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International Travel with a “Digital Briefcase”¹: If Customs Officials Can Search a Laptop, Will the Right Against Self-Incrimination Contravene This Authority?

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I. INTRODUCTION

In the 21st century, the most dangerous contraband is often contained in laptop computers or other electronic devices, not on paper.

—Michael Chertoff²

Customs officials are charged with enforcing over 600 federal laws as over one million travelers cross United States borders each day.³ Accordingly, the U.S. border has historically been a location where the government is given greater authority to protect the safety of Americans.⁴ Indeed, although the Fourth Amendment protects against unreasonable searches and seizures, courts have often held that a suspicionless search is reasonable, simply because it occurred at the border.⁵ However, should customs agents have similar free reign to conduct a suspicionless search of a traveler's laptop? Does a traveler's Fifth Amendment right against self-incrimination have any impact on this analysis?

2. Michael Chertoff, Former Secretary, Homeland Security, *Opposing View: Searches are Legal, Essential*, <http://blogs.usatoday.com/oped/2008/07/opposing-view-s.html> (July 16, 2008, 00:21 EST).

3. Jayson Ahern, Deputy Commissioner, U.S. Customs and Border Protection, Department of Homeland Security Leadership Journal Archive, *CBP Laptop Searches* (June 30, 2008), <http://www.dhs.gov/journal/leadership/2008/06/cbp-laptop-searches.html> [hereinafter Ahern, *CBP Laptop Searches*].

4. *See infra* Part II.B (discussing the border search exception to the Fourth Amendment). “[F]or more than 200 years, the federal government has been granted the authority to prevent dangerous people and things from entering the United States.” Jayson Ahern, Deputy Commissioner, U.S. Customs and Border Protection, *Laptop Inspections Legal, Rare, Essential* (Aug. 8, 2008), http://www.cbp.gov/xp/cgov/travel/admissibility/labtop_inspect.xml [hereinafter Ahern, *Laptop Inspections*].

5. *See infra* note 34 and accompanying text. The Supreme Court has traditionally condoned this view, having upheld luggage, purse, wallet, and vehicle searches conducted without any particularized suspicion. *See infra* notes 35–37 and accompanying text.

While laptops often accompany their owners across international borders for lawful business purposes, in some instances the devices are used to store information necessary to carry out illegal, perhaps even deadly, acts in the U.S.⁶ This threat to our national security renders laptops potentially dangerous items for travelers to transport across the border.⁷ In fact, the United States Customs and Border Protection (CBP) has asserted that its ability to search laptops is one of its greatest tools in the effort to enforce U.S. laws and uncover potential threats against the country.⁸ Given these factors, issues regarding suspicionless border searches of laptop computers are highly relevant in modern society.

Despite such relevance, the U.S. Supreme Court has declined to rule on whether customs agents can conduct a suspicionless search of a laptop.⁹ Nonetheless, the Ninth Circuit has now joined the Fourth Circuit in holding that such a search is lawful.¹⁰ With two U.S. circuits now in agreement, suspicionless laptop searches may soon become routine at the border.

6. Ahern, *CBP Laptop Searches*, *supra* note 3. "During border inspections of laptops, CBP officers have found violent jihadist material, information about cyanide and nuclear material, video clips of Improvised Explosive Devices (IEDs), pictures of high-level Al-Qaeda officials, and other material associated with people seeking to do harm to our country." *Id.*

7. Ahern, *Laptop Inspections*, *supra* note 4. Ahern explains:

[T]errorists and criminals increasingly use laptops and other electronic media to transport illicit materials that were traditionally concealed in bags, containers, notebooks and paper documents. Making full use of our search authorities with respect to items like notebooks and backpacks, while failing to do so with respect to laptops and other devices, would ensure that terrorists and criminals receive less scrutiny at our borders just as their use of technology is becoming more sophisticated.

Id.

8. CBP Laptop Searches, *supra* note 3.

Our ability to inspect what is coming into the United States is central to keeping dangerous people and things from entering the country and harming the American people. One of our most important enforcement tools in this regard is our ability to search information contained in . . . laptops and other digital devices

Id.

9. See Christine A. Coletta, Note, *Laptop Searches at the United States Borders and the Border Search Exception to the Fourth Amendment*, 48 B.C. L. REV. 971, 988 (2007).

10. See *United States v. Arnold (Arnold II)*, 533 F.3d 1003 (9th Cir. 2008), *denying reh'g* 523 F.3d 941 (9th Cir. 2008), *rev'g* 454 F. Supp. 2d 999 (C.D. Cal. 2006), *cert. denied*, 129 S. Ct. 1312 (2009); see also *infra* notes 100–06, 118–26 and accompanying text (discussing the holdings of *United States v. Ickes* and *United States v. Arnold*). The district court in *Arnold* noted that this is "an issue ripe for determination because technological advances permit individuals and businesses to store vast amounts of private, personal and valuable information within a myriad of portable electronic storage devices including laptop computers, personal organizers, CDs, and cellular telephones." *United States v. Arnold (Arnold I)*, 454 F. Supp. 2d 999, 1000 (C.D. Cal. 2006), *rev'd*, 523 F.3d 941 (9th Cir. 2008), *reh'g denied*, 533 F.3d 1003 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

During these searches, customs agents may encounter a laptop that is password-protected, potentially frustrating their ability to perform the search if the traveler is unwilling to reveal the password. The Supreme Court has yet to determine the constitutional protections afforded to passwords, and only a federal magistrate has addressed this issue.¹¹ *In re Boucher* held that an individual could assert his Fifth Amendment right to refuse the production of his password, a decision which could have far-reaching implications in the border search context.¹²

This Comment stresses that the government's ability to conduct suspicionless laptop searches at the border is in significant conflict with an individual's right to withhold his laptop password. Accordingly, this Comment argues that because laptop password-protection could substantially impede the government's ability to protect our nation, an exception to the right against self-incrimination should be employed at the border.¹³

Part II reviews general search and seizure doctrine and the border exception to the Fourth Amendment.¹⁴ Part III discusses the requisite elements necessary to invoke the Fifth Amendment right against self-incrimination and the application of the privilege to the compelled production of documents.¹⁵ Part IV explores the border search exception with respect to laptop searches, emphasizing the Fourth and Ninth Circuit decisions upholding the suspicionless search.¹⁶ Part V examines the possible constitutional protections applicable to passwords and the challenges to be faced by the government if Fifth Amendment privileges are available during a border search.¹⁷ Part VI suggests the creation of a border exception to the Fifth Amendment, similar to the current Fourth Amendment border search exception, which would effectively alleviate the potential threat to our country's national security.¹⁸ Part VII concludes the Comment¹⁹ and Part

11. *In re Boucher*, No. 2:06-mj-91, 2007 WL 4246473 (D. Vt. Nov. 29, 2007), *rev'd*, 2009 WL 424718 (D. Vt. Feb. 19, 2009).

12. *Id.*; see also *infra* notes 134–49 and accompanying text (discussing the *Boucher* holding). Interestingly, *In re Boucher* involved the suspicionless search of a traveler's laptop at the U.S. border. See *Boucher*, 2007 WL 4246473, at *1. On January 2, 2008, the Government appealed the magistrate judge's order granting *Boucher*'s motion to quash the grand jury subpoena, see *In re Boucher*, No. 2:06-mj-91, 2009 WL 424718, at *1 (D. Vt. Feb. 19, 2009), *rev'g* 2007 WL 4246473 (D. Vt. Nov. 29, 2007), and on February 19, 2009, the magistrate judge's holding was reversed. *Id.* at *4; see also *infra* Part VIII.

13. See *infra* Part VI. Alternatively, a less extreme option would be to create federal legislation requiring travelers to temporarily disable password-protection on their laptop computers if they plan to travel internationally. See *infra* note 193.

14. See *infra* notes 21–52 and accompanying text.

15. See *infra* notes 53–96 and accompanying text.

16. See *infra* notes 97–131 and accompanying text.

17. See *infra* notes 132–59 and accompanying text.

18. See *infra* notes 160–93 and accompanying text.

VIII is a Postscript discussing the most recent district court reversal of *In re Boucher*.²⁰

II. FOURTH AMENDMENT PROTECTION FROM UNREASONABLE SEARCH AND SEIZURE

A. Fundamental Protections of the Fourth Amendment

The Fourth Amendment guarantees that people shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."²¹ Furthermore, the Amendment provides that "no [w]arrants shall [be issued without] probable cause," requiring that law enforcement officers obtain a warrant prior to conducting a search.²² These Fourth Amendment limitations were incorporated into the Bill of Rights to prevent government interference with an individual's right to privacy.²³ Within the confines of one's home, for instance, an individual has such a significant privacy interest that most warrantless searches of the home will be deemed unreasonable.²⁴

Nonetheless, the Fourth Amendment's warrant requirement is not an absolute right.²⁵ Particular circumstances may justify setting aside the

19. See *infra* notes 194–97 and accompanying text.

20. See *infra* notes 198–210 and accompanying text. This Comment was written prior to the district court's reversal of *In re Boucher*. Thus, the Postscript discussing the most recent *Boucher* holding follows the Conclusion.

21. U.S. CONST. amend. IV.

22. *Id.*

23. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."). See also *United States v. Ortiz*, 422 U.S. 891, 895 (1975) ("The Fourth Amendment's requirement that searches and seizures be reasonable also may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation."); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

24. See *Johnson v. United States*, 333 U.S. 10, 14, 17 (1948) ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers, and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.").

25. See *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

warrant requirement and only examining the search's reasonableness by balancing the government's interest in conducting the search against the individual's privacy interest.²⁶ If the government's interest is so high that an individual could not have a reasonable expectation of privacy, a warrantless search may be found lawful under the Fourth Amendment.²⁷ An example of a search that, due to its characterization as reasonable, requires neither probable cause nor a warrant is a search conducted at the U.S. border, authorized even before the Bill of Rights was added to the Constitution.²⁸

B. The Fourth Amendment Border Search Exception

The First Congress of the United States enacted the original customs statute in 1789, authorizing customs officials to “enter and search ‘any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed’”²⁹ Customs statutes were originally created to prevent travelers from introducing contraband into the U.S. or avoiding the payment of duties by concealing goods transported across the border.³⁰ Yet, the current proliferation of drug trafficking and terrorism has resulted in the expansion of customs officials' roles in protecting U.S. borders.³¹ Accordingly, U.S. officials have been authorized to conduct searches at the nation's borders and its functional equivalents, such as international airports.³² When balancing the government's interest

26. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983)); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (“The determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’ On one side of the balance are arrayed the individual’s legitimate expectations of privacy and personal security; on the other, the government’s need for effective methods to deal with breaches of public order.”) (citation omitted).

27. Some exceptions to the warrant requirement include searches incident to arrest, searches of people in custody, searches at entrances to courthouses, searches at or near our nation’s border, and driver’s license and vehicle registration checks. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985).

28. *United States v. Ramsey*, 431 U.S. 606, 616 (1977). See *infra* text accompanying notes 29, 34.

29. *Ramsey*, 431 U.S. at 616 (citing Act of July 31, 1789, c. 5, 1 Stat. 29. § 24). The broad authority provided for in this statute was specifically distinguished from the limited power of entering and searching an individual’s home, which would require a warrant and probable cause. *Id.*

30. *Boyd v. United States*, 116 U.S. 616, 623 (1886).

31. See Ahern, *CBP Laptop Searches*, *supra* note 3. Jayson Ahern asserts that the U.S. Customs and Border Protection has a duty to ensure that no item brought into the United States poses a threat to our nation’s security, and that “[t]o treat our inspections of digital media at the border differently from any other documents or conveyances would give terrorists and criminals an advantage they should not have and that our nation cannot afford.” *Id.*

32. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (“[A] search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.”).

against an individual's privacy interest in the border search context, the U.S. Supreme Court has often emphasized that the scale is tipped in favor of the government.³³

The Supreme Court has "faithfully adhered" to the interpretation that searches taking place at U.S. borders are reasonable and not subject to the Fourth Amendment warrant requirement simply for the reason that a person or object has "entered into our country from the outside."³⁴ Courts have consistently rejected a particularized suspicion requirement for routine border searches of containers, such as luggage, purses, or wallets.³⁵ Courts, as well as Congress, have also authorized the inspection of vehicles and

33. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 539–40 (1985). According to then-Justice Rehnquist, because of the need to protect the country's borders, a Fourth Amendment reasonableness determination is much different at the border than in the interior. *Id.* at 538. Justice Rehnquist further notes in *United States v. Flores-Montano*, 541 U.S. 149 (2004), that an individual has a lesser expectation of privacy at the international border. *Id.* at 154. In *Carroll v. United States*, Chief Justice Taft discussed the difference between the government's power at the border and its power within the country's interior:

Travellers [sic] may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country . . . have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

267 U.S. 132, 154 (1925). See also *United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 125 (1973) ("Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations."); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) ("[A] port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country.").

34. *United States v. Ramsey*, 431 U.S. 606, 617, 619 (1977). In *Boyd v. United States*, the Supreme Court noted:

As [the Act of July 31, 1789] was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the [Fourth] [A]mendment.

Boyd, 116 U.S. at 623.

35. See *U.S. v. Ross*, 456 U.S. 798, 823 (1982) ("The luggage carried by a traveler entering the country may be searched at random by a customs officer . . . no matter how great the traveler's desire to conceal the contents may be."); *United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995) ("In a border search, a person is subject to search of luggage, contents of pockets, and purse without any suspicion at all."); *United States v. Wilmot*, 563 F.2d 1298, 1300 (9th Cir. 1977) (stating that even "mere suspicion" is not required to search the contents of a person's baggage, purse, wallet, or pocket at the border).

vessels crossing the border regardless of the suspicion present.³⁶ The search of a traveler's outer clothing, such as one's pockets, has similarly been authorized without any suspicion.³⁷ However, as to the search of one's person beyond the body's surface, the Court has refrained from suggesting its view as to the level of suspicion necessary.³⁸ Accordingly, circuit courts

36. See *Flores-Montano*, 541 U.S. at 154 ("We have long recognized that automobiles seeking entry into this country may be searched."). Moreover, 19 U.S.C. § 1581(a) states:

Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

19 U.S.C. § 1581(a) (2006); see also 19 U.S.C. § 1582 (2006) ("[A]ll persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations."); 19 U.S.C. § 482(a) (2006) ("Any of the officers or persons authorized to board or search vessels may stop, search, and examine . . . any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law . . ."). It is important to note that although Congress has authorized, and the Supreme Court has similarly approved vehicle border searches regardless of the level of suspicion present, the Supreme Court has suggested that the manner in which a search is conducted may be so offensive as to characterize the search as unreasonable. See *Ramsey*, 431 U.S. at 618 n.13. The Supreme Court's recognition of this possibility seems to contradict the rest of the *Ramsey* majority opinion, which explains that border searches of people and property are reasonable simply because they occur at the border. See *supra* text accompanying note 34. The Supreme Court may have meant that the *authority* to conduct a border search will always be reasonable, but the *manner* in which the search is conducted may violate the Fourth Amendment reasonableness requirement. See *infra* note 52 and accompanying text (discussing the Court's similar indication in *Flores-Montano*).

37. See *Bradley v. United States*, 299 F.3d 197, 203 (3d Cir. 2002) ("While the Supreme Court has never . . . explicitly classified patdowns as routine, of those courts of appeals which have addressed the patdown issue since *Montoya de Hernandez* . . . all have held that such patdowns . . . require no suspicion whatsoever."); *United States v. Nieves*, 609 F.2d 642, 646 (2d Cir. 1979) (reasonable suspicion not required to compel a traveler to remove his shoes for inspection), *cert. denied*, 444 U.S. 1085 (1980); *United States v. Palmer*, 575 F.2d 721, 723 (9th Cir. 1978).

