Testimony of

Larry Cunningham

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UNITED STATES SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

Hearing on "Laptop Searches and Other Violations of Privacy Faced by Americans Returning from Overseas Travel"

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9:00 A.M. Dirksen Senate Office Building, Room 226

Testimony of LARRY CUNNINGHAM

Chairman Feingold, Senator Brownback, and Members of the Subcommittee on the Constitution:

Introduction

Thank you for inviting me to testify about about this important topic. My name is Larry Cunningham. I am, until next Monday, an Assistant District Attorney in the Appeals Bureau of the Bronx County District Attorney's Office in New York City.1 Beginning next Tuesday, I will be a professor at St. John's University School of Law in Queens, New York, where I will be teaching legal writing. My experience with the topic of border searches stems from my research into this area while I was a law professor in Texas. I subsequently published an article analyzing the law of border searches in the Quinnipiac Law Review, volume 26, page 1. I have also taught the law of search and seizure as both a full-time and adjunct law professor.

Before directly addressing the topic that is the subject of today's hearing, I would like to make four observations. First, I understand the term "laptop search" to mean an investigation into the electronic contents of a laptop computer--the files and information that are contained in the computer's hard drive or its memory. By this, I understand to exclude from its definition the physical search of the compartments of the laptop itself. In other words, outside the scope of today's discussion would be the

search for narcotics or other contraband secreted in, say, a CD or DVD drive. Today's hearing, as I understand it, concerns the permissibility of a government agent's search of the electronic information contained in a laptop computer at the border.

Second, the relevant question is not whether a person feels that his privacy has been intruded upon when a customs agent searches his laptop. All government searches will, by definition, involve some intrusion into a person's subjective expectation of privacy. Otherwise, they would not be considered "searches" for purposes of the Fourth Amendment. In Katz v. United States,2 the Supreme Court held that whether there is a "search" at all, for Fourth Amendment purposes, depends on an affirmative answer to the threshold question: Has there been a breach of the reasonable expectation of privacy?

Third, the Constitution's text does not prohibit the government from conducting searches that intrude into people's privacy. What the text of the Fourth Amendment does prohibit is the conducting of unreasonable searches or seizures. Conversely, then, the Fourth Amendment permits reasonable searches and seizures. Through over two hundred years of case law, the Supreme Court has tried to define the boundaries between "reasonable" and "unreasonable" searches and seizures.

Fourth, then, we know that the extent of the privacy intrusion is only the beginning step of a constitutional or policy inquiry into a particular search or seizure practice. The discussion must then consider the reasonableness, or unreasonableness, of the practice. The Supreme Court has said that reasonableness, in turn, requires a balancing between the relevant government interests, on the one hand, and the privacy interests at stake, on the other.

With these preliminary considerations and observations in mind, I will now turn to the question of laptop searches at the border. I will do so by discussing, first, the background of border searches in order to provide historical context for the topic. Second, I will address the current state of the law dealing with border searches, in general, and laptops, in particular. Third, I will analyze the relevant policy considerations to determine whether some oversight or legislative action is necessary. Fourth, I will offer some modest proposals for legislative action or administrative regulation.

I. The Historical Background of Border Searches

In assessing "reasonableness," the modern Supreme Court starts with the general proposition that, ordinarily, searches and seizures must be preceded by a warrant and a judicially-determined finding of probable cause, "subject only to a few specifically established and well-delineated exceptions."3 Among those exceptions is the "border search exception," which permits the search of persons or property crossing the international border without a warrant or probable cause.

The Supreme Court did not officially and directly recognize this exception until 1977. Prior to that, it had hinted--through dicta in several cases--that such an exception existed. In Boyd v. United States, a civil forfeiture case from 1886, the Supreme Court had to decide whether customs agents lawfully seized several plates of glass, alleged to have been illegally imported by the claimant. At issue was the seizure of the goods, not the search that led to them. The Supreme Court upheld the seizure under the Fourth Amendment, noting that the seizure of contraband had been authorized at common law, by English statute, and by the First Congress-- the same body that went on to propose the Fourth Amendment to the states several months later. This latter, historical argument is significant because the same statute that authorized the seizure of contraband also authorized the warrantless search of ships and vessels for goods subject to duty. Therefore, an extension of the Boyd Court's reasoning would support the border search exception. If that Court upheld one aspect of the statute (the provision permitting seizure) then it stands to reason that the rest of the statute (authorizing warrantless searches) was also constitutional.

