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## Fairly Exposed: A Proposal to Improve the Reasonableness Standard for Digital Forensic Searches at the Border

Caroline V. McCaffrey

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# Fairly Exposed: A Proposal to Improve the Reasonableness Standard for Digital Forensic Searches at the Border

Caroline V. McCaffrey\*

## TABLE OF CONTENTS

Introduction.....	202
I. The Nuts and Bolts of Digital Forensic Searches.....	207
A. The Border Search Exception to the Fourth Amendment.....	209
B. Categories of Searches at the Border.....	211
1. Routine versus Non-Routine Searches at the Border.....	211
2. Manual versus Forensic Searches at the Border.....	212
II. The Circuit Split.....	214
A. Forensic Searches of Electronic Devices at the Border Require Reasonable Suspicion.....	214
1. The Ninth Circuit’s Perspective: <i>United States v. Cotterman</i> .....	215
2. The Fourth Circuit’s Perspective: <i>United States v. Kolsuz</i> .....	216
B. Forensic Searches of Electronic Devices at the Border Do Not Require Reasonable Suspicion.....	218
III. Factors Contributing to the Reasonableness of Digital Forensic Searches.....	219
A. Factors Contributing to the Reasonable Duration of a Forensic Search.....	219
1. Well-Established Precedent on the Reasonable Duration of Border Searches.....	221
2. The Circuit Split’s Impact on Forensic Search Durations.....	223
B. Factors Contributing to Reasonable Procedures for Forensic Searches.....	226
C. Public Safety and Reasonable Forensic Searches.....	231

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- 1. Clarifying the Meaning of “Reasonable Suspicion”  
in the Public Safety Context..... 233
- 2. The Circuit Split’s Impact on Public Safety..... 234
- D. Policy Considerations ..... 235
  - 1. The Circuit Split’s Impact on Equal Protection ..... 235
  - 2. The Circuit Split’s Impact on CBP Resource  
Optimization..... 237
- IV. Clearly Defining Reasonable Digital Forensic Searches..... 239
  - A. Duration ..... 240
  - B. Procedure ..... 242
  - C. Harms at Stake ..... 244
- Conclusion..... 245

INTRODUCTION

In July 2017, Ghassan and Nadia Alasaad, two law-abiding American citizens, traveled to Québec on a family vacation.<sup>1</sup> After spending three weeks in Canada, the Alasaads and their daughters boarded a plane to return to their home in Massachusetts.<sup>2</sup> While crossing the border from Canada to Vermont, a Customs and Border Protection (CBP) agent informed the Alasaad family that they were being detained because the agent “simply felt like ordering a secondary inspection.”<sup>3</sup> Subsequently, the agent escorted the Alasaad family to an inspection room and confiscated their smartphones.<sup>4</sup>

After the Alasaads waited for hours in the inspection room, the agent ordered Mrs. Alasaad to provide the passcode to her smartphone.<sup>5</sup> Mrs. Alasaad refused to comply with the agent’s demand and requested that a female agent conduct the search.<sup>6</sup> The agent informed the Alasaads that a female agent would not be available to search the phone for hours.<sup>7</sup> Unable

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1. Alasaad v. Nielson, No. 17-CV-11730-DJC, 2018 WL 2170323, at \*5 (D. Mass. May 19, 2018).  
 2. *Id.*  
 3. *Id.*  
 4. *Id.*  
 5. *Id.*  
 6. Mrs. Alasaad’s smartphone contained photos of her without her headscarf. It is against Mrs. Alasaad’s religious beliefs to allow men to view those images. *Id.*  
 7. *Id.*

to wait longer because their daughter was ill, the Alasaads departed the airport without their phones and did not receive them until 15 days later.<sup>8</sup> Additionally, when Mr. Alasaad attempted to access his daughter's graduation video weeks after the search, his phone displayed the message, "Sorry, this media file doesn't exist on your internal storage."<sup>9</sup> The error message had never appeared on Mr. Alasaad's phone before the CBP's forensic search at the border.<sup>10</sup>