38. *Montoya de Hernandez*, 473 U.S. at 541 n.4 ("[W]e suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches."). But see *Schmerber v. California*, 384 U.S. 757, 769–70 (1966) ("The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions [beyond the body's surface] on the mere chance that desired evidence might be obtained."). *Schmerber* seems to indicate that particularized suspicion would be required in order to conduct a more invasive search of one's person. Yet, it is perplexing why the Supreme Court in *Montoya de Hernandez* implied that particularized suspicion may not even be necessary to conduct border searches beyond the body's surface. *Montoya de Hernandez*, 473 U.S. at 541 n.4. The answer may be that *Schmerber* did not involve a border search, but rather the forced compulsion of a blood sample after an individual was arrested for driving under the influence. *Schmerber*, 384 U.S. at 758–59. Outside of the border search context, individual privacy interests are generally given greater weight when balanced against the government's interest, causing the Supreme Court to find that particularized suspicion is necessary away from the border. See *supra* note 26 and accompanying text.

are left with the responsibility of interpreting if and when particularized suspicion is necessary to classify a more invasive border search as reasonable.³⁹

To determine the reasonableness of a border search, many courts have interpreted Supreme Court precedent to apply a routine versus nonroutine search analysis.⁴⁰ *United States v. Montoya de Hernandez*⁴¹ and *United States v. Flores-Montano*⁴² remain two of the most frequently cited cases in the border search context. In *Montoya de Hernandez*, the Supreme Court expressed that "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant"⁴³ However, the Court specifically indicated it was not offering an opinion as to the suspicion required in "nonroutine border

39. See, e.g., *U.S. v. Oyekan*, 786 F.2d 832, 837 (8th Cir. 1986) ("We join those circuits holding that a reasonable suspicion that a person is carrying drugs on the outside of the body may insulate a strip search from [F]ourth [A]mendment challenge."); *U.S. v. Ogberaha*, 771 F.2d 655, 658 (2d Cir. 1985) ("To justify a strip search conducted at the border the circumstances must warrant a 'reasonable suspicion' that the party to be searched is guilty of illegal concealment."), *cert. denied*, 474 U.S. 1103 (1986); *United States v. Carter*, 590 F.2d 138, 139 (5th Cir. 1979) ("In this circuit, the standard for conducting . . . a strip search[] at a border is that Customs officials must have reasonable suspicion that the party to be searched is concealing contraband on his person."), *cert. denied*, 441 U.S. 908 (1979). Using past case law to determine when reasonable suspicion is required can be challenging because the facts of prior border search cases often involve the presence of reasonable suspicion before the search takes place. See Lindsay E. Harrell, Note, *Down to the Last JPEG: Addressing the Constitutionality of Suspicionless Border Searches of Computers and One Court's Pioneering Approach* in *United States v. Arnold*, 37 Sw. U. L. REV. 205, 219 (2008) (discussing how the Fifth, Second, and Ninth Circuits have previously avoided deciding whether customs officials can conduct suspicionless border searches of laptops because the cases before them involved some level of suspicion present prior to the respective searches). Consequently, disagreement can be found among various circuits regarding the necessity of reasonable suspicion to search. Compare *Anderson v. Cornejo*, 284 F. Supp. 2d 1008, 1025 (N.D. Ill. 2003) (contending that "a standard patdown search[] requires some level of suspicion that the person has contraband on his or her person"), with *Bradley*, 299 F.3d at 202 (no suspicion required to conduct a patdown search). The varying interpretations of the law between the Central District of California and Ninth Circuit Court of Appeals in *United States v. Arnold* further illustrate the need for greater Supreme Court clarification. See *infra* notes 113–26 and accompanying text (discussing the holdings of both *Arnold I* and *Arnold II*).

40. See Harrell, *supra* note 39, at 210; see also Jon Adams, *Rights at United States Borders*, 19 BYU J. PUB. L. 353, 356 (2004–2005); Coletta, *supra* note 9, at 981; Kelly A. Gilmore, Comment, *Preserving the Border Search Doctrine in a Digital World: Reproducing Electronic Evidence at the Border*, 72 BROOK. L. REV. 759, 766 (2007).

41. 473 U.S. 531 (1985).

42. 541 U.S. 149 (2004).

43. 473 U.S. at 538. Such "routine" searches are less likely to infringe on a traveler's privacy rights and include stopping passengers in vehicles attempting to cross the border or searching the baggage of travelers arriving at U.S. airports. See Gilmore, *supra* note 40, at 767.

searches such as strip, body-cavity, or involuntary x-ray searches.”⁴⁴ Despite the Court’s explicit statement, lower courts have cited *Montoya de Hernandez* to support the premise that “nonroutine” searches of one’s person typically involve a greater invasion of one’s privacy rights, and thus require reasonable suspicion.⁴⁵

In 2004, the Supreme Court revisited Fourth Amendment implications at the border, this time in the context of vehicle searches, in *United States v. Flores-Montano*.⁴⁶ Writing on behalf of the majority, Chief Justice Rehnquist explained that the Ninth Circuit had misunderstood *Montoya de Hernandez* in its determination that the search of a vehicle’s fuel tank required reasonable suspicion.⁴⁷ The Ninth Circuit had incorrectly used the Supreme Court’s analysis for the routine searches of one’s person to subsequently create a balancing test that was improperly premised on the search’s intrusiveness and erroneously expanded to vehicles.⁴⁸ The Court

44. *Montoya de Hernandez*, 473 U.S. at 541 n.4. The Supreme Court has not given much discussion as to what constitutes a “nonroutine” search other than the three examples provided in *Montoya de Hernandez*, a description included merely in a footnote. Moreover, *Montoya de Hernandez*’s discussion is somewhat confusing, causing some circuit courts to misinterpret its holding. For example, *Montoya de Hernandez* involved the extensive detainment of a traveler and the subsequent search of her alimentary canal. *Id.* at 534–35. Initially, the Court explained that the traveler’s *detainment* was justified if customs officials reasonably suspected that the traveler was smuggling drugs within her digestive system. *Id.* at 541. Yet, this reasonable suspicion requirement applied to the *detainment* of the alleged smuggler, not to the *search* of the alimentary canal itself. *Id.* In fact, the search was not even at issue in *Montoya de Hernandez* because customs agents had already obtained a warrant prior to conducting the rectal examination. *Id.* at 535. The Court specifically stated, “It is also important to note what we do *not* hold. . . . [W]e suggest no view on what level of suspicion, if any, is required for nonroutine border searches” *Id.* at 541 n.4 (second emphasis added). Ultimately, the Court concluded that the particular detainment in *Montoya de Hernandez* was lawful because, prior to detaining her, customs agents reasonably suspected that the traveler was smuggling drugs in her alimentary canal. *Id.* at 544. The Court’s holding regarding the detainment, not the search, can easily be misread and may have been clearer had the Court avoided hiding what they were *not* holding within a footnote. The Third Circuit, for instance, has incorrectly interpreted *Montoya de Hernandez* stating, “In *Montoya de Hernandez* . . . the Court concluded that an alimentary canal *search* was not ‘routine’ and is justified only if customs agents reasonably suspect that the traveler is smuggling contraband in his or her alimentary canal.” *Bradley*, 299 F.3d, at 202 (emphasis added). Even recently, the Ninth Circuit, in *Arnold II*, similarly misinterpreted *Montoya de Hernandez* stating, “the Supreme Court has held that reasonable suspicion is required to search a traveler’s ‘alimentary canal.’” *United States v. Arnold (Arnold II)*, 533 F.3d 1003, 1007 (9th Cir. 2008), *denying reh’g* 523 F.3d 941 (9th Cir. 2008), *rev’g* 454 F. Supp. 2d 999 (C.D. Cal. 2006), *cert. denied*, 129 S. Ct. 1312 (2009).

45. *See, e.g.*, *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993) (“When a border search and seizure becomes nonroutine, a customs official needs reasonable suspicion to justify it.”); *Anderson v. Cornejo*, 199 F.R.D. 228, 246 (N.D. Ill. 2000) (“As to nonroutine searches, however, defendants must have at least reasonable suspicion.”); *see also supra* note 44.

46. 541 U.S. 149 (2004). Rather than involving a search and seizure of one’s person, as was the case in *Montoya de Hernandez*, *Flores-Montano* involved the search of one’s property, specifically the disassembly and reassembly of a vehicle’s fuel tank after the driver was stopped at the U.S. border. *Id.* at 151.

47. *Id.* at 152.

48. *Id.* The Court was referring to the Ninth Circuit’s decision in *United States v. Molina*-

clarified that a search of one's *person* might be so intrusive as to implicate an individual's privacy and dignity interests, and thus require particularized suspicion.⁴⁹ However, the invasion of one's privacy and dignity interests was only to be considered with respect to the search of one's *person* and not to the search of one's vehicle.⁵⁰ The Court reiterated that "[c]omplex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles."⁵¹ Finally, the Court explicitly did not reach the question as to whether and when a border search of personal property conducted in a highly offensive or destructive manner might be deemed unreasonable.⁵²

In addition to implicating Fourth Amendment privacy interests, the government's expansive authority at the border may similarly infringe on an individual's Fifth Amendment right if travelers are required to provide oral or written information that makes their belongings accessible to customs officials.

Tarazon, where the appellate court made the very general determination that "[i]n order to conduct a search that goes beyond the routine, an inspector must have reasonable suspicion [T]he critical factor . . . between 'routine' and 'nonroutine' turns on the level of intrusiveness." *Id.* (quoting *United States v. Molina-Tarazon*, 279 F. 3d 709, 712–13 (9th Cir. 2002), *abrogated by United States v. Flores-Montano*, 541 U.S. 149 (2004)).

49. *Id.*; see also *infra* notes 119–23 and accompanying text (discussing the Ninth Circuit's interpretation of the *Flores-Montano* language in its *Arnold II* decision).

50. *Flores-Montano*, 541 U.S. at 152. The Court's specification that an analysis of whether there was an invasion of one's privacy and dignity interests was to apply only to the search of one's person indicates that the search of property may never be characterized as "highly intrusive." This is precisely how the Ninth Circuit interpreted the *Flores-Montano* holding when it decided *Arnold II*. See *infra* notes 118–26 and accompanying text. However, this interpretation does not necessarily mean that the search of one's property would never be considered unreasonable, as the Court in *Flores-Montano* left open the possibility that *destructive* searches of one's property may be one example of a search requiring reasonable suspicion. *Flores-Montano*, 541 U.S. at 154 n.2. The Court might have come to this conclusion by opining that a destructive search is one conducted in a highly offensive manner. *Id.* For further discussion see *infra* note 46 and accompanying text.

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

52. *Id.* at 154 n.2; accord *United States v. Ramsey*, 431 U.S. 606, 618 n.13 ("We do not decide whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out."). For a discussion of the Court's similar comment in *United States v. Ramsey*, see *supra* note 36. Notably, both of these statements were made in footnotes and lacked any further clarification by the Court. The suggestion that the Court may be differentiating the *authority* to search from the *manner* in which the search is conducted when examining a border search's reasonableness is further supported in the *Flores-Montano* opinion. See *supra* note 50. While the possibility exists that the manner in which officials conduct a search can be too offensive to be reasonable, the Court clarified that the suspicionless disassembly and reassembly of a vehicle's fuel tank does not represent such a situation. *Flores-Montano*, 541 U.S. at 155–56.

III. THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

The Fifth Amendment guarantees that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself”⁵³ The constitutional privilege against self-incrimination is one that favors individual privacy and dignity interests when balanced against the interests of the government.⁵⁴ Thus, the government is required, by its own means, to produce evidence against its citizens rather than force an individual to speak of his own guilt.⁵⁵ The privilege, however, does not prevent the government from discovering *all* evidence from the accused.⁵⁶ Rather, the Fifth Amendment only prohibits the forced extortion of incriminating “communications.”⁵⁷

53. U.S. CONST. amend. V. Scholars have found references to Fifth Amendment principles in the Bible: “To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.” *Miranda v. Arizona*, 384 U.S. 436, 458 n.27 (1966) (quoting Maimonides, *Mishneh Torah* (Code of Jewish Law), BOOK OF JUDGES, LAWS OF THE SANHEDRIN, c. 18, ¶ 6, III Yale Judaica Series 52–53). The historical event responsible for the Fifth Amendment’s inclusion in the U.S. Constitution was the trial of John Lilburn. *Id.* at 458–59. Lilburn was forced to take the Star Chamber Oath in 1637, which would have required him to answer any and all questions asked by the Court. *Id.* at 459. Lilburn resisted the oath stating: “Another fundamental right I then contended for, was, that no man’s conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so.” *Id.* (quoting THE LEVELLER TRACTS, 1647–1653, at 454 (William Haller & Godfrey Davies eds., 1944)). Parliament’s subsequent eradication of the Court of Star Chamber was favored in England and the Colonies, and the protection against self-incrimination eventually became part of the U.S. Bill of Rights. *Id.* at 459–60.

54. See *Miranda*, 384 U.S. at 460 (1966) (“[T]he [Fifth Amendment] privilege has come rightfully to be recognized in part as an individual’s substantive right, a ‘right to a private enclave where he may lead a private life. That right is the hallmark of our democracy.’”) (quoting *United States v. Grunewald*, 233 F.2d 556, 581–82 (2d Cir. 1956) (Frank, J., dissenting), *rev’d*, 353 U.S. 391 (1957)).

55. *Id.* The Supreme Court has stated:

[T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a “fair state-individual balance,” to require the government “to shoulder the entire load,” to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors

Id. (citation omitted).

56. See *Holt v. United States*, 218 U.S. 245, 252–53 (1910). “[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.” *Id.* Accordingly, the Court in *Holt* held that the Fifth Amendment would not apply if a prisoner is compelled to put on specific clothing. *Id.*

57. See Adam C. Bonin, Comment, *Protecting Protection: First and Fifth Amendment Challenges to Cryptography Regulation*, 1996 U. CHI. LEGAL F. 495, 509 (discussing the notion that the government may be prevented from compelling a witness to orally testify against himself, but may be able to compel him to produce “real or physical evidence”).

A. *Fifth Amendment Limited to the Protection of Compelled, Incriminating Testimony*

In order to seek Fifth Amendment protection, an individual must first be compelled to testify as a witness against himself.⁵⁸ The government can formally compel in-court testimony by serving an individual with a subpoena that, absent a valid privilege, subjects that person to contempt of court if he refuses to testify or produce documents.⁵⁹ Grand juries are responsible for issuing subpoenas and can do so both when someone is charged with a crime and while the government is merely investigating possible unlawful activity.⁶⁰ Alternatively, law enforcement officials can informally compel an individual to speak during in-custody questioning due to the inherent pressures accompanying the interrogation process.⁶¹ Hence,

58. *United States v. Doe (Doe I)*, 465 U.S. 605, 610 (1984).

59. FED. R. CIV. P. 45. At a minimum, an individual is compelled to be a witness against himself when he faces the "cruel trilemma" of truth, falsity, or silence during a criminal case where he is effectively forced to choose between telling the truth and testifying against himself, lying and committing the crime of perjury, or remaining silent and facing a contempt of court charge. *See Pennsylvania v. Muniz*, 496 U.S. 582, 596–97 (1990).

60. Grand juries are responsible for summoning witnesses and compelling the production of documents to determine whether "there is [an] adequate basis for bringing a criminal charge." *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 498 (D.C. Cir. 1998). In order to facilitate the grand jury's examination of witnesses prior to formally charging an individual with a crime, the prosecutor must inform the grand jury of the appropriate witnesses to call and documents to request. *See United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977). Subpoenas are not difficult to obtain, and even easier to acquire as compared to a search warrant, because subpoenas are not processed through the courts and do not require a showing of probable cause. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 562–63 (1978); *see also United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991) ("[T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists."); *Blair v. United States*, 250 U.S. 273, 282 (1919) ("[A grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.").

61. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966). Chief Justice Warren states:
[T]he modern practice of in-custody interrogation is psychologically rather than physically oriented. . . .

. . . .
. . . . An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

compulsion in the Fifth Amendment context hinges on whether communications are made voluntarily.⁶² If the accused has voluntarily confessed to the government or otherwise willingly produced incriminating information, the privilege against self-incrimination cannot be asserted.⁶³

In addition to compulsion, the communication sought must be criminally incriminating.⁶⁴ Incriminating statements include both statements made during trial, as well as statements that are not incriminating on their face, but lead to the discovery of incriminating evidence.⁶⁵ Accordingly, information is incriminating if it “furnish[es] a link in the chain of evidence” used to prosecute that individual for a crime.⁶⁶

The Fifth Amendment privilege against self-incrimination only applies where a person has reasonable grounds for fearing criminal prosecution as a result of his testimony.⁶⁷ If an individual has not been charged with a crime,

Id. at 448, 461.