The Supreme Court also alluded to a border search exception in Carroll v. United States, the case that recognized the car search exception, which permits the warrantless search of an automobile, provided the police have probable cause to believe that evidence or contraband is contained in the vehicle. In Carroll, Chief Justice Taft cited Boyd for the proposition that there is a fundamental difference between a search of a person's home and the search of goods that are in the "course of transportation."4 When contraband goods are in transit, "it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."5 Having established that the warrant requirement did not apply to car searches, the Court next addressed under what circumstances such stops could occur. The Court rejected a rule that would authorize the stop of every car on a road in the hope that contraband might be uncovered.6 Such blanket and suspicionless searches violated the Constitution, Taft held.7 The Court made a point of drawing a distinction to border searches, however. The Court noted:

Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.8

While dicta, this passage was strong support for the belief that, at least in 1925 when Carroll was decided, the suspicionless and warrantless searches of persons at the border were considered reasonable.

The Supreme Court continued alluding to a border search exception in dicta in two obscenity cases in the early 1970s. In United States v. Thirty-Seven (37) Photographs,9 the claimant returned to the United States from a trip to Europe with several pictures from the Kama Sutra, which he intended to sell. Customs officials seized the photographs under a statute prohibiting the importation of obscene materials. The Supreme Court construed the statute to require a prompt determination, by a judge, of whether the seized items were in fact obscene. The Court rejected a First Amendment challenge to the

statute, holding that Congress had the power to prohibit the importation of goods, even if the possession and viewing of the items within the privacy of one's home, could not subject the claimant to prosecution. The Court reasoned that a port of entry is markedly different from the private sanctum of a person's home. The Court stated:

[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.10

The Court concluded that Congress may constitutionally prohibit the importation of obscene materials.11

In United States v. 12,200-Ft. Reels of Super 8mm. Film,12 the Supreme Court applied the holding of Thirty-Seven Photographs to an end-user who had imported pornographic films for his private use. The Court, as in Thirty-Seven Photographs, relied on its conception of the international border as being constitutionally different from the interior of the country. The Court wrote:

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.13

The Court noted that the text of the Constitution14 gives broad power to Congress to regulate international commerce. "Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry."15

In Almeida-Sanchez v. United States,16 the Court came closest to addressing the constitutionality of border searches. The defendant was stopped by a "roving patrol" of the United States Border Patrol. He was stopped on a state highway in California, traveling on an east-west highway that was 25 air miles north of the Mexican border.17 Citing Boyd and Carroll, the Court in dicta upheld routine border searches. The Court wrote:

It is undoubtedly within the power of the Federal Government to exclude aliens from the country. ... It is also without doubt that this power can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders.18

The Court also opined that a routine border search would also be permissible at the "functional equivalent" of the border, such as fixed checkpoints in the interior of the country or at airports where an international flight makes its first stop in the country.19 However, the Court declined to extend this principle to the roving patrol at issue in the case. Describing the search as "of a wholly different sort," the Court held that suspicionless searches in the interior of the country were unconstitutional, citing Carroll.20

The Supreme Court directly confronted the issue of the constitutionality of warrantless and suspicionless border searches in United States v. Ramsey.21 The defendants were convicted of, among other things, the illegal importation of heroin. The defendants ran a heroin-by-mail enterprise in which they sent heroin from Thailand through the international mail to co¬conspirators in the United States, who would then distribute the drugs domestically. A customs inspector, on-duty at the sorting facility of the New York Post Office, noticed that there were several bulky envelopes that had been mailed from Thailand. He felt the envelopes and concluded that they contained something other than letters. He opened them and found heroin. Writing for a 5-4 majority, then-Justice Rehnquist upheld the search. The Court first put to bed the question of whether border searches, in general, are constitutional without a warrant or suspicion:

That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.22

In support, the Court looked principally to history. The Court re-adopted Boyd's historical argument. The Congress that proposed the Bill of Rights had, only a few months earlier, enacted a customs statute that permitted the warrantless search of "any ship or vessel, in which [customs officers had] reason to suspect any goods, wares or merchandise subject to duty [were] concealed."23 In contrast, the search of homes, stores, and other buildings required a warrant.24 The Court cited Carroll, Thirty-Seven Photographs, 12,200-Ft. Reels of Film, and Almeida-Sanchez for the proposition that there was a consistent and long history of support for the border search exception.

The Court also viewed the border as having a talismanic significance. The Court wrote: Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question has entered into our country from outside.25

This passage suggests that the Court viewed the border as having a special significance under Fourth Amendment, not unlike the car, home, or school. While the Court has repeated Katz's warning that the Fourth Amendment protects "people, not places,"26 one cannot help but read Ramsey as holding that the border is an area in which special Fourth Amendment rules apply.

Later, the Court talked about the border search exception as being grounded in a "right" of the government to control the entry of persons and objects into the country.27 The Court did not expand upon its rationale, except to note later in the opinion that "the 'border search' exception is not based on the doctrine of 'exigent circumstances' at all."28

The question for the Court was whether the search fell within or without the general exception. The defendant conceded, at oral argument, that Customs could open an envelope hand-carried by a passenger walking across the border. The question, then, was whether the mode of an object's entry should make a difference. The Court concluded that the "critical fact" was the border crossing, not the manner in which it was made.29 The Court also rejected the defendant's First Amendment arguments. Here, the Court relied on a diminished expectation of privacy at the border: "There are limited justifiable expectations of privacy for incoming material crossing United States borders."30 Specifically, the defendant was unable to demonstrate why a letter that is mailed should possess a greater expectation of privacy than a letter that is hand-carried across the border.

II. The Law In light of Ramsey, the present state of the law is this: Persons and property entering the United States from abroad are subject to warrantless and suspicionless search. Routine searches at the border are justified, under the Constitution, for the following reasons:

?historically, customs and border officials have had broad latitude to conduct suspicionless and warrantless searches at the border or its functional equivalent;

?the sovereign has an inherent right to control who and what crosses its borders;

?searches are necessary to protect the interior from contraband and disease; and

?there is a diminished expectation of privacy at the border.

The border search exception comes with an important caveat, however. A suspicionless and warrantless search is permitted only for so-called "routine" searches, such as opening a piece of mail or patting down a person crossing the border. "Non-routine" border searches require something more, the Supreme Court held in United States v. Montoya de Hernandez.31

Rosa Elvira Montoya de Hernandez arrived at Los Angeles International Airport on a flight from Bogota, Colombia. A customs inspectors grew suspicious because she had made a number of recent trips to Miami and Los Angeles, had no friends in the United States, did not have hotel reservations, had $5,000 in cash but no billfold, could not recall how she purchased the plane ticket, and had a suspicious story

about coming to the United States to buy supplies for her husband's store. A female inspector was summoned to pat-down the defendant. The pat-down revealed that the defendant's abdomen felt firm and full. The inspectors accused the defendant of being an "alimentary canal smuggler"--one who swallows balloons or condoms filled with drugs, crosses the border, and then excretes the packages and delivers them to an awaiting drug dealer. The inspectors asked the defendant for permission to x-ray her, which the defendant agreed to. The defendant stated she was pregnant, so the inspectors said they would give her a pregnancy test. The defendant withdrew consent after she learned that the inspectors would handcuff her on the ride to the hospital. The inspectors then offered her a choice: submit to an x-ray, wait in the customs area until she produced a monitored bowel movement, or return to Colombia. The defendant chose the last option, but the inspectors were unable to arrange a direct flight to Bogota. The defendant was placed in an empty office with a wastebasket. She was informed that if she had to go to the bathroom, she would have to use the wastebasket. The defendant was confined in the room for approximately 16 hours, most of the time spent curled up on a chair. She refused all offers of food and drink. After 16 hours, customs sought and obtained a court order authorizing a pregnancy test, x-ray, and rectal exam. The defendant was taken to a hospital where a physician performed a rectal exam. The doctor removed a balloon with drugs. Over the next several days, the defendant excreted 88 balloons containing 528 grams of cocaine.