For decades, the government has subjected individuals crossing the United States borders to a minimally intrusive search based on the sovereign's compelling interest in monitoring its borders.<sup>11</sup> Americans' tolerance for border searches, however, is declining as forensic technology increasingly threatens border entrants' privacy interests.<sup>12</sup> As technology evolves, digital forensic searches at the border are no longer "minimally" intrusive.<sup>13</sup> The CBP's search of the Alasaads' cell phones, for example, was not minimally intrusive.<sup>14</sup> Instead, it was excessively intrusive.<sup>15</sup> Although some courts maintain the constitutionality of the current use of forensic technology at the border, others reason that digital forensic searches clearly violate the prohibition against unreasonable searches and seizures under the United States Constitution's Fourth Amendment.<sup>16</sup> The inconsistent law involving digital border searches has provoked fear at the border for citizens such as the Alasaads.<sup>17</sup>

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8. *Id.*

9. *Alasaad v. Nielson: Plaintiffs' Stories*, ELECTRONIC FRONTIER FOUND. (Sept. 13, 2017), <https://www EFF.org/pages/alasaad-vs-duke-bios> [<https://perma.cc/KL46-C5VY>].

10. *Alasaad*, 2018 WL 2170323, at \*5.

11. Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 846 (2010); YULE KIM, CONG. RESEARCH SERV., RL31826, PROTECTING THE U.S. PERIMETER: BORDER SEARCHES UNDER THE FOURTH AMENDMENT I (2009).

12. The scope and duration of a forensic search are far greater than other searches. *See, e.g.*, *United States v. Saboonchi*, 990 F. Supp. 2d 536, 560–61 (2014) (describing the difference between forensic searches and manual searches). The use of forensic technology to conduct searches threatens intimate privacy interests. *See, e.g., id.*

13. *See Alasaad*, 2018 WL 2170323, at \*5.

14. *Id.*

15. *Id.*

16. *See United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018); *United States v. Touset*, 890 F.3d 1227 (11th Cir. 2018).

17. *See Alasaad*, 2018 WL 2170323, at \*5.

The Fourth Amendment seeks to protect citizens from unreasonable searches and seizures.<sup>18</sup> Specifically, the Fourth Amendment seeks to safeguard individuals' privacy interests and intercept wrongful intrusions by the government.<sup>19</sup> Lawmakers and courts have established legal safeguards such as search warrants to ensure that government officers interfere with individuals' Fourth Amendment rights only under limited circumstances and through specific methods. For example, federal courts only permit warrantless and suspicionless searches if law enforcement's conduct is reasonable under the circumstances.<sup>20</sup> Accordingly, reasonableness becomes a critical factor in determining a digital forensic search's constitutionality.<sup>21</sup> Certain criteria used to evaluate the reasonableness of digital forensic searches, however, are inconsistent and conflicting across jurisdictions.<sup>22</sup> Due to conflicts in federal caselaw, the standard of proof the government must meet to conduct reasonable warrantless forensic searches varies based on where a person crosses the border.<sup>23</sup> For example, a CBP agent in Virginia or California must have reasonable suspicion of criminal activity to seize and forensically search an individual's device.<sup>24</sup> A CBP agent in Georgia, however, may seize and forensically search an individual's device without any suspicion or justification.<sup>25</sup> This disparity leaves Americans uncertain of their rights at the border and increases national tension involving the government's reach into individuals' private lives.<sup>26</sup>

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18. U.S. CONST. amend. IV.

19. *Id.*

20. *See, e.g.,* United States v. Knights, 534 U.S. 112 (2001); Griffin v. Wisconsin, 483 U.S. 868 (1987); United States v. Smith, 273 F.3d 629 (2001).

21. *See* KIM, *supra* note 11, at 1.

22. *See generally* United States v. Kolsuz, 890 F.3d 133 (4th Cir. 2018) (requiring border agents have reasonable suspicion to conduct digital forensic searches in the Fourth Circuit because of the privacy interests at stake); United States v. Touse, 890 F.3d 1227 (11th Cir. 2018) (finding border agents do not need any suspicion to conduct a digital forensic search).