62. *Id.* at 478. “In order to combat these [compelling] pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights . . . [H]e must first be informed in clear and unequivocal terms that he has the right to remain silent.” *Id.* at 467–68.

63. *Id.* at 467. “Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.” *Id.* at 478. Where the accused is faced with a choice to produce communications, compulsion may be lacking. For instance, in *South Dakota v. Neville*, 459 U.S. 553 (1983), the Supreme Court held that the defendant’s refusal to submit to a blood-alcohol test may be admitted into evidence without violating the Fifth Amendment. *Id.* at 564. Although a positive blood-alcohol result would constitute incriminating evidence of the defendant’s intoxication, no compulsion was present because the officers gave the defendant the option to either take the test or refuse to take it. *Id.* at 562. The Court noted, however, that providing the accused with a “choice” does not necessarily end the compulsion analysis. *Id.* at 562–63. For instance, a suspect has a choice when confronted with the cruel trilemma, to choose between truth, falsity, or silence, but forcing one to face the cruel trilemma has long been held to constitute compulsion. *Id.* at 563; see also *supra* note 59. Moreover, the “choice” between confessing or submitting to an extremely painful, severe, or dangerous test or operation still likely constitutes compulsion. See *Neville*, 459 U.S. at 563 (citing *Schmerber v. California*, 384 U.S. 757, 765 n.9 (1966)).

64. The Fifth Amendment includes the language “in any criminal case,” indicating that the privilege against self-incrimination only applies to information that would render subsequent criminal charges. U.S. CONST. amend. V; see also *Pillsbury Co. v. Conboy*, 459 U.S. 248, 266 n.1 (1983) (“If there is no possibility of a criminal case, then the privilege would not apply.” (quoting *Piccirillo v. New York*, 400 U.S. 548, 564–65 (1971) (Brennan, J., dissenting))).

65. See *United States v. Hubbell*, 530 U.S. 27, 37 (2000). Justice Stevens noted:

[A] half century ago we held that a trial judge had erroneously rejected a defendant’s claim of privilege on the ground that his answer to the pending question would not itself constitute evidence of the charged offense. . . . Compelled testimony that communicates information that may “lead to incriminating evidence” is privileged even if the information itself is not incriminatory.

Id. at 37–38 (referring to the Court’s holding in *Hoffman v. United States*, 341 U.S. 479 (1951)).

66. *Hoffman*, 341 U.S. at 486.

67. *Id.* In its discussion of reasonable grounds, the Supreme Court relies on *Mason v. United States*, 244 U.S. 362 (1917), which, in turn, employs Chief Justice Marshall’s words during the trial of Aaron Burr: “The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither . . . be entirely disregarded.” *Mason*, 244 U.S. at 364 (quoting *United States v. Burr (In re Willie)*, 25 Fed. Cas. No.

he is not absolved from answering questions simply because he asserts that his answers would be incriminating.⁶⁸ Rather, the court must determine whether the witness is likely to suffer harm, and if so, the protection must be given.⁶⁹

Finally, to assert the Fifth Amendment, the information compelled must be testimonial.⁷⁰ Testimonial communications must "explicitly or implicitly[] relate a factual assertion or disclose information."⁷¹ The disclosure of information is only testimonial when it expresses the contents of an individual's *mind*.⁷² Incriminating *physical* evidence derived from one's body is not protected by the Fifth Amendment unless the physical evidence in some way reveals the person's thoughts.⁷³

38, 39–40 (C.C. Va. 1807) (No. 14,692e). The Court also relies on statements of law found in *The Queen v. Boyes*:

[T]he danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. . . . [A] merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice.

Mason, 244 U.S. at 365–66 (quoting *The Queen v. Boyes*, (1861) 121 Eng. Rep. 311, 330 (K.B.)); see also *Marchetti v. United States*, 390 U.S. 39, 53 (1968) ("The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination.").

68. *Hoffman*, 341 U.S. at 486 ("The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination."); see also *Mason*, 244 U.S. at 366 ("[I]t would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.").

69. *Hoffman*, 341 U.S. at 486–87. Justice Clark states:

It is for the court to say whether [the witness's] silence is justified, and to require him to answer if "it clearly appears to the court that he is mistaken." . . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."

Id. (citations omitted).

70. *Fisher v. United States*, 425 U.S. 391, 409 (1976).

71. *Doe v. United States (Doe II)*, 487 U.S. 201, 210 (1988).

72. *Id.* at 210 n.9 ("We do not disagree with the dissent that '[t]he expression of the contents of an individual's mind' is testimonial communication for purposes of the Fifth Amendment." (quoting *id.* at 219 n.1 (Stevens, J., dissenting))).

73. *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990); see also *infra* notes 75–79 and accompanying text (providing examples of physical evidence one might be compelled to produce that are not protected under the Fifth Amendment). For examples of physical evidence that may

The characterization of information as testimonial depends on the particular facts of each case.⁷⁴ Compulsion to provide a handwriting⁷⁵ or voice sample,⁷⁶ submit to a blood test,⁷⁷ try on a piece of clothing,⁷⁸ and provide one's signature⁷⁹ have all been held to be not testimonial for

constitute testimony, and thus would be protected, see *Schmerber v. California*, 384 U.S. 757, 764 (1966) (although a lie detector test measures changes in the body's functions, the test may also record an individual's psychological responses) and *South Dakota v. Neville*, 459 U.S. 553, 561 n.12 (1983) ("A second example of seemingly physical evidence that nevertheless invokes Fifth Amendment protection [addressed] . . . compelled disclosures during a court-ordered psychiatric examination. We specifically rejected the claim that the psychiatrist was observing the patient's communications simply to infer facts of his mind, rather than to examine the truth of the patient's statements.").

74. *Doe II*, 487 U.S. at 214–15.

75. *Gilbert v. California*, 388 U.S. 263, 266–67 (1967) (handwriting is of course a form of communication, but a handwriting sample, used solely for its "identifying physical characteristics" and not for its content, does not come within Fifth Amendment protection).

76. *United States v. Wade*, 388 U.S. 218, 222–23 (1967) ("[C]ompelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt.").

77. *Schmerber*, 384 U.S. at 772. *Schmerber* held that "[s]ince the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." *Id.* at 765.

78. *Holt v. United States*, 218 U.S. 245, 252–53 (1910). The *Holt* Court admitted testimony that the defendant put on a blouse and it fit him, explaining that "[t]he objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." *Id.* at 253.

79. *Doe II*, 487 U.S. at 219. In *Doe II*, the petitioner was ordered to sign a consent directive authorizing three foreign banks to release bank records of "all accounts over which Doe had a right of withdrawal, without acknowledging the existence of any such account." *Id.* at 204. The Court held that signing the consent directive would not violate the petitioner's constitutional right against self-incrimination because there was no implicit or explicit factual assertion or disclosure of information. *Id.* at 215. By drafting the form to speak in the hypothetical, the form did not identify which banks would be contacted, communicate whether any foreign bank accounts existed or were under the petitioner's control, or acknowledge whether the unidentified foreign banks possessed any documents relating to the petitioner. *Id.* Furthermore, the petitioner's signature would not communicate his consent to the release of bank records because the bank would only be informed that the signature was in response to a court order for the release of documents that "may" exist and "may" be relevant to the investigation. *Id.* at 216–17. Such compulsion, the majority explained, was similar to "be[ing] forced to surrender a key to a strongbox containing incriminating documents." *Id.* at 210 n.9 (quoting *id.* at 219 (Stevens, J., dissenting)). In his dissent, Justice Stevens contemplated the alternative, acknowledging there may be times when a defendant may legally be "forced to surrender a key to a strongbox." *Id.* at 219 (Stevens, J., dissenting). Justice Stevens argued that the present case was different, however, not because the petitioner was forced to surrender a hypothetical key, but rather because he was unlawfully "compelled to reveal the combination to his wall safe—by word or deed." *Id.* This analogy of producing a key (physical evidence) as opposed to a wall safe combination (information stored in one's mind) has been used in subsequent Supreme Court and lower court decisions when analyzing whether communication is testimonial. For instance, the *Hubbell* Court used the *Doe II* analogy, comparing the defendant's production of subpoenaed documents to the disclosure of a wall safe combination, which made "extensive use of the contents of [the defendant's] own mind." *United States v. Hubbell*, 530 U.S. 27, 43 (2000) (internal quotation marks omitted). See *infra* note 146 and accompanying text (discussing the magistrate judge's consideration of this same analogy in *In re Boucher*).

purposes of the Fifth Amendment. On the other hand, the Supreme Court has found compulsion to calculate the date of one's birthday to be testimonial because the answer's content discloses "the operations of [the accused's] mind in expressing it."⁸⁰ These examples illustrate that a person can be compelled to produce incriminating evidence without violating the Fifth Amendment, so long as the individual is not forced to disclose his psychological processes.⁸¹

B. Application of the Fifth Amendment to Documents and Other Tangible Items

In addition to oral and physical testimony, the Fifth Amendment privilege extends to the compulsion to produce documents and similar tangible items.⁸² Compliance with a request to produce such items can potentially disclose incriminating information in two ways: first, through the document's substantive content, and second, through the actual act of producing it.

1. Content Privilege

In the 1886 decision of *Boyd v. United States*, the Supreme Court declared that "compelling the production of [a man's] private books and papers, to convict him of a crime . . . is contrary to the principles of a free government."⁸³ At that time, the Court was interpreting the Fifth Amendment to protect the substantive content of documents and to prohibit

80. See *Pennsylvania v. Muniz*, 496 U.S. 582, 592, 594 (1990). Muniz, in his intoxicated state, could neither remember nor calculate the date of his sixth birthday, leaving him with the option to either incriminate himself by admitting that during the custodial interrogation he could not remember the date, or answer untruthfully with a date he, at that time, knew was inaccurate. *Id.* at 599. Either answer would indicate that Muniz's mental processes were impaired and violate his right against self-incrimination. *Id.*

81. *Hubbell*, 530 U.S. at 34–35.

82. *Boyd v. United States*, 116 U.S. 616, 634–35 (1886).

83. *Id.* at 631–32. The Court further states, "we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.* at 633. In *Boyd*, the Government ordered the defendants to produce an invoice as proof that the defendants had imported cases of glass into the United States without paying the required duty. *Id.* at 618. Although the defendants asserted their Fifth Amendment right against self-incrimination, the lower court admitted the invoice and found the defendants guilty. *Id.* The Supreme Court reversed, holding that the evidence was inadmissible because forcing an individual to produce documents against him would violate his Fifth Amendment rights. *Id.* at 622.

the taking and use of documents as evidence against the accused.⁸⁴ However, the Court has since rejected such broad document protection, clarifying that the Fifth Amendment would not apply in the absence of compulsion to create the document.⁸⁵ Thus, if the government subpoenaed voluntarily prepared documents, such as one's tax returns, Fifth Amendment protection would not be available even if the documents contained incriminating, testimonial statements because their maker was not compelled to create them.⁸⁶

2. Act of Production Privilege

Although the content of voluntarily produced documents may not receive Fifth Amendment protection, the act of producing those documents may be privileged.⁸⁷ Compliance with a subpoena request may, in effect, implicitly communicate testimonial and incriminating information merely by handing over the information requested.⁸⁸

84. *See id.* at 633–35.

85. *See Hubbell*, 530 U.S. at 36 (“It is clear, therefore, that respondent Hubbell could not avoid compliance with the subpoena served on him merely because the demanded documents contained incriminating evidence, whether written by others or voluntarily prepared by himself.”); *United States v. Doe (Doe I)*, 465 U.S. 605 (1984) (content of the defendant’s business documents not privileged under the Fifth Amendment); *Fisher v. United States*, 425 U.S. 391 (1976) (subpoena to produce tax papers voluntarily prepared by an accountant does not constitute compulsion under the Fifth Amendment).

86. *See Fisher*, 425 U.S. at 409. The statement that a man is protected from compelling his “private books and papers” indicates that the *Boyd* Court may have intended to distinguish one’s private papers from other types of documents. *See Boyd*, 116 U.S. at 631–35. However, the Supreme Court has suggested that such a distinction no longer exists. For example, in *Fisher*, the Court noted its multiple references to the *Boyd* distinction in dictum of the Court’s prior opinions, but stated that the Court had yet to find a current rationale for such a distinction. *Fisher*, 425 U.S. at 408–09. Regardless, the circumstances present in *Fisher* did not require the Court to review the *Boyd* proposition because the documents compelled were not the defendant’s “private papers.” *Id.* at 414. Subsequently, in *Doe I*, the Court held that the contents of the respondent’s business records were not privileged under the Fifth Amendment, also noting that the business documents were somewhat less personal than the *Fisher* defendant’s personal tax returns. *Doe I*, 465 U.S. at 610 n.7, 612–13. Justice O’Connor concurred, finding the majority’s opinion to imply that “the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind.” *Id.* at 618 (O’Connor, J., concurring). More recently, in *Hubbell*, Justice Thomas opined that failing to include the production of voluntarily produced documents as protected communications under the Fifth Amendment conflicted with the Amendment’s original meaning. *See Hubbell*, 530 U.S. at 49 (Thomas, J., concurring). He argued that a historical examination reveals that the term “witness” actually refers to “a person who gives or furnishes evidence,” a broader definition found in dictionaries published during the country’s founding. *Id.* at 50. This alternate definition, coupled with the language of the common law privilege against self-incrimination and the similar broad meaning found in the Sixth Amendment today, indicate that the privilege was to extend to *any* incriminating evidence. *See id.* at 49–54. Because the “private papers” distinction was not at issue in *Hubbell*, Justice Thomas agreed to reconsider its application in the future. *Id.* at 56.

87. *Doe I*, 465 U.S. at 612.

88. *Fisher*, 425 U.S. at 410; *see also infra* text accompanying note 90 (listing the three

Fisher v. United States explored the ramifications of a subpoena ordering the defendant to produce documents used by his accountant in preparation of the defendant's tax return.⁸⁹ In examining the information to be revealed by the defendant's compliance, the Court highlighted three factual assertions that may be independently communicated through the act of production: (1) the documents requested actually exist, (2) the documents are in the individual's possession or control, and (3) the documents produced are the same ones described in the subpoena.⁹⁰ If these factual assertions are sufficiently testimonial and incriminating, certain documents that would not otherwise receive a content-based privilege may be eligible for Fifth Amendment protection under the act of production privilege.⁹¹ However, these implicit act of production assertions might not receive Fifth Amendment protection if the Government proves that its independent prior knowledge of the facts communicated renders the information a "foregone conclusion."⁹² Such was the case in *Fisher*, where the Government overcame the Fifth Amendment obstacle by using the accountant's preparation and possession of the defendant's tax papers to establish that the documents' existence, possession, and authenticity was a "foregone conclusion."⁹³ Hence, it was unnecessary for the Government to rely on any communications conveyed by the defendant's act of production.⁹⁴

testimonial assertions that can be implicitly communicated through the act of production).

89. *Fisher*, 425 U.S. at 393–94. *Fisher* consolidated multiple cases involving IRS investigations about possible violations of the federal tax laws. *Id.* Both defendants transferred their tax documents from their accountants to their respective attorneys, and asserted their right against self-incrimination, accountant-client privilege, and attorney-client privilege. *Id.* at 395. The Court held that none of the privileges applied. *Id.* at 396.

90. *Id.* at 410.

91. *Id.* The Court notes that "[t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced." *Id.*

92. *Id.* at 411. When the Government can prove existence, possession, and authenticity, the defendant "adds little or nothing to the sum total of the Government's information by conceding that [the defendant] in fact has the papers." *Id.* "When the government has sufficient preexisting knowledge about the documents or records summoned, apart from existence and possession, the question becomes one 'not of testimony but of surrender.'" Thomas Kiefer Wedeles, Note, *Fishing for Clarity in a Post-Hubbell World: The Need for a Bright-Line Rule in the Self-Incrimination Clause's Act of Production Doctrine*, 56 VAND. L. REV. 613, 625 (2003).

93. *Fisher*, 425 U.S. at 411.