At issue was the 16-hour detention and seizure of the defendant. The defendant claimed that this was an unreasonable seizure and hence the subsequent search was invalid. Writing for the majority, then-Justice Rehnquist noted first the context of the seizure:

Here the seizure of respondent took place at the international border. Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. ... This Court has long recognized Congress' power to police entrants at the border.32

Congress has a legitimate concern about the "integrity of the border," a concern only heightened by what Rehnquist called the "veritable national crisis in law enforcement caused by smuggling of illicit narcotics ... and in particular by the increasing utilization of alimentary canal smuggling."33 Because the government's interests in protecting the border are so strong, the "Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior."34 In contrast, the defendant's expectation of privacy was less at the border because she had requested to be admitted to the country and had subjected herself to the laws of the United States.35 The Court concluded that the balancing of the interests of the government and the individual "is ... struck much more favorable to the Government at the border."36

But the Court noted that Ramsey concerned itself with a routine border search, and that the Court had never decided what was required for a non-routine search or seizure at the border.37 The Court

rejected the Ninth Circuit's test, which would have permitted the detention of an entrant only upon "clear indication" of alimentary canal smuggling.38 The Court looked instead to the familiar Fourth Amendment standard of "reasonable suspicion:"

We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.39

The Court upheld the detention of Montoya de Hernandez because the inspectors had reasonable suspicion that the defendant had drugs in her alimentary canal. The inspectors had more than a hunch. The circumstances of the defendant's entry into the country were suspicious, and the defendant did not help her case with her implausible story. This justified the inspectors' initial detention of the defendant. The continued detention (for over 16 hours) was justified because of the unique nature of alimentary canal smuggling. It is difficult to confirm whether a person is an alimentary canal smuggler because of the nature of the biological processes involved. Unlike brief Terry-like encounters,40 this type of drug smuggling cannot be detected in a matter of moments. The inspectors reasonably expected that Montoya de Hernandez's detention would be brief because she had not gone to the bathroom in quite some time. The detention lasted so long because the defendant chose to "resist the call of nature."41 "[Montoya de Hernandez] alone was responsible for much of the duration and discomfort of the seizure."42

Justice Brennan dissented, arguing that the customs officials needed both probable cause and a warrant in order to detain the defendant for so long. He drew a distinction between the 16¬hour detention at issue in Montoya de Hernandez and the limited inconveniences, such as questioning, patdowns, and searches of luggage, that occur in routine border search cases:

These [routine] measures, which involve relatively limited invasions of privacy and which typically are conducted on all incoming travelers, do not violate the Fourth Amendment given the interests 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."43

Justice Brennan distinguished the detention of the defendant. First, the purpose was for criminal investigation, not protection of the sovereign.44 If the government was truly concerned about preventing the entry of drugs into the interior, customs could have done a more thorough job at securing the defendant's passage out of the country.45 Second, a person's diminished expectation of privacy at the border is not nil. Justice Brennan wrote:

I do not imagine that decent and law-abiding international travelers have yet reached the point where they "expect" to be thrown into locked rooms and ordered to excrete into wastebaskets, held incommunicado until they cooperate, or led away in handcuffs to the nearest hospital for exposure to various medical procedures-- all on nothing more than the "reasonable" suspicions of low-ranking enforcement agents.46

He noted that extended and intrusive detentions have typically fallen within the traditional Fourth Amendment requirements of probable cause and a warrant.47

The "non-routine" border search cases, like Montoya de Hernandez, have involved searches of the "alimentary canal"--the digestive track of a person. On one occasion, however, the Supreme Court had the opportunity to decide to what extent, if any, a search of property can be considered "non-routine." In United States v. Flores-Montano,48 the defendant was stopped as he drove into a fixed checkpoint at the United States-Mexico border. After a brief inspection, Customs agents decided to remove the car's gas tank because they suspected that it contained drugs. Indeed, after a mechanic detached the gas tank--a process that took 15 to 25 minutes-- agents found 37 kilograms of marijuana bricks. On appeal, the government specifically conceded that the customs officials did not have reasonable suspicion to conduct the search, even though the facts of the case indicated that they did. A customs officer at the primary checkpoint had tapped on the gas tank and thought that it sounded "solid." The government elected not to argue that the officials had reasonable suspicion; it did so in order to challenge an earlier Ninth Circuit decision49 that held that reasonable suspicion was required to remove a gas tank from a car at the border.