23. Kelly T. Currie et al., *International Trade Law: Reasonable Suspicion Required for Forensic Searches of Electronic Devices at the Border*, CROWELL MORNING (May 25, 2018), <https://www.cmtradelaw.com/2018/05/no-reasonable-suspicion-required-for-forensic-searches-of-electronic-devices-at-the-border/> [<https://perma.cc/9ZQ2-TBZX>].

24. *See generally* United States v. Cotterman, 709 F.3d 952, 958 (9th Cir. 2013); *Kolsuz*, 890 F.3d at 136.

25. *See generally* *Touse*, 890 F.3d at 1227 (holding border agents may conduct a digital forensic search without suspicion).

26. Charlie Savage & Ron Nixon, *Privacy Complaints Mount Over Phone Searches at U.S. Border Since 2011*, N.Y. TIMES (Dec. 22, 2017), <https://www.ny>

Statistics from the Department of Homeland Security (“DHS”) confirm a rapid increase in warrantless border searches of electronic devices.<sup>27</sup> In 2017, the CBP conducted 60% more searches of electronic devices than in 2016, searching approximately 30,200 devices at the border—<sup>28</sup> nearly tripling the annual number of searches since 2015.<sup>29</sup> The public has noticed the impact of the increase in digital searches.<sup>30</sup> The Knight First Amendment Institute at Columbia University<sup>31</sup> recently obtained complaints submitted to the DHS by travelers whose electronic devices were searched at the border.<sup>32</sup> These complaints suggested digital searches severely violated travelers’ subjective sense of privacy and further emphasized the inconvenience the searches imposed on the travelers’ lives and plans.<sup>33</sup>

Notwithstanding the sharp increase in digital border searches, the Eleventh Circuit ruled in May 2018 that CBP agents do not need any

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times.com/2017/12/22/us/politics/us-border-privacy-phone-searches.html [https://perma.cc/6ZC2-8TES]. The debate over digital privacy and national security continues. Privacy advocates argue that the government uses technology to infringe on individual privacy. *Cell Phone Privacy*, ACLU, <https://www.aclu.org/issues/privacy-technology/location-tracking/cell-phone-privacy> [https://perma.cc/N9BV-RE8N] (last visited Oct. 27, 2018). Advocates for digital border searches, however, assert that device searches are necessary to gather intelligence and advance pre-existing criminal investigations. Matthew S. Schwartz, *ACLU: Border Searches Violate Constitution When They Search Electronic Devices*, NPR (May 2, 2019, 5:10 AM), <https://www.npr.org/2019/05/02/719337356/aclu-border-agents-violate-constitution-when-they-search-electronic-devices> [https://perma.cc/EY5L-9D9N].

27. Currie et al., *supra* note 23.

28. Alexis E. Dannerman & Gina LaMonica, *Courts Continue to Grapple with Border Searches of Electronic Devices: Fourth Circuit Rules Forensic Searches Require Individualized Suspicion*, PERKINSCOIE (May 23, 2018), <https://www.whitecollarbriefly.com/2018/05/23/courts-continue-to-grapple-with-border-searches-of-electronic-devices-fourth-circuit-rules-forensic-searches-require-individualized-suspicion/> [https://perma.cc/8JA6-9JNW].

29. Savage & Nixon, *supra* note 26.

30. *Defending the Freedoms of Speech and the Press in the Digital Age: About the Knight Institute*, KNIGHT FIRST AMEND. INST., <https://knightcolumbia.org/content/about-knight-institute> [https://perma.cc/UJ24-YLV7] (last visited Oct. 12, 2018).

