwise not entitled to enter or remain in the United States."[450] The bill would also generally prohibit officers from considering race, ethnicity, gender, national origin, religion, or sex (including sexual orientation and gender identity) during checkpoint operations.[451] Finally, immigration officers would have access to private lands (but not dwellings) for patrolling the

[445] *See* Farm Labor Org. Comm. v. Ohio State Highway Patrol, 308 F.3d 523, 533 (6th Cir. 2002) ("Similarly, the Supreme Court, in *Whren v. United States,* confirmed that an officer's discriminatory motivations for pursuing a course of action can give rise to an Equal Protection claim, even where there are sufficient objective indicia of suspicion to justify the officer's actions under the Fourth Amendment.") (citing *Whren*, 517 U.S. at 813).

[446] To establish an equal protection violation, a plaintiff must show that a law enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose. Wayte v. United States, 470 U.S. 598, 608 (1985). An equal protection claim can also be established by showing a facially discriminatory enforcement policy. *Id.* at 608 n.10.

[447] *See, e.g., Muniz-Muniz*, 869 F.3d at 444–47 (ruling that plaintiffs failed to show that the Border Patrol had any policy or widespread practice allowing consideration of race during investigatory stops for purposes of establishing an equal protection claim); Farm Labor Org. Comm. v. U.S. Border Patrol, 162 F. Supp. 3d 623, 638–41 (N.D. Ohio 2016) (ruling that plaintiffs failed to show that Border Patrol engaged in a pattern of racially profiling Hispanics during immigration enforcement operations); Melendres v. Arpaio, 989 F. Supp. 2d 822, 902–05 (D. Ariz. 2013) (concluding that policy of sheriff's office to use race as a factor in forming reasonable suspicion to detain aliens on the basis of immigration status violated equal protection).

[448] 8 U.S.C. § 1357(a)(3); 8 C.F.R. § 287.1(a)(2).

[449] Border Zone Reasonableness Restoration Act of 2019, S.2180, 116th Cong. § 2(a)(5) (2019); Border Zone Reasonableness Restoration Act of 2019, H.R.3852, 116th Cong. § 2(a)(5) (2019). The Secretary of Homeland Security would have authority to expand the area in which immigration officers may board vehicles, vessels, aircraft, trains, and other conveyances to more than 25 miles from the border (but no greater than 100 miles) for certain sectors or districts in limited circumstances. *Id.*

[450] *Id.* The Secretary of Homeland Security would have authority to expand the area in which immigration officers can conduct suspicionless checkpoints to more than 10 miles from the border (but no greater than 25 miles) for certain sectors or districts in some circumstances. *Id.*

[451] *Id.*

border only within 10 miles from the border (under current law that authority extends to 25 miles from the border).[452]

Other recent bills would restrict DHS's ability to search electronic devices at the border. Courts have held that CBP officers may conduct limited, manual searches of cell phones and other electronic devices without a warrant, probable cause, or any suspicion of unlawful activity.[453] As discussed previously, courts have split on whether more advanced, forensic searches require reasonable suspicion.[454] A bill introduced in the 116th Congress would allow a manual electronic device search only upon reasonable suspicion that (1) the individual transporting the device is carrying contraband or engaged in certain other specified activity, and (2) the device contains evidence relevant to the contraband or specified activity.[455] The bill would permit a forensic search (which is broadly defined to include a search that uses software or external equipment, involves copying of data, is conducted for more than four hours, or is conducted manually with the entry of a password) only with a warrant.[456]

A separate bill, the Protecting Data at the Border Act, would prohibit CBP from accessing the digital contents of an electronic device belonging to a "United States person" (defined to include a U.S. citizen and a lawful permanent resident) without a warrant supported by probable cause; and denying a United States person's entry into or exit from the United States based on his or her refusal to provide access to the device.[457] If a United States person consents to providing access to an electronic device, the bill would require the government to obtain the consent in writing (with written advisals that access to the device cannot be compelled without a valid warrant) before accessing the device.[458] The bill also provides for certain "emergency exceptions" to the warrant requirement (e.g., an emergency situation involving potential death or serious physical injury to any person).[459]

Legislation focused primarily on drone surveillance was last introduced in the 115th Congress. For example, the Drone Aircraft Privacy and Transparency Act would prohibit a government agency from using an unmanned aircraft system (or requesting information collected by another person using an unmanned aircraft system) without a warrant, unless there are "exigent circumstances."[460] The Preserving American Privacy Act would similarly bar government

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[452] *Id.*; *see also* 8 U.S.C. § 1357(a)(3).