Writing for a unanimous Court, Chief Justice Rehnquist held that the removal of the gas tank was constitutional, notwithstanding the absence of any degree of suspicion. The Court declined to find that this was a "non-routine" border search. "The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."50 "Time and again," the Court said, it had upheld searches at the border because the sovereign has a longstanding and "inherent" right to protect itself at the border.51 The Court also noted the long history of both legislative and judicial approval for such searches. In rejecting the defendant's arguments that the search unreasonably violated his right to privacy, the Court recognized that the "expectation of privacy is less at the border than it is in the interior."52 The Court found no evidence in the record that the temporary removal of the gas tank caused long-term damage to the vehicle. The Court left for another day whether a "different result" would be required if a search of property resulted in damage or was conducted in a particularly offensive manner.53

In the context of laptop searches, the question is this: Are they "routine: searches, which require no suspicion and may be done at random, or are they "non-routine," like the search and seizure in Montoya de Hernandez, which require, at a minimum, reasonable suspicion? The cases to have addressed this question have held that they fall under the former category. In United States v. Ickes,54 the Fourth

Circuit affirmed a defendant's conviction for transporting child pornography. The defendant was stopped as he crossed the Canadian-U.S. border. A search of his van found a computer and 75 disks containing child pornography, including a video of the defendant fondling the genitals of two young children. The Fourth Circuit began its analysis by poignantly noting, "However the Constitution limits the government's ability to search a person's vehicle generally, our law is clear that searches at the border are a different matter altogether."55 The court rejected the defendant's argument that the search was conducted in violation of 19 U.S.C. § 1581(a). This statute had historically been construed in an "expansive manner."56 In rejecting the defendant's constitutional challenge, the Fourth Circuit applied the holding in Ramsey and found the search of the computer disks to have been lawful. It declined to carve out an exception for "expressive material."57 "Particularly in today's world, national security interests may require uncovering terrorist communications, which are inherently 'expressive.'"58 The court discounted the defendant's argument that, under the government's argument, any person on an international flight could have his or her laptop computer's hard drive exhaustively searched. The unanimous court found this idea "far-fetched" because Customs agents do not have the time or resources to search the contents of every computer that crosses the border.59 "As a practical matter," the Court stated, "computer searches are most likely to occur where--as here--the traveler's conduct or the presence of other items in his possession suggest the need to search further."60

Two cases from the Ninth Circuit followed Ickes and directly involved laptop computers. In both cases--United States v. Romm61 and United States v. Arnold62--the defendants were stopped at international airports after arriving from foreign countries and had their laptop computers searched. In both cases, Customs agents found child pornography on the laptops' hard drives and the Ninth Circuit upheld the searches as constitutional. In Romm, however, the court declined to address the defendant's argument that the search of the laptop was "too intrusive" to qualify as a "routine" border search because he had raised this issue for the first time in his reply brief to the appellate court.63 (Likewise, in United States v. Irving,64 the Second Circuit rejected a challenge to the search of floppy disks at the border, finding that the search was based on reasonable suspicion. Therefore, that court did not have the opportunity to address whether the search was routine or non-routine.)