31. Columbia University established the Knight First Amendment Institute in 2016 to “safeguard free expression in the landscape of the digital age.” *Id.* The Institute focuses on threats to Constitutional protections evolving from technology. *Id.*

32. Savage & Nixon, *supra* note 26.

33. *Id.*

suspicion to conduct digital forensic searches at the border.<sup>34</sup> The Eleventh Circuit's decision impacts millions of travelers, citizens, and noncitizens crossing the border with highly sensitive or confidential information.<sup>35</sup> Furthermore, its decision indirectly impacts non-travelers.<sup>36</sup> Confidential information, images, phone numbers, and other details of an individual's life may be stored on a traveling friend or relative's electronic devices.<sup>37</sup> Consequently, the government can access a non-traveler's private information while forensically searching a traveler's digital device.<sup>38</sup> Courts' improper application of the Fourth Amendment analysis involving digital forensic searches has frustrated the Fourth Amendment's reasonableness standard as it applies to the border.<sup>39</sup> Accordingly, the United States needs a regulated approach to analyze the reasonableness of digital forensic searches at the border to clarify the law and uniformly protect travelers' Fourth Amendment rights.

A multi-factor reasonableness test is the best solution to the nation's inconsistent law currently governing digital forensic searches at the border.<sup>40</sup> The test would provide courts with variables to weigh when determining the reasonableness of digital forensic searches at the border.<sup>41</sup> First, courts will use several factors to analyze the duration and procedure of the suspicionless search at issue.<sup>42</sup> Next, courts will identify the type, degree, and imminence of harm the state was trying to prevent when conducting the suspicionless search.<sup>43</sup> If the forensic search at the border was unnecessary to prevent the type of harm at stake, the search should be deemed less reasonable.<sup>44</sup> Finally, courts must consider the impact that upholding a suspicionless digital forensic search at the border will have on the sovereign's interest in preventing intentional discrimination at the

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34. *United States v. Touset*, 890 F.3d 1227 (11th Cir. 2018).

35. Grayson Clary, *Summary: Circuit Split on Device Searches at the Border in U.S. v. Touset*, LAWFARE (May 30, 2018, 8:00 AM), <https://www.lawfareblog.com/summary-circuit-split-device-searches-border-us-v-touset> [<https://perma.cc/9BXA-524T>].

36. *See generally* *United States v. Saboonchi*, 990 F. Supp. 2d 536, 547 (D. Md. 2014).

37. *Id.*

38. *Id.*

39. Dannerman & LaMonica, *supra* note 28.

40. *See infra* Part IV.

41. *See infra* Part IV.

42. *See infra* Part III.

43. *See infra* Part III.

44. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989) (holding suspicionless drug tests of railroad operators was necessary and reasonable to protect the public because the harms at stake were imminent).

border and CBP resource depletion.<sup>45</sup> The preceding test equips courts with a principled basis to monitor and scrutinize suspicionless forensic searches of electronic devices at the border.

Part I of this Comment discusses border searches in general and addresses the purpose of previous laws. Part II considers the circuit split and details the conflicting law regarding forensic searches of electronic devices at the border. Part III analyzes caselaw regarding the duration and procedure of suspicionless searches and seizures. Additionally, this Comment addresses the factors courts have considered in judging the reasonableness of a suspicionless search or seizure. Finally, Part IV proposes a multi-factor reasonableness test to evaluate forensic searches of electronic devices at the border.

## I. THE NUTS AND BOLTS OF DIGITAL FORENSIC SEARCHES

The Fourth Amendment of the United States Constitution provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause . . . .”<sup>46</sup> Since its ratification, the Fourth Amendment has been a critical pillar of American democracy because it protects individuals from arbitrary government intrusion.<sup>47</sup> Federal courts have consistently confronted Fourth Amendment issues in the face of societal change and have applied the Fourth Amendment protections in accordance with the evolving American culture.<sup>48</sup>

The Fourth Amendment protects individuals from government action that constitutes an unreasonable search or seizure.<sup>49</sup> To evaluate the constitutionality of a search or seizure, courts must initially answer the

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45. See *Janfeshan v. United States Customs & Border Prot.*, No. 16-CV-6915(ARR)(LB), 2017 U.S. Dist. LEXIS 151058, at \*4 (E.D.N.Y. Aug. 21, 2017) (holding a search unreasonable because agents intentionally discriminated against the border entrant).

46. U.S. CONST. amend. IV.

47. Barry Friedman & Orin Kerr, *The Fourth Amendment*, NAT’L CONST. CTR. (Sep. 3, 2018, 7:12 PM), <https://constitutioncenter.org/interactive-constitution/amendments/amendment-iv> [<https://perma.cc/N6Z5-JLZK>].