94. *Id.* The Supreme Court has failed to specify a particular standard of proof that the Government must meet in order to establish that existence, possession, and authenticity are foregone conclusions. See Phillip R. Reiting, *Compelled Production of Plaintext and Keys*, 1996 U. CHI. LEGAL F. 171, 182–83. In *Fisher*, the accountant's involvement easily enabled the Government to prove a foregone conclusion, and thus the Court did not need to determine the requisite degree of prior knowledge to be possessed by the Government. Yet, in *Hubbell*, the Supreme Court

The act of production may become particularly relevant at the U.S. border due to recent case law expanding the government's authority to search laptop computers.⁹⁵ The common use of passwords to secure one's laptop suggests that customs officials may need to compel travelers to provide their laptop passwords so that officials can search the machine. While the government generally enjoys expansive power to search at the border, it is unclear whether this authority extends to compelling the production of passwords, as it potentially implicates the Fifth Amendment by forcing travelers to testify as witnesses against themselves.⁹⁶

IV. LAPTOP SEARCHES AT THE UNITED STATES BORDER

Continuing technological advancements have forced customs officials to screen not only tangible items hidden in one's luggage, clothing, or alimentary canals of the body, but also intangible data stored in electronic form.⁹⁷ Circuit courts have often avoided deciding whether a laptop search was routine or nonroutine because particular fact patterns allowed them to affirm or reverse on other grounds.⁹⁸ Currently, only two federal courts of

considered the act of production when no third party was involved, determining that the Government had failed to prove a foregone conclusion, and thus the Fifth Amendment applied. *United States v. Hubbell*, 530 U.S. 27, 45 (2000). In *Hubbell*, the defendant was subpoenaed to produce 13,120 pages of documents connected with a pending grand jury investigation in exchange for immunity. *Id.* at 31. Once the defendant produced the documents, however, he was indicted for criminal charges in a new, unrelated investigation. *Id.* Aside from its unpersuasive argument that a businessman will always possess business documents, rendering the documents' existence and possession a foregone conclusion, the Government had in no way demonstrated its prior knowledge of the documents' existence or its ability to independently authenticate them. *Id.* at 44–45. Moreover, because the documents were expected to implicate the defendant in the first federal prosecution, the Government did not expect to discover new incriminating information that would lead to a separate prosecution of the defendant. *Id.* at 42–43. Similar to the *Fisher* decision, the *Hubbell* Court still refrained from adopting a clear standard of proof necessary to demonstrate a foregone conclusion, stating: "Whatever the scope of this 'foregone conclusion' rationale, the facts of this case plainly fall outside of it." *Id.* at 44. However, when characterizing the issue at the start of its opinion, the Court mentioned the Government's inability to demonstrate existence with "reasonable particularity." *Id.* at 30. Reasonable particularity is the standard used to evaluate the validity of a search warrant pursuant to the Fourth Amendment requirement that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV; see also *United States v. Grubbs*, 547 U.S. 90, 97–98 (2006). The *Hubbell* Court, however, did not use the "reasonable particularity" term anywhere else in its opinion other than in its initial description of the issue, indicating that the Court may not have intended to recognize this standard.

95. See *infra* Part IV.

96. A case has yet to include a fact pattern where border officials encounter a traveler refusing to provide them with his laptop password. The closest case on point is *In re Boucher*, No. 2:06-mj-91, 2007 WL 4246473 (D. Vt. Nov. 29, 2007), *rev'd*, 2009 WL 424718 (D. Vt. Feb. 19, 2009). For a discussion of *Boucher*, see *infra* notes 134–49 and accompanying text, as well as Part VIII.

97. See *supra* notes 2, 66–88 and accompanying text (discussing the need to search electronic devices).

98. See *supra* note 39; see also *United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006)

appeals have specifically addressed the suspicionless search of laptops—the Fourth Circuit in *United States v. Ickes* and the Ninth Circuit in *United States v. Arnold*—each circuit determining that customs officials possess the authority to search laptops without any particularized suspicion.⁹⁹

A. *United States v. Ickes: “A Laptop is Merely Cargo”*

In *United States v. Ickes*, U.S. customs officials discovered pornographic photographs of young boys, drug contraband, and a warrant for John Ickes’s arrest during a vehicle search at the U.S. border.¹⁰⁰ After arresting Ickes and continuing their search of his vehicle, agents discovered a laptop and disks containing additional child pornography.¹⁰¹ Having been subsequently charged with the transportation of child pornography, Ickes sought to exclude the content of his laptop and disks from evidence, arguing that his First and Fourth Amendment rights had been violated.¹⁰²

The Fourth Circuit declined to accept Ickes’s claim that because electronic equipment was not clearly included in the language of customs statute, 19 U.S.C. § 1581(a), a warrant was required to search his laptop and

(finding that because Romm failed to raise, in his opening brief, that the border search of his laptop was too intrusive to be “routine,” the issue was “waived.”); *United States v. Irving*, 452 F.3d 110, 124 (2d Cir. 2006) (requiring no determination to be made of whether the border search of computer diskettes was routine or nonroutine because reasonable suspicion, derived from a tip that the traveler was transporting child pornography, was present before customs officials searched the diskettes); *United States v. Roberts*, 274 F.3d 1007, 1016–17 (5th Cir. 2001) (avoiding the discussion of whether the laptop search was routine because Roberts had already consented to the search as well as admitted his disks contained child pornography, providing customs officials with probable cause to search).

99. *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005); *United States v. Arnold (Arnold II)*, 533 F.3d 1003 (9th Cir. 2008), *denying reh’g* 523 F.3d 941 (9th Cir. 2008), *rev’g* 454 F. Supp. 2d 999 (C.D. Cal. 2006), *cert. denied*, 129 S. Ct. 1312 (2009).

100. *Ickes*, 393 F.3d at 502–03. When customs officials stopped Ickes at the border between Canada and the United States, Ickes explained that he was returning home from vacation. *Id.* at 502. However, the officials were confused because Ickes’s automobile looked to be carrying “everything he own[ed].” *Id.* Customs officials intended to only conduct a brief search of Ickes’s van, but after discovering a video recording of a tennis match that focused exclusively on a young ball boy, they became suspicious and proceeded with a more detailed inspection. *Id.* This inspection gave rise to the incriminating items found within Ickes’s vehicle and the subsequent discovery of his laptop containing child pornography. *Id.* at 503.

101. *Id.* at 503. Ickes admitted to customs officials that his laptop contained videos of minors engaged in sexual acts, confirmed the existence of his outstanding warrants, and revealed that he was wanted in Virginia for child abuse. *Id.*

102. *Id.* The district court denied Ickes’s motion to exclude the laptop and disks because the search was conducted pursuant to the border exception to the Fourth Amendment. *Id.* Ickes was thereafter found guilty of transporting child pornography. *Id.*

disks.¹⁰³ Based on its recognition of the government's expansive border search powers, the court concluded that the search was lawful because § 1581(a)'s term "cargo" encompassed "[any good] transported by a vessel, airplane, or vehicle," including Ickes's laptop and disks.¹⁰⁴ Moreover, the court refused to create an exception to border searches that would exclude the search of "expressive material," such as Ickes's laptop.¹⁰⁵ In response to Ickes's contention that every international traveler carrying a laptop would now be subject to a search of his electronic files, the court explained that a lack of time and resources would most likely require that customs agents search a traveler's laptop only after some other factor triggered suspicion.¹⁰⁶

Although indicating that suspicion was not required to search a laptop at the border, the *Ickes* decision was still another case where reasonable suspicion was present before the search.¹⁰⁷ Furthermore, *Ickes* involved a border search of a vehicle, which has historically not required particularized suspicion.¹⁰⁸ Had the search not included a vehicle, but rather taken place at an airport, the Fourth Circuit may have analyzed the search differently.

Unlike *Ickes*, *United States v. Arnold* presented a unique fact pattern involving a laptop border search not preceded by any real suspicion. Such circumstances finally forced the Ninth Circuit to tackle the question that other circuits had avoided and the Supreme Court has yet to decide.

103. *Id.* at 505. For the text of 19 U.S.C. § 1581(a) see *supra* note 36.

104. *Ickes*, 393 F.3d at 504. The characterization of a laptop as cargo implies that the court viewed a laptop search as the type of ordinary or "routine" search authorized by Congress, although the court never explicitly stated as such. Yet, the court did cite *Flores-Montano* as clear support for its conclusion that the laptop search was reasonable. *Id.* at 505 n.1.

105. *Id.* at 506. The court noted that exempting expressive material from border searches would greatly impede the government's ability to protect its borders if, for instance, the government could not seize terrorist communications because they were "expressive." *Id.* For further discussion of the court's refusal to recognize a First Amendment exception see *infra* notes 170–72 and accompanying text.

106. *Id.* at 506–07. The court never expressly stated whether particularized suspicion would be necessary to conduct such a search, but its failure to discuss whether the customs officials possessed reasonable suspicion to search Ickes's van indicates the court's belief that particularized suspicion was not necessary. Furthermore, the court's discussion of the unlikelihood that customs agents would search laptops without prior suspicion suggests the court's view that suspicionless laptop searches are lawful, and travelers should not worry about their frequent imposition unless the traveler was to arouse additional suspicion. *See id.* at 507.

107. *See Harrell, supra* note 39, at 221. The photos of the young boys, drugs, and warrant for Ickes's arrest led to the customs agents' continued search of Ickes's van where they discovered his laptop. *Ickes*, 393 F.3d at 502–03.

108. *See supra* note 36 and accompanying text (discussing vehicle searches at the border).

B. *United States v. Arnold*: "Laptops Do Not Carry Sufficient Privacy and Dignity Interests"

In *United States v. Arnold*, Michael Arnold was selected for secondary questioning at a U.S. customs checkpoint, following his arrival at the Los Angeles International Airport.¹⁰⁹ Customs officials requested that Arnold turn on his laptop, and then proceeded to search Arnold's picture files, discovering a photo of two nude women.¹¹⁰ Arnold was questioned about his laptop for several hours while agents further searched the computer and eventually uncovered several photos of child pornography.¹¹¹ In response to his indictment for multiple counts of child pornography, Arnold sought to exclude his laptop's content, arguing that the suspicionless search violated his Fourth Amendment rights.¹¹²

The Central District of California, the first court to preside over the *Arnold* case, explicitly held that customs officials could not search a laptop at the border in the absence of reasonable suspicion.¹¹³ The district court interpreted *United States v. Flores-Montano* to mean that certain border searches are highly intrusive if they implicate an individual's privacy and dignity interests.¹¹⁴ Moreover, the court determined that a nonroutine, intrusive search had occurred, requiring a higher level of suspicion.¹¹⁵ Contrary to the Fourth Circuit, the district court concluded that a laptop was not mere cargo, but rather an extension of one's own memory, which if

109. *United States v. Arnold (Arnold II)*, 533 F.3d 1003, 1005 (9th Cir. 2008), *denying reh'g* 523 F.3d 941 (9th Cir. 2008), *rev'g* 454 F. Supp. 2d 999 (C.D. Cal. 2006), *cert. denied*, 129 S. Ct. 1312 (2009). Arnold had just completed a twenty-four hour flight from the Philippines. *Id.* During Arnold's secondary questioning, customs agents inquired about where Arnold had traveled, the length of his stay, and the purpose of his trip, to which Arnold responded that he had spent three weeks in the Philippines visiting friends. *Id.*

110. *Id.* Arnold's computer desktop contained folders, two of which were titled "Kodak Pictures" and "Kodak Memories." *Id.* After discovering the photo of nude women within these folders, special agents with the United States Immigration and Customs Enforcement were called to conduct more extensive questioning. *Id.*

111. *Id.*

112. *Id.* at 1006. Arnold argued that, under the Fourth Amendment, reasonable suspicion was necessary to search the contents of a laptop, and such suspicion was not present before customs agents searched Arnold's computer. *Id.*

113. *United States v. Arnold (Arnold I)*, 454 F. Supp. 2d 999 (C.D. Cal. 2006), *rev'd*, 523 F.3d 941 (9th Cir. 2008), *reh'g denied*, 533 F.3d 1003 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

114. *Id.* at 1002.

115. *Id.* at 1003. Judge Pregerson misstated previous Supreme Court precedent, indicating that suspicion is required to conduct an intrusive search, when the Supreme Court has only indicated that highly intrusive searches *might* support a requirement of particularized suspicion. *See United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

searched, could invade an individual's privacy and dignity interests even more so than a physically intrusive strip search.¹¹⁶ Accordingly, the California district court held that customs officials did not possess reasonable suspicion prior to inspecting Arnold's laptop, and therefore the search was illegal.¹¹⁷

The Ninth Circuit Court of Appeals took quite a different approach to the border search of laptops, reversing the district court and holding that particularized suspicion was not required to search.¹¹⁸ The court's decision was premised on an alternative interpretation of *Flores-Montano* that prohibited the application of intrusive balancing tests to *all* property, reserving such scrutiny solely for highly intrusive searches of one's *person*.¹¹⁹ The court rejected Arnold's argument that the intrusiveness analysis discussed in *Flores-Montano* should apply to his laptop because *Flores-Montano* only prohibited its application to the search of *vehicles*.¹²⁰ The *Arnold II* court stressed that the Supreme Court did not intend to distinguish vehicles from other types of property, and instead, meant that vehicles, as a form of property, do not carry the same privacy and dignity interests as one's *person*.¹²¹ Furthermore, the court opined that the Supreme

116. *Arnold I*, 454 F. Supp. 2d at 1000, 1003. Judge Pregerson noted that laptops contain numerous private thoughts and personal information such as financial records, personal letters, medical information, trade secrets, or confidential client information. *Id.* at 1004–05. Furthermore, a reasonable person is likely to experience fear or apprehension if the government possessed the authority to search within an individual's mind, further justifying Fourth Amendment protection. *Id.* at 1004. However, Judge Pregerson failed to acknowledge that people can similarly be fearful or apprehensive knowing that the government has the authority to search their luggage. Travelers can respond to that fear by choosing not to travel with items that might cause concern or lead to embarrassment should those items be discovered by customs agents. Individuals traveling with laptops can likewise choose to transfer particularly confidential, incriminating, or otherwise private information from their hard drives to an external memory device before traveling. While such a procedure may be slightly inconvenient, international travelers are well aware that there is a lesser expectation of privacy at the border. *See supra* note 33 (discussing this diminished privacy expectation).

117. *Arnold I*, 454 F. Supp. 2d at 1004. The district court explained that the Government has the burden to prove the search was reasonable. *Id.* at 1006. Yet, the court found the customs agent's testimony unpersuasive as to the presence of reasonable suspicion. *Id.* at 1004. The agents' failure to complete a written record at the time the search took place, as well as the inconsistent and imprecise testimony of one of the agents who conducted the inspection, was "fatal to the Government's case." *Id.* at 1005.

118. *United States v. Arnold (Arnold II)*, 533 F.3d 1003, 1008 (9th Cir. 2008) ("[T]he district court's holding that particularized suspicion is required to search a laptop, based on cases involving the search of the person, was erroneous."), *denying reh'g* 523 F.3d 941 (9th Cir. 2008), *rev'g* 454 F. Supp. 2d 999 (C.D. Cal. 2006), *cert. denied*, 129 S. Ct. 1312 (2009).

119. *Id.*; *see also infra* note 121 and accompanying text.

120. *Arnold II*, 533 F.3d at 1008. Arnold was referring to the following statement in *Flores-Montano*: "Complex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles." *Flores-Montano*, 541 U.S. at 152.

121. *Arnold II*, 533 F.3d at 1008. The court's argument is supported by the *Flores-Montano*

Court has never meant to use a "routine" versus "nonroutine" balancing test; the Court stated in *Flores-Montano* that "routine" has merely been used as a descriptive term in the border search context.¹²²

The court did not suggest, however, that particularized suspicion would never be required to search property, recognizing that some property searches may be so destructive, or conducted in such an offensive manner, as to warrant a higher level of suspicion.¹²³ Nonetheless, neither of those two circumstances was present in this case, as Arnold did not claim his laptop was damaged from the search and he did not present evidence that the search was conducted in a "particularly offensive manner."¹²⁴ Moreover, the Ninth Circuit declined to accept Arnold's argument that a laptop's storage capacity makes the device "capable of functioning as a home" and thus

Court's use of the word "property" in referencing the customs officials' manipulation of a vehicle's fuel tank: "While it may be true that some searches of *property* are so destructive as to require a different result, this was not one of them." *Flores-Montano*, 541 U.S. at 155–56 (emphasis added). If the Court truly meant to distinguish vehicles from property, it would have likely used the phrase "some searches of *vehicles*" rather than choosing the broader term "property."