In Arnold, however, the Ninth Circuit squarely addressed whether the search of a laptop at the border is routine or non-routine. In reversing the district court's order suppressing the fruits of the search, the Ninth Circuit concluded that the search was routine and the government was not required to establish that its agents had reasonable suspicion. The court rejected the district court's use of a "sliding intrusiveness scale to determine when reasonable suspicion is needed to search property at the border"65 because of the Supreme Court's disapproval, in Flores-Montano, of "[c]omplex balancing tests" to determine what is a routine search.66 The defendant attempted to distinguish this portion of Flores-Montano by noting that it was in the context of vehicle searches. The Ninth Circuit, however, recognized that, "The Supreme Court's analysis determining what protection to give a vehicle was not based on the unique characteristics of vehicles with respect to other property, but was based on the fact that a vehicle, as a piece of property, simply does not implicate the same 'dignity and privacy' concerns as 'highly intrusive searches of the person.'"67 Finally, the court found that neither of the two possible exceptions left open by Flores-Montano was applicable. The defendant's laptop was not damaged and there was nothing to indicate that Customs searched the laptop in a "particularly offensive manner."68 A petition for rehearing en banc is presently pending before the Ninth

Circuit.69

III. Resolution of the Competing Policy Interests

I submit that the laptop border search cases have correctly applied the law. Ramsey established a necessarily broad rule for searches at the international border. The nation has an inherent right to protect itself and to interdict the importation of harmful items. The ability to conduct suspicionless searches is a vital tool to prevent narcotics, weapons, drug money, untaxed imports, child pornography, and disease-carrying plants and animals from entering the country. At the same time, persons have a diminished expectation of privacy at the border. Travelers in the modern age--particularly those who travel internationally--know and expect that they will be subject to search without cause at multiple points in their journeys.

The courts have correctly rejected attempts to analogize laptop searches to the type of search and seizure conducted in Montoya de Hernandez. Defendants have argued that the situations are similar because of the highly private information contained on some laptop computers. This argument is unavailing. The search and seizure in Montoya de Hernandez was considered "non-routine" not just because it was an intrusion into the defendant's privacy. The Court's decision was also based on the fact that there was a unique "interest[] in human dignity" that was at stake.70 A laptop computer--no matter the quantity or nature of the information contained within it--simply does not implicate the same degree of privacy concerns involved with a person's "alimentary canal."

Nevertheless, the Constitution, and the courts' interpretation of its text, only sets a minimum standard for civil rights and liberties. Of course, Congress and the Executive have the authority to set laws and policies that exceed these constitutional protections, if doing so would provide greater protection for privacy and individual rights. It is this broader question that I will now address. The appropriate inquiry, in the context of policy-making, should involve a careful balancing of the competing interests at stake: the government's interests in conducting suspicionless searches versus the privacy interests of those crossing the border.

Opponents71 of border searches of laptops point to the personal and private information, such as Internet browsing history, e-mails, and financial records, that are contained on some laptops. There is a correspondingly high expectation of privacy, they argue, that warrants a requirement of reasonable suspicion.

There is no doubt that many people keep personal information on their laptop computers. But the same can be said for the traveler who keeps his checkbook, notes for an upcoming novel, medications, photographs, sketches for a new invention, political literature, love letters, and personal diary in his

briefcase. No one doubts that each of these items can be seen and examined by Customs officials at the border without a requirement of reasonable suspicion.

So the question becomes whether a laptop is, by its very nature, sufficiently different that it warrants a categorical exception to the general rule. Stated another way, should the "high-tech" traveler receive special treatment because he carries his private information electronically, rather than in a more traditional form? Certainly more information can be kept on a computer than can be stored in a briefcase. The international traveler, however, can control how much of this information can be seen by the government. Files that are not necessary for a specific trip can be kept at home or at one's business. Opponents would likely counter that even "deleted" files can be retrieved by government technicians. This is true. However, this argument assumes that the government has the time and manpower to do so in every case. As a practical matter, the government would more likely reserve those resources for cases in which its agents already had some suspicion that the laptops contained something illegal, as the Fourth Circuit recognized in Ickes.72

In addition, there is an even less of a reasonable expectation of privacy at the international border because of the nature of international travel. Countries, including the United States, randomly search travelers at both entry and exit.73 So a person who travels from, say, China to the United States, will be subject to, at a minimum, two searches: upon exiting China and upon entering the United States. Likewise, a person who travels in the opposite direction will face a search upon departure from the United States, by American authorities, and again before being permitted to enter China, by Chinese customs officers. I submit that many countries conduct much more aggressive searches than the United States. The international traveler should expect, then, that he will encounter several searches of his person or property and that some will be more invasive than others. Therefore, even if the United States adopted a rule requiring reasonable suspicion for searches of laptops, international travelers would still face a diminished expectation of privacy because their computers could still be randomly searched by the foreign country that they were visiting or leaving.