[453] *See* United States v. Arnold, 533 F.3d 1003, 1008–10 (9th Cir. 2008); United States v. Ickes, 393 F.3d 501, 506 (4th Cir. 2005). However, as noted in this report, a federal district court has ruled that "non-cursory" manual searches must be supported by reasonable suspicion. Alasaad v. Nielsen, No. 17-CV-11730, 2019 WL 5899371, at *14 (D. Mass. Nov. 12, 2019), *appeal filed*, No. 20-1081 (1st Cir. Jan. 29, 2020).

[454] *See* United States. v. Touset, 890 F.3d 1227, 1233 (11th Cir. 2018); United States v. Kolsuz, 890 F.3d 133, 145–46 (4th Cir. 2018); United States v. Cotterman, 709 F.3d 952, 960, 966 (9th Cir. 2013).

[455] A Bill to Place Restrictions on Searches and Seizures of Electronic Devices at the Border, S.2694, 116th Cong. § 2(b) (2019).

[456] *Id.* §§ 1, 2(d). The bill would allow the seizure of an electronic device only upon probable cause that (1) the individual is carrying contraband or engaged in certain other specified activity, or has violated any law punishable by more than one-year imprisonment, and (2) the device contains evidence related to the contraband, specified unlawful activity, or criminal violation. *Id.* § 2(c).

[457] Protecting Data at the Border Act, S.1606, 116th Cong. § 4(a) (2019); Protecting Data at the Border Act, H.R.2925, 116th Cong. § 4(a) (2019). The bill would also prohibit the government from delaying a United States person's entry into or exit from the United States for more than 4 hours pending a determination as to whether that person will consent to providing access to the device. *Id.* § 4(a)(3).

[458] *Id.* § 4(c).

[459] *Id.* § 4(b).

[460] Drone Aircraft Privacy and Transparency Act of 2017, S.631, 115th Cong. § 340 (2017); Drone Aircraft Privacy and

agencies from using unmanned aircraft systems for law enforcement purposes without a warrant, but would create exceptions including emergency circumstances (e.g., imminent death of serious physical injury to a person) and Border Patrol operations within 25 miles of the border.[461]

Transparency Act of 2017, H.R.1526, 115th Cong. § 340 (2017). "Exigent circumstances" would exist if "a law enforcement entity reasonably believes there is an imminent danger of death or serious physical injury," or "a law enforcement entity reasonably believes there is a high risk of an imminent terrorist attack by a specific individual or organization and the Secretary of Homeland Security has determined that credible intelligence indicates there is such a risk." *Id*.

[461] Preserving American Privacy Act of 2018, H.R.6617, 115th Cong. § 3119c (2018).

Appendix.

The following tables provide (1) an overview of federal statutes authorizing warrantless customs searches and boarding of vessels; (2) an overview of federal statutes authorizing warrantless searches and seizures by immigration officers; and (3) a comparison of the requirements for searches and seizures at the border and surrounding regions.