48. See generally Tom McInnis, *The Changing Definition of Search or Seizure*, 11 INSIGHTS ON L. & SOC’Y (No. 2) 10 (2011), [https://www.americanbar.org/content/dam/aba/images/public\\_education/presentations/ChangingDefinitionofSearch.pdf](https://www.americanbar.org/content/dam/aba/images/public_education/presentations/ChangingDefinitionofSearch.pdf) [<https://perma.cc/7PSY-44MW>] (describing how the Fourth Amendment has been interpreted differently at different points in history).

49. KIM, *supra* note 11, at 1.



threshold question of whether a search or seizure occurred.<sup>50</sup> A search takes place when a government agent infringes on someone's reasonable expectation of privacy or commits an investigatory trespass.<sup>51</sup> Further, a seizure of an object occurs when a government agent interferes with a person's possessory interest in that object.<sup>52</sup> Once a court concludes that a search or seizure occurred, it must decide two separate questions: (1) whether the government agent had the requisite level of justification for conducting the search or seizure and (2) whether the government conducted the search or seizure in a reasonable manner.<sup>53</sup> Indeed, the United States Supreme Court dictated that "the touchstone of the Fourth Amendment is reasonableness."<sup>54</sup> To evaluate a search's reasonableness, courts examine the totality of circumstances surrounding a search and balance the government's interests against an individual's interests.<sup>55</sup> Courts recognize that the government violates the Fourth Amendment when a citizen's legitimate expectation of privacy significantly outweighs the government's interest in the search or seizure.<sup>56</sup>

Generally, the government does not have the requisite level of justification for conducting a search under the Fourth Amendment unless a warrant accompanies the search.<sup>57</sup> State and federal courts interpret the Fourth Amendment to impose a "presumptive warrant requirement" on all searches and seizures.<sup>58</sup> Before a judge can issue a warrant for a search or seizure, the government official must demonstrate probable cause that the

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50. *Id.*

51. *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Jones*, 565 U.S. 400 (2012). An investigatory trespass occurs when a government agent trespasses in an effort to obtain evidence for a criminal prosecution without a warrant or probable cause. *See, e.g., Jones*, 565 U.S. 400.

52. 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.1 (5th ed. 2018).

53. *See, e.g., United States v. Guzman-Padilla*, 573 F.3d 865, 876 (9th Cir. 2009). The first element of the reasonableness inquiry concerns the level of suspicion that government agents must possess to justify their intrusions. *Id.* The required level of suspicion varies depending on the type of search or seizure. At the border, for example, government agents may conduct certain searches or seizures without any suspicion. *Id.*

54. *See, e.g., Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness' . . .").

55. KIM, *supra* note 11, at 6.

56. *Id.*

57. *Id.* A warrant is executed when a judge signs an order authorizing law enforcement to search or seize certain persons or property. *See Warrant*, BLACK'S LAW DICTIONARY (11th ed. 2019).

58. KIM, *supra* note 11, at 1.

search will reveal evidence of a crime.<sup>59</sup> An officer demonstrates probable cause when “there is a fair probability that contraband or evidence of a crime will be found in a specified place.”<sup>60</sup> The Supreme Court, however, has recognized different situations where the warrant requirement does not apply, creating several specific exceptions to the Fourth Amendment.<sup>61</sup> Under these exceptions, a warrantless search may be justified when the government has probable cause, reasonable suspicion,<sup>62</sup> or even no suspicion.<sup>63</sup> Nonetheless, even if the search does not require a warrant, it must be reasonable under the totality of circumstances.<sup>64</sup>

#### *A. The Border Search Exception to the Fourth Amendment*

Many searches fall under certain judicially created exceptions to the warrant requirement.<sup>65</sup> The border search exception is a long-recognized exception that allows CBP to search and seize persons and property crossing the border without a warrant.<sup>66</sup> Congress and courts have deemed

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59. *Id.*

60. *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Probable cause is a relatively low standard to meet. *See generally id.*

61. *KIM*, *supra* note 11, at 1.