All of these privacy considerations must then be balanced against the government's legitimate interests in conducting suspicionless searches of laptops and other electronic devices. The reported cases on this subject involved individuals attempting to bring child pornography into the country. Congress itself has recognized the dangers associated with such imagery by providing for steep penalties for its importation, distribution, and possession. Additionally, there is the potentiality for terrorists and international criminal organizations to use laptops as a means of secreting files, plans, and messages into the country for distribution to cells and allies within the interior of the country. Presently, the threat of random, suspicionless searches may be deterring such means of communication. Given the possibility of surveillance of phones and the Internet, "old fashioned" smuggling across the border, by storing files on a laptop, might prove a safer and more attractive alternative for such communication provided the persons doing so could be assured that the computer would not be subject to the possibility of random and suspicionless search.

There is an additional problem with creating a special exception for laptops at the border: defining its scope. Should reasonable suspicion be required for searches of flash drives and other storage media? What about Blackberry and other PDA devices? Why not extend protection to equally private containers of information, such as the films and videos that were at issue in the early civil forfeiture cases? This highlights the problem of deviating from a categorical rule in this area. We have a privacy interest in nearly everything we own or bring across the border--no person wants the government "snooping" through his laptop any more than his briefcase, checkbook, medications, clothing, books, Blackberry, or digital media. It would be difficult to avoid having the exception swallow the rule.

I have confined my analysis to the question of laptop searches. Seizures of such devices are another matter altogether. The border exception justifies the search, not the seizure, of items that cross the border. In order to seize an item, the government must have probable cause that the item is, or contains, contraband. If a Customs officer finds child pornography on a laptop, for example, he or she would be justified in seizing the computer since it contains contraband and persons do not have a right to retain contraband. I am aware of no authority that would permit the government, without probable cause to believe it contains contraband, to keep a person's laptop or to copy the contents of its files.

IV. Some Modest Proposals

During oral argument in Flores-Montano, it came to light that Customs keeps a record of all border searches that its agents conduct and the reasons, if any, for each particular search.74 If this is the still the case, the records should provide Congress with enough information to determine whether laptop searches are being conducted in a abusive or racially discriminatory manner.75 Given the highly sensitive nature of such records, such review should be kept under seal, in the same manner that, for example, information about the number of air marshals is kept out of the public record.76 If such records are no longer being kept, it might be advisable for the

practice to be restarted.

The Executive Branch can take administrative and rule-making steps, in addition to record-keeping, to ensure that privacy intrusions are kept to a minimum. For example, at the traveler's request, an examination of a computer should occur away from public view. Only officers who have received appropriate training should be allowed to conduct searches, in order to minimize the possibility of irreparable damage to, or erasure of, files and the hardware itself. A rule requiring searches to be conducted in the presence of a supervisor would also be prudent.

Conclusion

Any search at the border will be viewed, by the person being searched, as a "violation of privacy." The Constitution recognizes, however, that such "violations" are nevertheless permissible if they are "reasonable" in the broader context of the legitimate government interests at stake. The government's interest in protecting the nation is at its zenith at the international border. At the same time, a person's legitimate expectation of privacy is at its lowest. To create a special exception for laptop computers at the border would set a curious precedent, since there are innumerable other types of property in which a similarly strong argument about privacy could be made. At the same time, such an exception would open a vulnerability in our border by providing criminals and terrorists with a means to smuggle child pornography or other dangerous and illegal computer files into the country.

I thank the subcommittee again for the invitation to testify here today. I would be glad to answer any questions. I can be reached via phone at (212) 920-4623 or via e-mail at larry.cunningham@yahoo.com.