Table A-1. Federal Statutes Authorizing Warrantless Customs Searches and Boarding of Vessels

Federal Statute	Scope of Search or Seizure	Enforcing Agency	Location of Search or Seizure
14 U.S.C. § 522	Authorizes boarding of any vessel "subject to the jurisdiction, or to the operation of any law, of the United States" to question occupants, examine documentation, and conduct inspections and searches Also permits arrests for violations of federal law and seizure of vessel or merchandise	Coast Guard	Vessels on the high seas and waters over which United States has jurisdiction
19 U.S.C. § 482	Authorizes, pursuant to the boarding of a vessel under 19 U.S.C. § 1581, the search of "any vehicle, beast, or person" on the vessel that is suspected of carrying merchandise subject to customs duties or that has been brought into the United States unlawfully Also authorizes the search of "any trunk or envelope" on the vessel for which there is "reasonable cause" to suspect there is merchandise unlawfully brought to the United States	CBP/Coast Guard	Vessels in the United States or within customs waters (i.e., within 12 nautical miles of the coast)
19 U.S.C. § 1467	Authorizes the inspection of persons, baggage, and merchandise arriving in the United States by vessel from a foreign port	CBP/Coast Guard	At the border (e.g., a port of entry)
19 U.S.C. § 1496	Allows the examination of baggage of any person arriving in the United States	CBP/Coast Guard	At the border (e.g., a port of entry)
19 U.S.C. § 1581	Permits boarding of a vehicle or vessel to examine documentation and to inspect and search the vehicle or vessel (including any person, trunk, package, or cargo on board) Also authorizes seizure of vehicle or vessel that is subject to forfeiture, fine, or penalty	CBP/Coast Guard	Vehicles or vessels found in "any place in the United States" or "within the customs waters" (i.e., within 12 nautical miles of the coastline)
19 U.S.C. § 1583	Authorizes search of international mail	CBP/Coast Guard	At the border

Federal Statute	Scope of Search or Seizure	Enforcing Agency	Location of Search or Seizure
19 U.S.C. § 1589a	Permits warrantless arrests for any criminal offense under federal law committed in the officer's presence; or for any felony under federal law committed outside the officer's presence if there are reasonable grounds to believe the suspect has committed the felony	CBP/Coast Guard	Anywhere in the United States or within customs waters (i.e., within 12 nautical miles of the coast)

Source: 6 U.S.C. §§ 202, 211(c); 14 U.S.C. § 522(a); 19 U.S.C. §§ 482(a), 1401(j), 1467, 1496, 1581(a), 1581(e), 1583(a)(1), 1589a(3), 1709(b), 1709(c); 19 C.F.R. § 101.1.

Table A-2. Federal Statutes Authorizing Warrantless Searches and Seizures by Immigration Officers

Statutory Provision	Scope of Search or Seizure	Location of Search or Seizure
8 U.S.C. § 1357(a)(1)	Interrogation of any person believed to be an alien concerning his or her right to be or remain in the United States	Anywhere within the United States or at the border
8 U.S.C. § 1357(a)(2)	Arrest of alien entering or attempting entry into the United States unlawfully	Anywhere within the United States or at the border
	Arrest of alien if there is "reason to believe" alien is in United States unlawfully and likely to escape before a warrant can be obtained	
8 U.S.C. § 1357(a)(3)	Boarding of vessels, railway cars, aircraft, conveyances, and vehicles to search for aliens.	Within a "reasonable distance" of any "external boundary" of the United States. DHS regulations generally define "reasonable distance" as within 100 air miles from any external boundary or any shorter distance set by immigration authorities within a particular sector or district; in "unusual circumstances" a reasonable distance may be set that is greater than 100 air miles from an external boundary
	Access to private lands (but not dwellings) for the purpose of patrolling the border	Within 25 miles from any external boundary
8 U.S.C. § 1357(a)(4)	Arrests for felonies under any federal law regulating the admission or removal of aliens (e.g., unlawful reentry) if there is reason to believe the arrested person is guilty of the felony and there is a likelihood of the person escaping before an arrest warrant can be secured	Anywhere within the United States or at the border

Statutory Provision	Scope of Search or Seizure	Location of Search or Seizure
8 U.S.C. § 1357(a)(5)	Arrests for any felony under federal law committed in the immigration officer's presence, if the officer is performing duties relating to the enforcement of immigration laws and there is a likelihood of the person escaping before a warrant can be secured Arrests for any felony under federal law if the immigration officer has reasonable grounds to believe the arrested person has committed the felony, if the officer is performing duties relating to enforcement of immigration laws and there is likelihood of the person escaping before a warrant can be secured	Anywhere within the United States or at the border
8 U.S.C. § 1357(c)	Search of a person (and his or her personal belongings) who is seeking admission to the United States if there is "reasonable cause" to suspect there are grounds for denying the person's admission that the search would disclose	Generally at the border

Source: 8 U.S.C. §§ 1225(d)(1), 1357(a)(1), (a)(2), (a)(3), (a)(4), (a)(5), (c); 8 C.F.R. § 287.1(a)(1), (2).