122. *Arnold II*, 533 F.3d at 1007. To support this proposition, the court cited one of its previous decisions, *United States v. Cortez-Rocha*, 394 F.3d 1115, 1122 (9th Cir. 2005), *amending* 383 F.3d 1093 (9th Cir. 2004), which discussed the *Flores-Montano* Court's rejection of another Ninth Circuit holding, *United States v. Molina-Tarazon*, 279 F.3d 709, 713 (9th Cir. 2002), *abrogated by* *United States v. Flores-Montano*, 541 U.S. 149 (2004). For discussion of the *Molina-Tarazon* holding see *supra* note 48 and accompanying text. *Cortez-Rocha* rejected a "routine" versus "nonroutine" test due to the Supreme Court's criticism of the Ninth Circuit's use of such a test in *Molina-Tarazon*. *Id.* The *Arnold II* court also cited *United States v. Chaudhry*, in which a different panel of Ninth Circuit judges interpreted *Flores-Montano* to limit the use of a "routine" versus "nonroutine" balancing test to the searches of property. *United States v. Chaudhry*, 424 F.3d 1051, 1054 (9th Cir. 2005). Based on Supreme Court precedent, it is unclear whether the Court intended to create a routine and nonroutine distinction limited to searches of a person or if such a distinction was never intended to apply to border searches. See Coletta, *supra* note 9, at 980 ("The U.S. Supreme Court has not explicitly distinguished routine from nonroutine searches."). The Supreme Court initially used the term "routine" with respect to border searches in *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (federal government has the power to conduct "routine inspections and searches of individuals or conveyances seeking to cross our borders"). Over the course of the subsequent decade, the Court characterized certain border searches as "routine" in over a dozen cases, and first used the word "nonroutine" in *United States v. Montoya de Hernandez* in conjunction with examples of searches beyond the body's surface. *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 n.4 (1985). Yet even in *Montoya de Hernandez*, the Court never provided a definition of "nonroutine" and did not expressly state that a nonroutine search would require a standard of suspicion different from a routine search. Thus, it is possible that the terms routine and nonroutine are truly descriptive words, and not meant to be distinguished by separate balancing tests of intrusiveness.

123. *Arnold II*, 533 F.3d at 1007–08 (citing *Flores-Montano*, 541 U.S. at 152, 155 n.2).

124. *Id.* at 1009. Arnold only stated that the customs agents "had [him] boot [the laptop] up, and looked at what [Arnold] had inside." *Id.*

worthy of higher Fourth Amendment protection.¹²⁵ Accordingly, the Ninth Circuit joined the Fourth Circuit in declaring that reasonable suspicion was not required to search a traveler's laptop at the border.¹²⁶

C. Judicial Response After Arnold

The Ninth Circuit's decision in *Arnold II* has already greatly impacted border search doctrine and will likely continue to do so.¹²⁷ Multiple laptop search cases have been appealed to the Ninth Circuit since the *Arnold II* holding, and the court of appeals has continued to uphold the suspicionless search of laptops at the border.¹²⁸ Other federal circuits have cited the *Arnold II* decision as support that reasonable suspicion is not required to conduct a laptop border search.¹²⁹ *Arnold II* has even affected the holdings

125. *Id.* at 1009–10. The court found no case law to support Arnold's contention that an item's storage capacity had any bearing on the offensiveness of a search. *Id.* at 1010. Additionally, the court cited *California v. Carney*, 471 U.S. 386, 393–94 (1985), which admitted evidence from the warrantless search of a mobile home despite the party's argument that the mobile home was "capable of functioning as a home." *Arnold II*, 533 F.3d at 1009.

126. *Arnold II*, 533 F.3d at 1008.

127. On July 18, 2008, only a few months after the *Arnold* holding, the Department of Homeland Security published the U.S. Customs and Border Protection's POLICY REGARDING BORDER SEARCH OF INFORMATION, which specified the government's authority to search, without any particularized suspicion, any electronic device transported across the border. U.S. CUSTOMS AND BORDER PROTECTION, POLICY REGARDING BORDER SEARCH OF INFORMATION, 2 (2008), http://www.cbp.gov/linkhandler/cgov/travel/admissibility/search_authority.ct/search_authority.pdf. On September 11, 2008, Representative Loretta Sanchez introduced the Border Search Accountability Act of 2008, intended to establish specific standards by which customs officials could inspect, seize, copy, and share a traveler's belongings and information. See Border Search Accountability Act of 2008, H.R. 6869, 110th Cong. (2008). Sanchez was motivated to create the legislation due to the "lack of protections individuals have when their electronic equipment is randomly seized." Roy Mark, Bill Targets Laptop, Mobile Device Search and Seizures (Sept. 15, 2008), <http://www.eweek.com/c/a/Mobile-and-Wireless/Bill-Targets-Laptop-Search-and-Seizures>. Sanchez also explained that U.S. citizens would be able to travel across the country's borders with "more peace of mind knowing that their data will be further protected and that there are stringent accountability measures in place for safeguarding their personal information." *Id.* On September 26, 2008, Senator Russ Feingold went a step further, introducing the Travelers' Privacy Protection Act of 2008, aimed to completely prevent the suspicionless search of laptops at the border. Lester M. Paredes III, *The Travelers' Privacy Protection Act of 2008: Be Reasonable with My Private Information and Expensive Equipment*, 45 No. 1 CRIM. L. BULL. 1 (2009) (citing the Travelers' Privacy Protection Act of 2008, S. 3612, 110th Cong. (2008)). Among a number of other restrictions, the suggested legislation would require customs officials to possess reasonable suspicion and obtain a supervisor's approval prior to conducting a border search. See S. 3612, §§ 4(a), 5(a).

128. See *United States v. Singh*, 295 F. App'x 190, 190 (9th Cir. 2008) ("Singh's argument that the border officer needed reasonable suspicion to search his laptop computer is squarely foreclosed by *United States v. Arnold*. There, we held that searches of the defendant's computer hard drive at the border . . . did not require reasonable suspicion.") (citation omitted); *United States v. Hilliard*, 289 F. App'x 239, 239 (9th Cir. 2008) (citing *Arnold II* to reject the argument that a person has a heightened level of privacy in the contents of his laptop).

129. See *United States v. Bunty*, No. 07-641, 2008 WL 2371211, at *3 (E.D. Pa. June 10, 2008); see also *United States v. Pickett*, No. 07-0374, 2008 WL 4330247, at *3 (E.D. La. Sept. 16, 2008)

of state courts, such as a California Court of Appeals decision which, shortly after *Arnold II* was decided, found suspicionless laptop searches at the border valid under the Fourth Amendment.¹³⁰

In February 2009, the U.S. Supreme Court denied Arnold's petition for certiorari, allowing the *Arnold II* holding to remain binding authority in the Ninth Circuit.¹³¹ While it is uncertain whether other circuit courts will follow the Ninth Circuit's decision, the current uniformity between the Ninth and Fourth Circuits warrants consideration of other constitutional rights that may be implicated once an international traveler is compelled to present his laptop at the border, specifically one's Fifth Amendment right against self-incrimination.

V. DOES FIFTH AMENDMENT PROTECTION EXTEND TO THE PRODUCTION OF PASSWORDS?

At the U.S. border, claims of Fourth Amendment violations may be more common, but the particular circumstances surrounding a border search may also support a viable Fifth Amendment claim. One such circumstance involves a search that customs officials are unable to conduct without the traveler's assistance because the traveler has protected his device with a password.¹³² If customs officials need the traveler to type or state his password in order to make the item accessible, the search has expanded to include the possible compulsion of incriminating testimonial

(citing *Arnold II* as support that customs officials do not need reasonable suspicion to search a traveler's laptop).

130. *People v. Endacott*, 79 Cal. Rptr. 3d 907 (Ct. App. 2008). In *Endacott*, U.S. customs officials questioned Endacott about his trip to Thailand. *Id.* at 907. The customs agent found it odd that Endacott traveled to Thailand for four months and returned from such a hot climate wearing a leather jacket and gloves. *Id.* at 908. Consequently, Endacott was referred to secondary inspection where customs officials searched his two laptops and discovered numerous images of nude preadolescent females. *Id.* Endacott was charged with ten counts of possession of child pornography. *Id.* at 907. He sought to suppress the evidence obtained from his laptop, arguing that the search required reasonable suspicion because a laptop, containing expressive materials, is entitled to greater protection than other forms of property. *Id.* at 908–09. The court reasoned that although viewing one's private computer files may implicate privacy and dignity interests, those interests are not affected any more so than the search of a locked briefcase containing intimate, confidential documents. *Id.* at 909. Accordingly, the court held that a laptop is afforded no greater protection than any other container, and reasonable suspicion is not necessary to search it. *Id.*

131. *See Arnold II*, 533 F.3d 1003. Although the suspicionless border search of laptops is quite timely, the Supreme Court may have denied certiorari until the issue rendered a circuit court split.

132. The inability to search may only be an issue when individuals travel with electronic devices. In most other situations, customs officials can use the physical force necessary to break open an item if the traveler insists on transporting it across the border. *See infra* note 168.

communication. In such a situation, a Fifth Amendment privilege may be applicable.

A. In re Boucher Holds Such Protection Exists

A magistrate judge's 2007 evidentiary ruling, *In re Boucher*, was the first decision to hold that the Fifth Amendment privilege protects an individual's password.¹³³ In *Boucher*, customs officials searched Sebastien Boucher's vehicle when he attempted to enter the U.S. from Canada.¹³⁴ During the search of Boucher's car, agents inspected picture and video files on a laptop computer found in Boucher's back seat, noticing that some of the files had pornographic titles.¹³⁵ The agents subsequently located thousands of pornographic images, some including children, and one file which could not be opened due to password-protection.¹³⁶ Boucher admitted that he downloaded child pornography and then accessed his laptop's drive Z, allowing the agents to view numerous additional pictures and videos of child pornography.¹³⁷ The agents thereafter arrested Boucher and seized his laptop.¹³⁸

Weeks later when agents attempted to view Boucher's drive Z a second time, the hard drive was password protected with an encryption algorithm that could take the Government years to break.¹³⁹ As a result, a grand jury subpoenaed Boucher to produce "all documents, whether in electronic or paper form, reflecting any passwords used or associated with the Alienware Notebook ComputerFalse."¹⁴⁰ The Government suggested that Boucher input the password outside the presence of the grand jury and offered to refrain from using his act of entering the password against Boucher in subsequent criminal prosecution.¹⁴¹ Despite the Government's proposal,

133. *In re Boucher*, No. 2:06-mj-91, 2007 WL 4246473 (D. Vt. Nov. 29, 2007), *rev'd*, 2009 WL 424718 (D. Vt. Feb. 19, 2009).

134. *Id.* at *2.

135. *Id.* One of Boucher's laptop files was titled, "2yo getting raped during diaper change." *Id.* at *1.

136. *Id.* at *2. The customs official was able to determine that the protected file had been opened less than a week before the border search. *Id.* at *1.

137. *Id.* at *1. It is unclear whether Boucher entered a password to access his drive Z at that time. When asked during a telephone interview if he had typed in his password during the border search, Boucher responded: "I prefer not to answer that one." Ellen Nakashima, *In Child Porn Case, a Digital Dilemma: U.S. Seeks to Force Suspect to Reveal Password to Computer Files*, WASH. POST, Jan. 16, 2008, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/15/AR2008011503663.html>.

138. *In re Boucher*, 2007 WL 4246473, at *2.

139. *Id.* For over a year, the Government has been unable to access the drive Z on Boucher's laptop. Nakashima, *supra* note 137.

140. *In re Boucher*, 2007 WL 4246473, at *2.

141. *Id.*

Boucher moved to quash the subpoena, arguing that production of the password would violate his Fifth Amendment right against self-incrimination.¹⁴²

Initially, the court concluded that the subpoena constituted compulsion and the disclosure of files purportedly containing child pornography would be incriminating to Boucher.¹⁴³ Thus, the court was left to determine

142. *Id.* The Federal District of Vermont is part of the Second Circuit, which has not determined whether suspicionless laptop searches violate the Fourth Amendment. If the Government eventually files formal criminal charges against Boucher, it will be interesting to see whether Boucher tries to suppress the suspicionless laptop border search from evidence. The failure to challenge the search may indicate the party's recognition that suspicionless laptop searches are becoming accepted as lawful at the border. For a discussion of the district court's reversal of *In re Boucher*, see *infra* Part VIII.

143. *In re Boucher*, 2007 WL 4246473, at *2. Although compulsion and self-incrimination were present in Boucher's situation, suppose customs agents requested the password during the border search itself, rather than weeks after the search took place and the laptop was seized. Would there be sufficient compulsion during the actual border search to warrant Fifth Amendment protection? If a traveler's subjection at the border to possible inspection and questioning constitutes custody, and an agent's questioning of him signifies interrogation, then the inherent elements of coercion present in such a scenario may constitute compulsion. See *supra* note 61 and accompanying text. However, circuit courts have generally held that custodial interrogation is not present at the border. See, e.g., *United States v. Kiam*, 432 F.3d 524 (3d Cir. 2006) (defendant not in custody when customs agent questioned defendant based on suspicion that defendant was lying about helping Chinese nationals enter the U.S.); *United States v. Ozuna*, 170 F.3d 654, 658 (6th Cir. 1999) (citing *United States v. Bengivenga*, 845 F.2d 593, 599 (5th Cir. 1988) (en banc) ("Routine citizenship checks . . . do not impose a degree of restraint associated with arrest because the detention is by nature brief and subject to the scrutiny of other travelers, the intrusion is limited in scope, advance notice obtains and visible signs of authority mitigate rather than enhance the perceived degree of restraint."); *United States v. Fernandez-Ventura*, 132 F.3d 844 (1st Cir. 1998) (defendants not in custody where customs officials sent them straight to secondary inspection to be interviewed and searched, and were surrounded by armed officers for at least one hour and twenty minutes); *United States v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997) (defendant not in custody while in primary inspection area because "[s]tops and routine questioning are the norm at the border in the primary inspection areas"); *United States v. Harrell*, 894 F.2d 120 (5th Cir. 1990) (not in custody where defendant was taken to a nearby INS office separated from the public, interviewed by multiple INS officers for sixty to seventy-five minutes, and physically restrained to a lesser degree than would be the case during a formal arrest). Nevertheless, some courts have indicated that when questions are "distinctly accusatory," they may transform the encounter into custody. See *United States v. Hudson*, 210 F.3d 1184, 1192 (10th Cir. 2000); *United States v. Moya*, 74 F.3d 1117, 1120 (11th Cir. 1996). Interestingly, the Third Circuit has even considered distinguishing questions during customs inspections as "routine" or "nonroutine," but noted that most circuits have characterized all border questioning as "routine." *Kiam*, 432 F.3d at 529. The fact that a traveler has the option to return to his country of citizenship, rather than participate in the customs inspection, may further decrease the existence of compulsion at the border. It is important to reiterate however, that the presence of choices does not necessarily mean compulsion does not exist. See *supra* note 63. Regardless, the legal force of a subpoena will generally still be available even before an individual has been arrested and charged with a crime. See *supra* note 60 and accompanying text (discussing the grand jury's broad investigatory powers). Thus, if a customs agent discovers suspicious password protected files, he can contact a federal prosecutor to obtain a grand jury subpoena of the traveler's password. The

whether Boucher's act of inputting the password was sufficiently testimonial to receive Fifth Amendment protection.¹⁴⁴ By entering the password, the court found that Boucher would admit to both his knowledge of the password and his access to the drive Z files, even if Boucher entered the password outside the grand jury's presence.¹⁴⁵ Revealing the password would be analogous to revealing the combination to a wall safe; both are facts stored in one's mind, and therefore, amount to testimonial communication.¹⁴⁶ Finally, the court rejected the Government's contention

agent could temporarily detain the traveler while awaiting the subpoena, and once served, the subpoena would constitute sufficient compulsion under the Fifth Amendment.