1 I am speaking today in my individual capacity; my views do not necessarily reflect those of the District Attorney.

2 389 U.S. 347 (1967).

4 Id. at 151, 153.

5 Id. at 153.

6 Id. at 154. 7 Id.

7 Id. at 154

8 Id. at 153-54.

9 402 U.S. 363 (1971).

10 Id. at 376 (emphasis added).

11 Id.

12 413 U.S. 123 (1973).

13 Id. at 125.

14 U.S. CONST. art. I, § 8, cl. 3.

15 12,200-Ft. Reels of Super 8mm. Film, 413 U.S. at 125.

16 Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

17 Id. at 267-69. 18 Id.

19 Id. at 272-73.

20 Id. at 274-75.

21 431 U.S. 606 (1977).

22 Id. at 616.

23 Id. (quoting 1 Stat. 29, § 24).

24 Id.

25 Id. at 619 (emphasis added).

26 Katz, 389 U.S. at 349.

27 Ramsey, 431 U.S. at 620. ("The border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country.").

28 Id.

29 Id. at 620.

30 Id. at 623 n.17.

31 473 U.S. 531 (1985).

32 Id. at 537.

33 Id. at 538.

34 Id

35 Id. at 539 (citing Carroll v. United States, 267 U.S. 132 [1925] and 19 U.S.C. § 482).

36 Id. at 540.

37 Id.

38 Id. at 540-41.

39 Id. at 541. 40 Terry v. Ohio, 392 U.S. 1 (1968).

41 Montoya de Hernandez, 473 U.S. at 543.

42 Id.

43 Id. at 551 (quoting Carroll, 267 U.S. at 154)

44 Id. at 564.

45 Id. 46 Id. at 560

47 Id. at 552-58.

48 541 U.S. 149 (2004).

49 See United States v. Molina-Tarazon, 279 F.3d 709 (9th Cir. 2002).

50 Flores-Montano, 541 U.S. at 152-53

51 Id.

52 Id. at 154.

53 Id. at 155-56.

54 393 F.3d 501 (4th Cir. 2005).

55 Id. at 503

56 Id. at 505.

57 Id. at 506.

59 Id. at 507.

60 Id.

61 455 F.3d 990 (9th Cir. 2006)

62 523 F.3d 941 (9th Cir. 2008).

63 Romm, 455 F.3d at 997.

64 432 F.3d 401 (2d Cir. 2005).

65 Arnold, 523 F.3d at 945.

66 Id. at 946.

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

68 Id. at 946-47.

69 Arnold was cited favorably in a recent district court decision. See United States v. Bunty, 2008 WL 2371211 (E.D. Pa. June 10, 2008) (Kauffman, J.) ("Although the Supreme Court has not addressed specifically the search of computer equipment at the border, other federal courts have agreed that such searches do not require reasonable suspicion.").

70 Montoya de Hernandez, 473 U.S. at 540 n.3.

71 See, e.g., Brief for Amici Curiae Association of Corporate Travel Executives and Electronic Frontier Foundation in Support of Appellee's Petition for Rehearing En Banc, United States v. Michael Timothy Arnold, No. 06-50581 (9th Cir.); Jeanne Meserve, Suit: Airport searches of laptops, other devices intrusive, http://www.cnn.com/ 2008/TRAVEL/02/11/laptop.searches/index.html (accessed June 21, 2008).

72 "As a practical matter, computer searches are most likely to occur where--as here--the traveler's conduct or the presence of other items in his possession suggest the need to search further."

73 Exit searches were the subject of my law review article, The Border Search Exception for Exports: A Global Conceptualization, 26 Quinnipiac L. Rev. 1 (2007). Exit searches are justified for myriad reasons, including the need to ensure that appropriate duties and taxes have been paid, that travelers are not smuggling high technology, and that unreported currency, which is the lifeblood of the international drug trade, is not leaving the country.

74 Flores-Montano, 541 U.S. at 156 (Breyer, J., concurring).

75 Id. ("This administrative process should help minimize concerns that gas tank searches might be undertaken in an abusive manner.")

76 See

http://www.tsa.dhs.gov/approach/mythbusters/fams_shortage.shtm.