Table A-3. Judicial Requirements for Border-Related Searches and Seizures

Type of Search or Seizure	Physical Location	Border Crossing Required	General Scope of Search or Seizure	Evidentiary Requirements
Border Searches	At the physical border itself or the functional equivalent of the border (e.g., port of entry, border checkpoint, international airport)	Yes	Typically involves routine inspections and searches (e.g., brief questioning and examining luggage or merchandise)	No reasonable suspicion or probable cause required for *routine* inspections and searches Nonroutine inspections and searches (e.g., strip searches, forensic cell phone searches) may require at least reasonable suspicion of criminal activity
Extended Border Searches	Generally occur in areas close to the border after a recent border crossing	Yes	Covers the surveillance, pursuit, and search of an individual who recently crossed the border and is suspected of committing a crime (e.g., drug trafficking)	Requires (1) reasonable certainty of a border crossing; (2) reasonable certainty that person or vehicle did not change condition since the border crossing; and (3) reasonable suspicion of a crime
Boarding of Vessels in Coastal or Interior Waterways	Inland waters with ready access to the open sea, coastal waterways, or the high seas	No	Generally limited to a routine safety and document inspection in publicly accessible areas of the vessel	No reasonable suspicion required for routine boarding and inspection of vessel Limited searches of vessel may require reasonable suspicion of a crime Exhaustive searches of vessel (e.g., private living quarters) require probable cause
Roving Patrols	Random patrols in certain areas away from the border (e.g., remote backroads), but not at fixed locations	No	Typically includes brief stop for questioning about citizenship or immigration status, or any "suspicious circumstances" May also include search of vehicle and its occupants	Reasonable suspicion required for a vehicle stop Probable cause or consent is needed to search vehicle (extended detention may also require probable cause)

Type of Search or Seizure	Physical Location	Border Crossing Required	General Scope of Search or Seizure	Evidentiary Requirements
Immigration Checkpoints	Fixed locations away from the border (typically more than 25 miles from the border)	No	A brief detention, routine questioning about citizenship or immigration status, and visual inspection of the vehicle Generally does not involve a search of the vehicle or its occupants	No reasonable suspicion required for routine checkpoint stops Extended detention may require at least reasonable suspicion of a crime Vehicle searches require probable cause or consent
Transportation Checks	Bus or train stations near the border	No	Boarding of bus or train to ask passengers about immigration status, travel plans, or luggage	Probably no reasonable suspicion required for brief stop and questioning Extended detention likely requires reasonable suspicion or probable cause

Source: United States v. Drayton, 536 U.S. 194, 203–04 (2002); United States v. Arvizu, 534 U.S. 266, 273 (2002); Florida v. Bostick, 501 U.S. 429, 436 (1991); United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985); United States v. Villamonte-Marquez, 462 U.S. 579, 592–93 (1983); United States v. Cortez, 449 U.S. 411, 418 (1981); United States v. Ramsey, 431 U.S. 606, 619–20 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976); United States v. Ortiz, 422 U.S. 891, 896–97 (1975); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 272–73 (1973); United States v. Stewart, 729 F.3d 517, 525 (6th Cir. 2013); United States v. Guzman-Padilla, 573 F.3d 865, 878–79 (9th Cir. 2009); United States v. Cardenas, 9 F.3d 1139, 1148 (5th Cir. 1993); United States v. Roy, 869 F.2d 1427, 1430 (11th Cir. 1989); United States v. Herrera, 711 F.2d 1546 n.6 (11th Cir. 1983); United States v. Williams, 617 F.2d 1063, 1087 (5th Cir. 1980).

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