144. *In re Boucher*, 2007 WL 4246473, at *2. Both parties agreed that: (1) the laptop's content was not privileged because the media files were voluntarily downloaded; (2) Boucher could not be forced to orally provide the password in court because it would reveal the contents of Boucher's mind; and (3) reciting the password would be incriminating by providing a link in the chain of evidence. See Susan W. Brenner, *The Privacy Privilege: Law Enforcement, Technology, and the Constitution*, 7 J. TECH. L. & POL'Y 123, 186 (2002); see also Reiting, *supra* note 94, at 203, 205 ("In general, courts will not compel oral testimony that may be incriminating. . . . Thus, only truly memorized passwords might defeat the government's subpoena power. . . ."); Aaron M. Clemens, Comment, *No Computer Exception to the Constitution: The Fifth Amendment Protects Against Compelled Production of an Encrypted Document or Private Key*, 2004 UCLA J.L. & TECH. 2, available at http://www.lawtechjournal.com/articles/2004/02_040413_clemens.php ("Compelling production of a memorized [password] can never be permissible. Such an act is particularly analogous to the forbidden act of compelling production of 'the combination to a wall safe.'"). For discussion of the "combination to a wall safe" comparison see *supra* note 79 and *infra* note 146.

145. *In re Boucher*, 2007 WL 4246473, at *2.

146. *Id.* at *4. The court uses the Supreme Court's analogy from *Doe v. United States (Doe II)*, 487 U.S. 201, 219 (1988) (Stevens, J., dissenting). See *supra* note 79. Emphasizing that the comparison is meant to distinguish testimonial communications from non-testimonial communications, the *Boucher* court states: "The combination conveys the contents of one's mind; the key does not and is therefore not testimonial." *In re Boucher*, 2007 WL 4246473, at *4. The "key" in this context may refer to a password that the creator has recorded, rather than solely committed to memory. The password itself would not be incriminating unless it was "I, Boucher, am guilty of possessing child pornography." If recorded voluntarily, the written password could be compelled without violating the Fifth Amendment, similar to the compelled production of a document. See Reiting, *supra* note 94, at 197, 204. Yet, although production may be compelled, the act of producing the recorded password or "key" may still be protected by the Fifth Amendment. The court in *Boucher* recognized that if the Government was unaware of whether the accused possessed the "key," then forcing the accused to surrender the key may implicitly communicate existence, possession, and authentication. *In re Boucher*, 2007 WL 4246473, at *4 n.1. See also Sherry F. Colb, Does the Fifth Amendment Protect the Refusal to Reveal Computer Passwords? In a Dubious Ruling, a Vermont Magistrate Judge Says Yes, FindLaw, (Feb. 4, 2008), <http://writ.news.findlaw.com/colb/20080204.html> ("[P]roducing either a key or a combination could be testimonial if the government were essentially asking a suspect, 'Do you have control over this locked (and criminally-suspicious) item?['']") (emphasis added). Yet, some argue that the Supreme Court's failure in *Doe II* to afford Fifth Amendment protection to the defendant, when he was compelled to provide his signature, demonstrates that providing a "key" is an entirely physical act that lacks the testimonial aspects protected by the Fifth Amendment. See Brenner, *supra* note 144, at 188. However, the *Doe II* Court's reasoning for not characterizing the defendant's act of producing his signature or "key" as testimonial was that the consent form's hypothetical language did not implicitly or explicitly convey existence, possession, or authenticity. See *supra* note 79 (further discussing the *Doe II* Court's holding). A password, on the other hand, presents a different situation because the possessor of the password is most likely the one who created it as a means to

that the production of both the drive Z files and the password were foregone conclusions.¹⁴⁷ The court reasoned that the Government had only viewed some of Boucher's files and therefore lacked knowledge as to if and how much other incriminating information existed on his laptop.¹⁴⁸ With respect

privatize his documents. Thus, the act of producing the password could convey information more testimonial and worthy of Fifth Amendment protection than was the case in *Doe II*.

147. *In re Boucher*, 2007 WL 4246473, at *6.

148. *Id.* FindLaw columnist Sherry Colb disagrees with the *Boucher* holding, arguing that Boucher's knowledge of the password was a foregone conclusion and should not have been protected under the Fifth Amendment. Colb, *supra* note 146. She argues that the Government already knew that Boucher possessed the files and that Boucher knew the password. *Id.* The purpose of requiring Boucher to provide the password was not meant to link Boucher with the incriminating files or provide the Government with newly-discovered evidence, but rather to simply provide the Government with "newly-accessible" files. *Id.* Therefore, because the Government can already prove existence, possession, and authenticity based on the events during the border search, the Government has overcome the Fifth Amendment privilege. *Id.* Two U.S. Supreme Court cases that have referenced the foregone conclusion doctrine are *Fisher v. United States*, 425 U.S. 391 (1976) (foregone conclusion established) and *United States v. Hubbell*, 530 U.S. 27 (2000) (foregone conclusion not proven). See *Fisher* discussion, *supra* notes 89–94 and accompanying text and *Hubbell* discussion, *supra* note 94. *In re Boucher* differs from *Fisher* because in *Fisher*, the accountant, not the defendant, was the creator and custodian of the documents, allowing the Government to establish existence, possession, and authenticity through the accountant's testimony rather than the defendant's actions. *Hubbell* may appear to more closely resemble Boucher's situation because the *Hubbell* defendant was the custodian of the compelled documents and there was no third party, like the accountant in *Fisher*, who provided the Government with independent knowledge of existence, possession, and authenticity. However, with respect to the application of the foregone conclusion doctrine, Boucher's case is entirely distinguishable. In *Hubbell*, the Government lacked any prior knowledge about the subpoenaed documents that were subsequently used against the defendant in trial. This was particularly demonstrated by the Government's use of the documents to bring completely new and unrelated charges against the defendant. Alternatively, in *Boucher*, the Government knew the nature of the files protected by Boucher's password. Customs agents had already observed Boucher access the Z drive, viewed some of the Z drive's files during the border search, and heard Boucher admit the files were his own. Thus, the customs agents could subsequently testify as to what they saw and heard to establish the Government's independent knowledge and prove that existence, possession, and authenticity was a foregone conclusion. Accordingly, Colb's argument that Boucher's password should not have received Fifth Amendment protection is very strong. It seems that any time an authorized search is conducted at a customs checkpoint, the traveler's production of his belongings for the agents to search automatically conveys existence, possession, and authenticity. Thus, the subsequent act of producing information in court that has previously been searched and uncovered at the border should not receive Fifth Amendment protection. See Reiting, *supra* note 94, at 196, 201, 199 ("[T]he government generally can establish the authenticity of the underlying document and possession of it by showing how it obtained the document—through search and seizure, interception, and so on—so these also may be foregone conclusions. . . . Moreover, the government can establish the existence, possession, and authenticity of the [document] without the aid of the [password] by presenting testimony and evidence resulting from the search. . . . If the government can prove that I have the [recorded password] that unlocks a particular . . . document, then, just like any other document, my act of producing the [password] is not testimonial regarding possession, and the government can require me to produce the [password] . . ."). Commentator Aaron Clemens disagrees with Reiting, taking

to the password, the court held that the foregone conclusion doctrine did not apply to non-physical evidence because such evidence is comprised of facts existing solely in the accused's mind, incapable of being independently known by the Government.¹⁴⁹

B. The Boucher Court Failed to Consider its Decision's Ramifications at the Border

Even though *In re Boucher* involved a border search, the court's analysis did not consider the government's "inherent sovereign authority to protect its territorial integrity."¹⁵⁰ While protection of a password may be appropriate in some circumstances, it is not warranted in the border search context. A significant consequence of the *Boucher* holding is the possible prevention of customs officials from effectively monitoring the information and items transported across the country's borders. Indeed, if a traveler refuses to provide the password to his laptop files, customs agents may never gain access to them, and password protection becomes an easy means to override the government's ability to conduct a sanctioned search.¹⁵¹

Although the Fifth Amendment would not apply if the government could prove independent knowledge of existence, possession, and authenticity of the compelled documents, the nature of a border search may severely limit the government's ability to do so.¹⁵² The ambiguous standard of proof that the government must meet to successfully establish a foregone

the position that if a password gives the Government access to documents other than those the Government was aware existed, producing the password is sufficiently testimonial:

A prosecutor's bare assertion that a document exists cannot establish a document's existence as a matter of law. . . .

. . . [U]nless the government had the defendant under intrusive surveillance, it cannot prove that it has seized every single document that can be decrypted with [the password].

. . . [Password] production would give the government access both to documents whose existence were proven and provide access (while authenticating) documents the government did not know about.

Clemens, *supra* note 144. Clemens's approach corresponds with the *Boucher* court's conclusion that the Government could not prove a foregone conclusion because it had not seen the other files on drive Z. This issue remains unsettled as the Supreme Court has not specified a standard of proof that the Government must meet to overcome the Fifth Amendment privilege. *See supra* note 94 (discussing the minimal guidance as to how the Government may establish independent knowledge).

149. *In re Boucher*, 2007 WL 4246473, at *6.

150. *Torres v. Puerto Rico*, 442 U.S. 465, 473 (1979); *see also supra* notes 29–37 and accompanying text (discussing the government's broad authority to search at the border).

151. Privacy and protection expert and former federal prosecutor Mark Rasch believes that the *Boucher* ruling is "dangerous" for law enforcement: "If it stands, it means that if you encrypt your documents, the government cannot force you to decrypt them So you're going to see drug dealers and pedophiles encrypting their documents, secure in the knowledge that the police can't get at them." Nakashima, *supra* note 137.

152. *See supra* notes 92–94 and accompanying text (discussing the foregone conclusion doctrine and its application in both *Fisher* and *Hubbell*).

conclusion makes it unclear if, as *Boucher* held, independent knowledge of each file protected by the password would be necessary.¹⁵³ If such expansive knowledge is required, it is unlikely that the government could overcome the Fifth Amendment privilege in most cases, particularly due to the lack of evidence available in the initial stages of an investigation.¹⁵⁴ In a suspicionless laptop search that reveals only a few questionable file names, a prosecutor will have little or no evidence to establish independent knowledge of existence, possession, and authenticity, and the password will likely remain protected.

Restricting customs officials' authority in this manner does not seem consistent with the government's goal to regulate people and property crossing the border. Moreover, it does not conform with the general sentiment of the American people who, since September 11, 2001, generally support heightened security measures even if their right to privacy is lessened.¹⁵⁵ The 9/11 Commission, created to investigate the circumstances surrounding the 2001 terrorist attacks, recommended that the government take a more active role in maintaining the security of the nation's borders.¹⁵⁶ Such security measures must include the inspection of laptops because it has been established that terrorists use wireless electronic devices for the "planning of attacks, fund raising, communication, and the dissemination of propaganda."¹⁵⁷ In fact, when investigating the 1993 World Trade Center

153. See *supra* notes 147–48 and accompanying text (discussing the *Boucher* court's reasoning). See also *supra* note 94 (discussing the differing outcomes of *Fisher* and *Hubbell*, and the "reasonable particularity" standard) and note 148 (comparing Reitingger's argument that extensive knowledge would not be required with Clemens's assertion that the existence of each document would need to be independently established before existence, possession, and authenticity could be deemed a foregone conclusion).

154. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 562 n.8 (1978) (discussing the risks of using a subpoena in criminal investigations).

155. Robert M. Bloom, *Border Searches in the Age of Terrorism*, 78 *MISS. L.J.* 295, 295 (2008).

156. See Rishikof, *supra* note 1, at 416. Rishikof discusses various programs supported by the Department of Homeland Security that were created as a result of the 9/11 Commission's suggestions. *Id.* The 9/11 Report recommended among other options: "1) creating a strategy to combine terrorist intelligence, operations, and law enforcement; 2) integrating the U.S. border security system into a larger network of screening points; 3) implementing a biometric entry-exit screening system; and 4) enhancing international cooperation, particularly with Canada and Mexico." *Id.* After the 9/11 Report, the former Customs Service, Border Patrol, Immigration and Naturalization Service, and Animal and Plant Health Inspection Service were consolidated into the U.S. Customs and Border Protection (CBP), one official government agency run by the Department of Homeland Security. See *Importing into the United States: A Guide for Commercial Importers*, CBP Publication No. 0000-0504, 1 (Nov. 2006), available at <http://www.cbp.gov/linkhandler/cgov/newsroom/publications/trade/iius.ctt/iius.doc>.

157. Gilmore, *supra* note 40, at 787.

bombing, officials uncovered detailed plans on the bomber's laptop to destroy U.S. airplanes.¹⁵⁸ Accordingly, providing Fifth Amendment protections at the border would "render[] the enforcement powers of CBP meaningless[,] . . . prevent the effective policing of our borders[,] . . . [and] undermine the compelling reasons that lie at the heart of the border search doctrine."¹⁵⁹

VI. THE SOLUTION: CREATE A BORDER EXCEPTION TO THE FIFTH AMENDMENT

In order to rectify the potential conflict between the Fourth Amendment border search exception and the Fifth Amendment right against self-incrimination, it is necessary to limit Fifth Amendment protections at the border.¹⁶⁰ Congress could enact a statute requiring travelers to disclose their laptop passwords during a border search, but courts could subsequently strike down the law as unconstitutional.¹⁶¹ Thus, in order for customs officials to exercise their broad authority to search laptops, it is necessary that courts recognize a Fifth Amendment border exception. Such an exception is reasonable as it would only be implemented at the border, where citizens historically have been afforded limited constitutional protections, and would only be employed to facilitate a lawful search.¹⁶²

158. *Id.* at 788. Additionally, in a 2004 Pakistan raid, officials uncovered substantial amounts of information stored on laptop computers about al-Qaeda's determination to commit continued terrorist acts on the United States. *Id.*

159. *Id.* at 786, 788.

160. A Fifth Amendment limitation at the border would only include restricting an individual's right against self-incrimination.

161. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("It is clear, of course, that no Act of Congress can authorize a violation of the Constitution."); Brenner, *supra* note 144, at 189. Brenner notes:

The password holder would be faced with the alternatives of giving up the password and thereby providing incriminating testimony or refusing to give it up and being held criminally liable for refusing.

. . . Enforcing the statute would, in other words, be unconstitutional (a) when the password holder had memorized the password and (b) when the government previously did not know that this specific person was actually the possessor of a password (in whatever form).

Id.

162. The CBP has often assured U.S. citizens that it is not their aim to infringe on travelers' rights: "It is not our intent to subject legitimate travelers to undue scrutiny, but to ensure the safety of the American public. In conducting these searches, we are fully dedicated to protecting the civil rights of all travelers." Ahern, *CBP Laptop Searches*, *supra* note 3. In its July 2008 publication, the CBP dedicated a section specifically to the handling of private information, such as trade secrets or attorney-client privileged documents. *See U.S. CUSTOMS AND BORDER PROTECTION*, *supra* note 127, at 4-5. The CBP publication explained that customs officers shall "take all reasonable measures" to avoid public disclosure of any particularly sensitive documents. *Id.* at 4; *see also* Ahern, *Laptop Inspections*, *supra* note 4 (urging Americans to look at the CBP's track record of handling confidential information):

A. Policy Considerations Fundamental to the Fourth Amendment Border Exception Justify a Similar Fifth Amendment Exception

The Fourth Amendment is a prime example of a constitutional provision, established to protect significant individual privacy rights, yet encompassing numerous exceptions that preserve the government's interest.¹⁶³ The policy considerations fundamental to the Fourth Amendment's border exception, specifically the government's inherent right to secure the nation's borders and protect American lives, similarly justify the creation of a border exception to the Fifth Amendment.¹⁶⁴ Statutes and

Every day, thousands of commercial entry documents, shipping manifests, container content lists, and detailed pieces of company information are transmitted to CBP so we can effectively process entries and screen cargo shipments bound for the United States. This information is closely guarded and governed by strict privacy procedures. Information from passenger laptops or other electronic devices is treated no differently.

... [O]fficers are subject to numerous policy restrictions regarding the retention, sharing, and scrutiny of travelers' documents and information.

Id.

163. See *supra* notes 25–28 and accompanying text. In *California v. Acevedo*, Justice Scalia commented that “the ‘warrant requirement’ [has] become so riddled with exceptions that it [is] basically unrecognizable.” *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

164. *United States v. Stanley*, 545 F.2d 661 (9th Cir. 1976), provides a useful summary of the many reasons why the Fourth Amendment's probable cause and warrant requirements have not been extended to border searches:

The purpose behind border searches has been variously phrased as the need to stem the “flow of illegal aliens” into the United States; to “prevent importation of contraband or of undeclared . . . merchandise[]”; and to “search . . . newly arrived vessels to determine whether goods requiring entry are aboard.” Other justifications include “the universal understanding that persons, parcels and vehicles crossing the border may be searched,” and the “recognition of the difficulty involved in effectively policing our national boundaries.”

...
The Fourth Amendment was designed to balance the government's interests in enforcing its laws against the individual's interests in his dignity and privacy. . . . On crossing a border, [a person entering or leaving the country] is on notice that a search may be made, and his privacy is arguably less invaded by such search.

...
Thus both incoming and outgoing border-crossing searches have several features in common: (1) the government is interested in protecting some interest of United States citizens, such as restriction of illicit international drug trade, (2) there is a likelihood of smuggling attempts at the border, (3) there is difficulty in detecting drug smuggling, (4) the individual is on notice that his privacy may be invaded when he crosses the border, and (5) he will be searched only because of his membership in a morally neutral class.

Id. at 666–67 (citations omitted). Multiple circuit courts have applied similar reasoning to their analysis of Fifth Amendment implications during border searches. See, e.g., *United States v. Kiam*, 432 F.3d 524, 529 (3d Cir. 2006) (“‘A person seeking entry into the United States does *not* have a right to remain silent.’ An alien at the border of our country . . . must convince a border inspector of his or her admissibility to the country by affirmative evidence.”) (citation omitted); *United States v.*

case law consistently emphasize that, at the border, the government's interests are of greater weight than individual privacy interests.¹⁶⁵ The Supreme Court has stated that customs officials may search a traveler's luggage "no matter how great the traveler's desire to conceal the contents may be."¹⁶⁶ Although the Fifth Amendment does not specifically mention searches, its protections can seriously impede a laptop border search by denying the government access to the laptop's content.¹⁶⁷ Customs agents would not decline to search a locked briefcase merely because a traveler wished to conceal its files; the result should not differ simply because the "lock" is in electronic form.¹⁶⁸

The need to maintain an appropriate balance of interests at the border has resulted in the unwillingness of courts to limit the border search exception, even when additional constitutional rights have been implicated.¹⁶⁹ Defendants have argued First Amendment violations when customs officials search "expressive material," such as laptop computers.¹⁷⁰

Fernandez-Ventura, 132 F.3d 844, 846–47 (1st Cir. 1998) ("In the context of Customs inspections, our assessment of whether an interrogation is custodial must take into account the strong governmental interest in controlling our borders. . . . '[E]vents which might be enough to signal custody away from the border will not be enough to establish custody in the context of entry into the country.'") (citations omitted); *United States v. Moya*, 74 F.3d 1117, 1119–20 (11th Cir. 1996) ("Because of the overriding power and responsibility of the sovereign to police national borders, the [F]ifth [A]mendment guarantee against self-incrimination is not offended by routine questioning of those seeking entry to the United States. Thus, because of the sovereign's responsibility, some degree of questioning and of delay is necessary and is to be expected at entry points into the United States.") (citations omitted).

165. See *supra* notes 26–28 and accompanying text (discussing the balance of government and individual interests at the border).

166. *U.S. v. Ross*, 456 U.S. 798, 823 (1982).

167. The language of the Fifth Amendment is as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

168. See *United States v. McAuley*, 563 F. Supp. 2d 672, 678 (W.D. Tex. 2008) ("A password on a computer does not automatically convert a routine search into a non-routine search. A password is simply a digital lock. Locks are usually present on luggage and briefcases, yet those items are subject to 'routine' searches at ports of entry all the time."). At an airport, the Transportation Security Administration (TSA) has the right to cut off a non-TSA approved luggage lock in order to further screen the contents of the bag. See Transportation Security Administration, *Damaged Locks Alert*, <http://www.tsa.gov/travelers/customer/claims/damagedlocks.shtm> (last visited Oct. 15, 2009).

169. See *infra* notes 170–71 and accompanying text (discussing the additional constitutional claims made in *Ickes* and *Arnold II*).

170. See *United States v. Ickes*, 393 F.3d 501, 506 (4th Cir. 2005) (defendant urged the court to make an exception for First Amendment "expressive material"); see also *supra* note 105 and accompanying text (discussing the defendant's argument in *Ickes*); *People v. Endacott*, 79 Cal. Rptr.

Yet, courts have found these claims unpersuasive because exempting "expressive material" could essentially protect terrorist communications.¹⁷¹ Moreover, customs officials would face great difficulty trying to determine the scope of First Amendment protection during each individual search.¹⁷²

Courts should similarly refrain from limiting the border search exception in response to Fifth Amendment infringement claims, and accordingly, establish a Fifth Amendment border exception. Terrorist information stored on laptops would likewise be protected if a password rendered them inaccessible to customs officials.¹⁷³ Customs officials would also face the similar task of determining whether Fifth Amendment protection was available during each particular search. For instance, a traveler refusing to divulge his password might have a valid Fifth Amendment privilege so long as his laptop contained criminally incriminating content.¹⁷⁴ Yet, if a password prompt appeared immediately

3d. 907 (Ct. App. 2008); *supra* note 130.

171. See *Ickes*, 393 F.3d at 506. Judge Wilkinson explains:

[T]he ramifications of accepting *Ickes*'s First Amendment argument would be quite staggering. . . . The border search doctrine is justified by the "longstanding right of the sovereign to protect itself." Particularly in today's world, national security interests may require uncovering terrorist communications, which are inherently "expressive." Following *Ickes*'s logic would create a sanctuary at the border for all expressive material—even for terrorist plans[,] . . . [thus] undermin[ing] the compelling reasons that lie at the very heart of the border search doctrine.

Id. (citations omitted); see also *United States v. Arnold (Arnold II)*, 533 F.3d 1003, 1010 (9th Cir. 2008), *denying reh'g* 523 F.3d 941 (9th Cir. 2008), *rev'g* 454 F. Supp. 2d 999 (C.D. Cal. 2006), *cert. denied*, 129 S. Ct. 1312 (2009); *Endacott*, 79 Cal. Rptr. 3d at 909 (accepting the *Ickes* Court's analysis regarding First Amendment implications of "expressive material").

172. *Ickes*, 393 F.3d at 506. Judge Wilkinson continues:

[R]ecognizing a First Amendment exception to the border search doctrine would ensure significant headaches for those forced to determine its scope. Disputes about whether material is obscene, for example, are not always easily resolved. Were we to carve out this First Amendment exception, government agents at the border (and subsequently courts) would be faced with . . . hav[ing] to decide—on their feet—which expressive material is covered by the First Amendment. And then in cases where they conclude that the exception applies, they would still have to determine if probable cause existed. These sorts of legal wrangles at the border are exactly what the Supreme Court wished to avoid by sanctioning expansive border searches. We refuse to put these issues into play and thereby divert customs officials from their charge of policing our borders and protecting our country.

Id. (citations omitted).

173. This is exactly what *Ickes* and *Arnold II* hoped to prevent. See *supra* notes 170–71 and accompanying text.

174. An individual can only assert his right against self-incrimination if he has a reasonable basis for fearing criminal prosecution. See *supra* notes 67–69 and accompanying text. For example, assume a married couple travels together and customs officials request the password to the husband's computer so they can search it. However, stored on the laptop are the husband's personal

after powering on the traveler's laptop, customs agents would be unable to view any of the laptop's files and, accordingly, would be prevented from determining whether its content was sufficiently incriminating for Fifth Amendment protection.¹⁷⁵ Courts would have to intervene each time such password protection was utilized, making a customs officer's duty to screen items extremely difficult.¹⁷⁶ Thus, establishing a Fifth Amendment border exception would accomplish the same goal as the current Fourth Amendment exception by maintaining the traditional balance of government and individual interests at the U.S. border.

B. A Fifth Amendment Border Exception is Appropriate, as the Right Against Self-Incrimination has been Limited in Similar Regulatory Search Contexts

Aside from border searches, the U.S. Supreme Court has upheld searches conducted without a warrant or particularized suspicion for such purposes as public safety and administrative efficiency.¹⁷⁷ Similar to its

letters from a woman with whom he is having an affair. He may desperately want to prevent the customs officials from searching through his files in case his wife should see the letters. Yet, although discovery of this information could be devastating to the husband's marriage, it is not the type of incriminating material constitutionally protected under the Fifth Amendment.

175. Laptop users can set their computers to display a password prompt after the computer boots up, preventing access to any of the computer's data unless the correct password is entered. Suppose a customs agent detains a traveler solely based on an anonymous tip that a terrorist will be entering the country. The agent might assume that the traveler's laptop contains incriminating information, but he cannot be certain. The ambiguity present with respect to Fifth Amendment protection in this scenario would cause customs agents great difficulty in carrying out the search.

176. A judge, responsible for resolving whether testimony would be self-incriminating, would also likely face difficulty in making this determination. *See supra* note 69 and accompanying text (discussing the judge's role in deciding whether a witness has reasonable grounds to assert his right against self-incrimination). It is also unclear whether a grand jury would even issue a subpoena to compel a traveler to divulge the password that blocked the customs agent's access to the entire laptop. It is true that the grand jury has extensive investigatory powers. *See supra* note 60; *see also* *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991) ("Unlike [the Supreme] Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.' The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950))). However, if suspicion was not present prior to attempting the search, the government may be overstepping its authority at the border if it could validly infer possible illegal activity simply because an individual implemented security measures that prevented public access to his laptop. Alternatively, if the search was predicated on an anonymous tip, a grand jury would probably be more likely to issue a subpoena, legally compelling the traveler to provide his password. Nevertheless, it would still be unclear whether the information was sufficiently self-incriminating to warrant Fifth Amendment protection.

177. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989) (upholding suspicionless alcohol and drug testing of railroad employees involved in train accidents) ("The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school,

justification for border searches, the Court has reasoned that searches conducted in response to a special need and not predominately to enforce criminal laws should not be subject to the Fourth Amendment warrant requirement, but rather a reasonableness analysis that balances government versus individual privacy interests.¹⁷⁸ When government interests outweigh individual privacy interests, as is usually the case during a border search, limitations on traditional Fourth Amendment constraints are justified.¹⁷⁹

Included in this category of exceptional searches is the administrative or regulatory search, an inspection authorized by Congress to enforce regulatory laws affecting such areas as the health and safety of citizens and interstate commerce.¹⁸⁰ Administrative searches must promote the

or prison, 'likewise presents special needs beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'" (citation omitted); *Donovan v. Dewey*, 452 U.S. 594, 600 (1981) ("[A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."); *United States v. Biswell*, 406 U.S. 311 (1972) (holding that a warrant is not necessary to inspect the premises of registered gun dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (rejecting a warrant requirement to inspect the premises of liquor dealers because of the industry's long history of "close supervision and inspection"). The *Biswell* Court explained: "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Biswell*, 406 U.S. at 316.

178. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In *T.L.O.*, the Court faced the question of whether traditional Fourth Amendment requirements applied to the search of a student's belongings, conducted by a school official. In examining the search's reasonableness, the Court balanced the student's legitimate expectation of privacy with the school's need to maintain a safe learning environment for its students, ultimately concluding that the school's special safety needs necessitated a limited application of the Fourth Amendment:

The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

Id. at 340 (citation omitted).

179. See *T.L.O.* discussion, *supra* note 178; see also *supra* notes 25–28 and accompanying text.

180. See *Donovan*, 452 U.S. at 599 ("Congress has broad authority to regulate commercial enterprises engaged in or affecting interstate commerce, and an inspection program may in some cases be a necessary component of federal regulation."). Examples of administrative searches involving a substantial government interest include "improving the health and safety conditions in the Nation's underground and surface mines[,] . . . [the] regulation of firearms . . . to prevent violent crime and to assist the States in regulating the firearms traffic within their borders[,] . . . [and] protecting the revenue against various types of fraud." *New York v. Burger*, 482 U.S. 691, 702

satisfaction of civil liberties, “directed at the public at large,” and not solely monitor a “selective group inherently suspect of criminal activities.”¹⁸¹ In upholding the reasonableness of administrative searches, the Court has focused on the search’s “long history of judicial and public acceptance,” the “public interest . . . that all dangerous conditions be prevented or abated,” and on the fact that “the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, [and thus] involve a relatively limited invasion of . . . privacy.”¹⁸² Even an administrative search that produces criminal evidence or shares the same ultimate goals as penal laws will not automatically be invalid if the search was conducted for a civil, regulatory purpose.¹⁸³ For instance, the Court has upheld the warrantless administrative search of an automobile junkyard, even though the search revealed the owner’s possession of stolen vehicles and the regulation authorizing the search was established to combat automobile theft.¹⁸⁴

(1987) (citations omitted).

181. See *Marchetti v. United States*, 390 U.S. 39, 47 (1968) (requirement that the defendant produce records to prove compliance with a federal wagering tax violated the Fifth Amendment because regulation was directed at those involved in the illegal gambling business, a group “inherently suspect of criminal activities”); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965) (statute requiring members of the Communist Party to register their membership status with the Attorney General violated the Fifth Amendment right against self-incrimination because registration involved “an area permeated with criminal statutes, where response to any of the form’s questions in context might involve the petitioners in the admission of a crucial element of a crime”).

182. *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967); see also *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978) (“Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise.”) (citation omitted).

183. See *California v. Byers*, 402 U.S. 424, 430 (1971) (upholding a California statute requiring all drivers to report their involvement in car accidents) (“Although the California Vehicle Code defines some criminal offenses, the statute is essentially regulatory, not criminal. The California Supreme Court noted that § 20002(a)(1) was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents.”); *Burger*, 482 U.S. at 713 (“[A]n administrative scheme may have the same ultimate purpose as penal laws, even if its regulatory goals are narrower.”). The *Burger* Court explained:

In *United States v. Biswell*, we recognized this fact that both administrative and penal schemes can serve the same purposes by observing that the ultimate purposes of the Gun Control Act were “to prevent violent crime and to assist the States in regulating the firearms traffic within their borders.” It is beyond dispute that certain state penal laws had these same purposes. Yet the regulatory goals of the Gun Control Act were narrower: the Act ensured that “weapons [were] distributed through regular channels and in a traceable manner and [made] possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms.” The provisions of the Act, including those authorizing the warrantless inspections, served these immediate goals and also contributed to achieving the same ultimate purposes that the penal laws were intended to achieve.

Id. (citations omitted).

184. *Id.* at 713–16. The Court also explained:

[T]he State has a substantial interest in regulating the vehicle-dismantling and automobile-junkyard industry because motor vehicle theft has increased in the State and because the problem of theft is associated with this industry. In this day, automobile theft

Administrative inspections constitute a type of search whereby the Court has not only limited Fourth Amendment requirements, but also has narrowed the availability of the Fifth Amendment right against self-incrimination.¹⁸⁵ For example, the Court has disallowed defendants to assert their Fifth Amendment rights when compelled to produce tax returns, report an accident, or even present one's child in court if compliance was required as part of a regulatory scheme.¹⁸⁶ Although such requirements might

has become a significant social problem, placing enormous economic and personal burdens upon the citizens of different States.

Id. at 708.

185. See *Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 556 (1990) ("The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws.").

186. See *United States v. Hubbell*, 530 U.S. 27, 35 (2000) ("[T]he fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return [(*United States v. Sullivan*, 274 U.S. 259 (1927))], maintaining required records [(*Shapiro v. United States*, 335 U.S. 1 (1948))], or reporting an accident [(*California v. Byers*, 402 U.S. 424 (1971))], does not clothe such required conduct with the testimonial privilege."). In *Shapiro*, the Supreme Court held that the defendant could not invoke his Fifth Amendment right against self-incrimination to avoid the production of documents that the defendant was required to maintain as part of an administrative scheme under the Emergency Price Control Act of 1942. *Shapiro*, 335 U.S. at 17–18. The Court explained that the required sales records, which revealed information about the defendant's buying and selling transactions, were maintained "not for [the defendant's] private uses, but for the benefit of the public, and for public inspection." *Id.* Similarly, in *Byers*, the Court upheld a "hit and run" statute requiring all drivers in a car accident to provide their names and addresses, even though the disclosure requirements could reveal criminally incriminating information. *Byers*, 402 U.S. at 425. Concurring with the majority, Justice Harlan explained:

Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute. To hold otherwise would, it seems to me, embark us on uncharted and treacherous seas.

Id. at 458 (Harlan, J., concurring). See also *Bouknight*, 493 U.S. at 557 (production of the defendant's child in court not protected by the Fifth Amendment act of production privilege because production was required under the state's regulatory scheme). In *Bouknight*, State Social Services believed that the defendant's child was being abused. *Id.* at 552. The child was placed in foster care and subsequently returned to the defendant, pursuant to several conditions. *Id.* When the defendant violated these conditions, the State ordered the defendant to produce her child in court so that Social Services could take over custody. *Id.* The defendant again failed to comply, asserting that her Fifth Amendment right precluded her from doing so. *Id.* at 553. The defendant argued that the act of producing her child would be equivalent to her testimony that the child was in her possession and control at the moment of production, and thus would assist the State in bringing charges against her. *Id.* The Court rejected the defendant's argument, holding that compliance with the court order was part of the defendant's duty under the State's regulatory scheme. *Id.* at 561. The Court explained that once it was determined that the child was in need of the State's assistance, the State became responsible for the child's safety, as the child was now a "particular object of the State's regulatory interests." *Id.* at 559. When the State returned the child to the defendant, they entrusted her as the

effectively compel incriminating testimony, the Court has restricted Fifth Amendment protection in this context because of the privilege's ability to prevent the government from carrying out its regulatory laws.¹⁸⁷

It is reasonable, therefore, that the Court adopt a similar Fifth Amendment limitation in the border search context, particularly due to the broad regulatory goals shared by both administrative and border searches.¹⁸⁸ Like administrative searches, customs inspections at the border were specifically established for a civil rather than a predominantly criminal purpose, particularly to collect duties and prevent the introduction of contraband into the United States.¹⁸⁹ The Court has declared: "At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives."¹⁹⁰ Thus, although border searches may and often do reveal criminal evidence, the criminal aspect of the search is just one component of an extensive, highly-regulated inspection aimed at monitoring all persons and items moving in and out of the country.¹⁹¹

child's "custodian," subject to routine inspection by the State. *Id.* The multiple orders to produce the child in court were "part of a broadly directed, noncriminal regulatory regime governing children cared for pursuant to custodial orders." *Id.* Accordingly, in such a situation, Fifth Amendment protections were not available. *Id.* at 561. *Cf. Marchetti*, 390 U.S. 39 (upholding Fifth Amendment protection to preclude the production of records even though production was required as part of a state regulation). In *Marchetti*, the defendant refused to produce records regarding his compliance with a federal wagering tax imposed on those involved in the illegal gambling business. *Id.* at 60. The Court allowed the defendant to assert his Fifth Amendment right, however, because the regulatory scheme involved monitored wagering, which the Court explained, "is 'an area permeated with criminal statutes,' and those engaged in wagering are a group 'inherently suspect of criminal activities.'" *Id.* at 47.

187. *See Bouknight*, 493 U.S. at 557. "[T]he ability to invoke the [Fifth Amendment] privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement. . . . [It can also be diminished when] a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers. . . ." *Id.* at 557–58.

188. Bloom, *supra* note 155, at 303 ("As time has passed, border searches have merged into the evolving administrative or regulatory search doctrine. These searches have one common element: they are not being done for the normal law enforcement goal of finding criminals but for goals unrelated to criminal investigation.").

189. *See supra* notes 29–30 and accompanying text and *see infra* text accompanying note 190.

190. *United States v. Montoya de Hernandez*, 473 U.S. 531, 544 (1985).

191. Today, violations of current customs laws can carry both civil and criminal penalties. *See Importing into the United States, supra* note 156, at 150. For instance, 19 U.S.C. § 1592 is a civil fraud statute whereby violators are subject to monetary fines if "by fraud, gross negligence, or negligence" they "enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States . . ." 19 U.S.C. § 1592(a)(1)(A) (2006). Criminal penalties may also exist for an individual who "enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement . . . or by means of any false or fraudulent practice . . ." 18 U.S.C. § 542 (2006). Such penalties may include a fine, up

The special regulatory needs satisfied by both border and administrative searches justify current Fourth Amendment limitations. However, the Fifth Amendment can still potentially interfere with the government's broad regulation at the border, including the screening of travelers, the collection of revenue, and the detection of contraband. The Court has already expressed its concern regarding the Fifth Amendment's ability to impede government regulation in the administrative search context, choosing to restrict application of the privilege.¹⁹² The Court should thus implement an analogous Fifth Amendment limitation with respect to border searches, as it would be consistent with the Court's treatment of administrative searches and is crucial for the continued security of our nation.¹⁹³

to two years imprisonment, or both. *See* § 542. 18 U.S.C. § 1956 includes civil and criminal penalties for money laundering that takes place across U.S. borders. Civil penalties consist of the value of the property or up to a \$10,000 fine, and criminal penalties may include up to a \$500,000 fine or twice the value of the funds involved in the transfer, up to twenty years imprisonment, or both. 18 U.S.C. § 1956(a)(2), (b) (2006).

192. *See supra* notes 185–87 and accompanying text.

193. Even if a border exception to the Fifth Amendment is recognized, however, travelers could effectively comply with the requirement to provide their password, but still prevent customs officials from accessing all of their laptop's content. *See* What Can Customs Agents Do With Your Laptop? Almost Anything They Want To, <http://ridethelightning.senseient.com/2008/08/index.html> (Aug. 21, 2008, 7:21 EST). DriveCrypt is a data encryption (password protection) program that not only makes it very difficult for computer experts to access another person's computer files, but also includes a feature allowing an individual to enter a secondary password to display false data. *See* SecurStar, Encryption Software Solutions, http://www.securstar.com/products_drivecrypt.php (last visited Oct. 15, 2009). DriveCrypt allows users to create two passwords for the same password prompt, one that protects personal, confidential information, and another that secures less delicate information that the user would not mind another person viewing. *Id.* When the password prompt appears, the user can enter the secondary password to display the less sensitive information and continue to hide the secured, highly confidential files. *Id.* No evidence will indicate that other data is still securely stored on the computer. *Id.* At the border, a traveler whose laptop is equipped with this program can enter his secondary password to reveal certain pre-determined files, but continue to secure other information that customs officials will be unaware even exists. DriveCrypt also allows users to conceal confidential information in music files, which customs officials will likely bypass during a laptop search. *Id.* Because people could continue to create clever mechanisms that circumvent the purpose of a password disclosure requirement, prohibiting the use of passwords altogether may be the best option at the border. If Congress enacted legislation that prevented people from traveling with a password-protected laptop, there would be no Fifth Amendment issue, no need to guess whether the laptop's content included incriminating information, and the search could be conducted much more efficiently. Moreover, the CBP already employs dozens of restrictions as to what travelers may bring into the country, so a password-protected laptop would merely be another prohibited item. The CBP has explained that "[t]he importation of certain classes of merchandise may be prohibited or restricted to protect the economy and security of the United States, to safeguard consumer health and well-being, and to preserve domestic plant and animal life." Importing into the United States, *supra* note 156, at 106. A laptop password restriction would similarly further the CBP's goal.

VII. CONCLUSION

As the Ninth Circuit Court of Appeals instructs in *Arnold II*, customs officials have the authority to conduct suspicionless border searches of laptops.¹⁹⁴ Alternatively, *In re Boucher* offers the proposition that a password is protected under the Fifth Amendment, allowing an individual to withhold production of it when compelled to do so by the Government.¹⁹⁵ The implications of these two cases at the border are tremendous, as an individual can essentially password protect the files on his laptop and impede the government's ability to search. The longstanding recognition of the principles underlying the border search exception suggests that the government would not be willing to allow such a scenario to take place.¹⁹⁶ Accordingly, a Fifth Amendment exception should be implemented to limit an individual's assertion of the right against self-incrimination.¹⁹⁷ Such an exception would only infringe the rights of travelers in a very narrow context, while assuring the safety of all citizens within the U.S. border.

VIII. POSTSCRIPT¹⁹⁸

On February 19, 2009, the U.S. District Court for the District of Vermont reversed the magistrate judge's *In re Boucher* ruling.¹⁹⁹ The district court held that Boucher lacked a Fifth Amendment act of production privilege, which would have allowed him to refuse compliance with the subpoena.²⁰⁰ The district court's decision was based upon consideration of the Government's revised subpoena request, which no longer compelled Boucher to produce his password, but rather to produce "an unencrypted

194. *United States v. Arnold (Arnold II)*, 533 F.3d 1003 (9th Cir. 2008), *denying reh'g* 523 F.3d 941 (9th Cir. 2008), *rev'g* 454 F. Supp. 2d 999 (C.D. Cal. 2006), *cert. denied*, 129 S. Ct. 1312 (2009).

195. *In re Boucher*, No. 2:06-mj-91, 2007 WL 4246473 (D. Vt. Nov. 29, 2007), *rev'd*, 2009 WL 424718 (D. Vt. Feb. 19, 2009).

196. *See supra* Part II.B. Retired Supreme Court Justice Sandra Day O'Connor expressed the country's likely response after the September, 11, 2001 terrorist attacks:

The trauma that our nation suffered will [alter] and has already altered our way of life, . . . and it will cause us to reexamine some of our laws pertaining to criminal surveillance, wiretapping, immigration, and so on . . . As a result, we are likely to experience more restrictions on our personal freedom than has ever been the case in our country.

Bloom, *supra* note 155, at 295.

197. *See supra* Part VI.

198. This article was written prior to the district court's reversal of *In re Boucher*, No. 2:06-mj-91, 2007 WL 4246473 (D. Vt. Nov. 29, 2007), *rev'd*, 2009 WL 424718 (D. Vt. Feb. 19, 2009).

199. *In re Boucher*, No. 2:06-mj-91, 2009 WL 424718, at *4 (D. Vt. Feb. 19, 2009). For a discussion of the magistrate judge's ruling see *supra* notes 134–49 and accompanying text.

200. *In re Boucher*, 2009 WL 424718, at *4.

version of the Z drive."²⁰¹ Consequently, the district court's ruling did not discuss the implications of providing one's password and instead, concentrated on the inferences associated with the production of a non-password protected version of Boucher's Z drive.²⁰²

The opinion focused on whether the foregone conclusion doctrine applied to prevent Boucher from asserting his Fifth Amendment right.²⁰³ Contrary to the magistrate judge's decision, the district court concluded that the foregone conclusion doctrine did apply in this case.²⁰⁴ The court explained that Second Circuit precedent does not require the Government to have knowledge of the incriminating *content* of the files and therefore, prior observation of all of Boucher's Z drive files was not needed.²⁰⁵ Rather, only knowledge of the location and existence of the Z drive and its files was necessary, which was established with reasonable particularity when customs agents both witnessed Boucher access his Z drive and viewed the

201. *Id.* at *2. The Government's former subpoena ordered Boucher to "provide all documents, whether in electronic or paper form, reflecting any passwords used or associated with the Alienware Notebook Computer, Model D9T, Serial No. NKD900TA5L00859, seized from Sebastien Boucher at the Port of Entry at Derby Line, Vermont on December 17, 2006." *Id.*

202. Although the district court did not examine the password issue, one commentator notes that even if Boucher is required to produce the Z drive, as opposed to the password, production of an *unencrypted* version of the drive admits both that the Z drive exists and that Boucher has the password to access it. North Carolina Criminal Law blog, *Encrypted Computer Files and the Fifth Amendment*, <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=147> (Mar. 19, 2009, 11:13 EST). Yet, if a reviewing court determined that because Boucher accessed the Z drive during the border search, existence, possession, and authenticity of his password was a foregone conclusion, then Boucher's act of producing the unencrypted drive would not implicitly communicate incriminating testimony. *Id.* However, in an alternative fact pattern that differs from Boucher's case, a limitation to the foregone conclusion doctrine may be necessary:

Imagine that officers determine that a computer located in a college dorm room is sharing child pornography over the internet. They search the room when no one is present, and seize the computer, which is on and which contains child pornography. Just as in *Boucher*, the officers shut the computer down, and later find that its hard drive is encrypted. They issue a grand jury subpoena to roommate A, asking him to produce an unencrypted copy of the drive. Arguably, the foregone conclusion doctrine still applies: the officers know of the existence and location of the drive. But if roommate A produces an unencrypted copy of the drive, he's implicitly admitting that he has the password, which shows that he, rather than (or in addition to) roommate B, controlled the computer. That's information that the prosecution didn't already have, and a different result seems appropriate in that case.

Id.

203. *In re Boucher*, 2009 WL 424718, at *3-4.

204. *Id.* at *3. See *supra* note 148 and accompanying text discussing the magistrate judge's determination that the foregone conclusion doctrine did not apply because the Government failed to view all the drive Z files.

205. *In re Boucher*, 2009 WL 424718, at *3.

illegal content of some of the drive's files.²⁰⁶ Thus, the court explained, Boucher's production of the unencrypted Z drive would not provide the Government with additional information as to the existence and location of the files.²⁰⁷ Moreover, although the act of producing the Z drive would essentially authenticate it as the one subpoenaed, the court noted the Government's claim that it could connect Boucher with the Z drive files without using Boucher's act of production.²⁰⁸ So long as Boucher's act of production was not used for authentication purposes, the court held Boucher was required to produce the unencrypted Z drive.²⁰⁹

The district court's reversal highlights a split in interpretation regarding the degree of knowledge the Government must possess in order to establish a foregone conclusion. Does knowledge of existence and location refer to knowledge of each individual document, necessitating the Government's awareness of the specific incriminatory content contained in each file? Or is the burden less stringent, requiring that the Government possess knowledge of the existence and location only of the document's source, such as the hard drive or computer? The U.S. Supreme Court has expressed that the act of production is not privileged when the information would "add[] little or

206. *Id.* at *3. In support of its conclusion, the court cited the Second Circuit opinion of *In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992 (In re Grand Jury Subpoena)*, 1 F.3d 87 (2d. Cir. 1993), in which the Government successfully established that the existence and location of a subpoenaed calendar was a foregone conclusion. In *In re Grand Jury Subpoena*, the Government, suspicious of the authenticity of the defendant's photocopied calendar, sought production of the defendant's original calendar to verify whether certain entries had been "whited-out" before it was copied. *Id.* at 89. The defendant asserted his Fifth Amendment right, arguing that the calendar was protected as his "intimate personal document." *Id.* at 90. The court concluded that a Fifth Amendment act of production privilege was unavailable because the defendant's prior production of the copied calendar and his testimony about his prior use of it established that the calendar's existence and location was a foregone conclusion. *Id.* at 93.

207. Interestingly, the magistrate judge also relied upon *In re Grand Jury Subpoena* to alternatively conclude that viewing each individual file would be necessary to assert the foregone conclusion doctrine. See *In re Boucher*, No. 2:06-mj-91, 2007 WL 4246473 at *5 (D. Vt. Nov. 29, 2007), *rev'd*, 2009 WL 424718 (D. Vt. Feb. 19, 2009). The magistrate judge distinguished *In re Grand Jury Subpoena* from the facts of *Boucher* by noting that the Government in the former case had already possessed a copy of the defendant's calendar and thus obtaining the original would not add to the sum total of information known by the Government. *Id.* Contrarily, in *Boucher*, because the Government had not viewed all of Boucher's files, the Government did not know the extent of their incriminating effect, and production of them would add to the Government's sum total of information. *Id.* at *6. One could argue, however, that the Government in *In re Grand Jury Subpoena* did not know the content of the potential "whited-out" entries, and therefore, if the original calendar did contain entries not present on the copy, production of the original calendar would add to the sum total of the Government's knowledge and thus resemble Boucher's situation. Although the degree of knowledge that the Government must possess to prove a foregone conclusion remains unclear, it seems overly burdensome to require such specific knowledge.

208. *Id.* at *4.

209. *Id.* The district court noted that it was making no determination on whether the Government could in fact authenticate the drive Z or its files. *Id.* at *4 n.2. Such a ruling would be made when Boucher finally produced the evidence in court.

nothing to the sum total of the Government's information."²¹⁰ Yet, a determination of whether the production of evidence adds to the Government's sum total of information is subject to varying interpretations when it is unclear if knowledge refers solely to the existence and location of documents or alternatively, to the content of each document. Because the Supreme Court has not adopted a standard of knowledge necessary in the foregone conclusion context, *In re Boucher* may likely reach the Court in the future and redefine the scope of Fifth Amendment protection.

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210. *Fisher v. United States*, 425 U.S. 391, 411 (1976).

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