62. Reasonable suspicion is “a particularized and objective basis for suspecting the particular person” of wrongdoing. *United States v. Montoya de Hernandez*, 473 U.S. 541, 541 (1985) (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

63. *KIM*, *supra* note 11, at 1. Courts presume that agents need a warrant and probable cause unless an exception to the warrant requirement applies. For example, searches incident to arrest exempt government agents from the requirements of warrants, probable cause, and reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1 (1968). Additionally, short detentions for traffic violations do not require a warrant or probable cause. *See Whren v. United States*, 517 U.S. 806 (1996).

64. *See Maryland v. King*, 569 U.S. 435 (2013). The question of whether the government’s search or seizure is justified at the outset is different than whether the search or seizure is reasonably *conducted*. To illustrate, a government agent could obtain a search warrant supported by probable cause, thus satisfying the justification prong of the Fourth Amendment analysis. If the agent kicks down the door to a home in order to conduct the search, however, the agent’s search may be considered unreasonable. *See, e.g., Richards v. Wisconsin*, 520 U.S. 385 (1997).

65. Major exceptions to the warrant requirement include consent, exigent circumstances, searches incident to arrests, the “plain view” doctrine, and *Terry* stops. *Exceptions to the Warrant Requirement*, JUSTIA, <https://www.justia.com/criminal/procedure/warrant-requirement/> [<https://perma.cc/5MAJ-PW8M>] (last visited Oct. 25, 2018).

66. *KIM*, *supra* note 11, at 7.

these searches inherently reasonable under the Fourth Amendment.<sup>67</sup> As statutorily intended and judicially recognized,<sup>68</sup> the border search exception promotes Congress's constitutional authority to control commerce and furthers the sovereign's interest in protecting itself from terrorist activities and contraband.<sup>69</sup> At the border, the government's interest in national self-protection outweighs an individual's privacy interests.<sup>70</sup>

The border search exception applies to all people or items entering or leaving the United States at the border or a functional equivalent of the border.<sup>71</sup> Generally, the functional equivalent of the border is "the first practical detention point after a border crossing or the final port-of-entry."<sup>72</sup> Caselaw suggests that the following constitute the functional equivalent of a border: international airports receiving nonstop flights from foreign nations, domestic airports receiving international flights, landing-rights airports,<sup>73</sup> airstrips, automobile checkpoints where all international traffic passes through ports, vessels in inland waters, and territorial waters.<sup>74</sup> Limits to the functional equivalent of a border do exist, however, including bus depots and restaurants located 100 miles from the international border.<sup>75</sup> Further, courts categorize searches that occur at the border or a functional equivalent based on the invasive nature of the search.<sup>76</sup>

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67. See, e.g., *United States v. Alfaro-Moncada*, 607 F.3d 720, 728 (11th Cir. 2010).

68. See, e.g., 19 U.S.C. § 482 (2018) (allowing customs officials to conduct searches of persons, vehicles, and mail at the border without a warrant); 8 U.S.C. § 1357 (2018) (giving immigration officers broad powers to question and detain persons without a warrant at the border).

69. KIM, *supra* note 11, at 7.

70. *Id.*

71. R.V. Seep, *What Constitutes Functional Equivalent of Border for Purpose of Border Exception to Requirements of Fourth Amendment*, 94 A.L.R. FED. 372 (Westlaw 2018).

72. KIM, *supra* note 11, at 7.

73. Seep, *supra* note 71, at § 2[a] (defining a landing-rights airport as "an airport at which permission to land may be granted by the appropriate Customs officer with the concurrence of the Immigration and Naturalization Service, the Public Health Service, and the Animal and Plant Health Inspection Service of the Department of Agriculture, such permission being necessary before an aircraft may land at an airport not designated as an international airport").

74. Seep, *supra* note 71.

75. See *United States v. Barbera*, 514 F.2d 294 (1975); *Blackie's House of Beef, Inc. v. Castillo*, 467 F. Supp. 170 (1978).

76. KIM, *supra* note 11, at 9.

## *B. Categories of Searches at the Border*

Border searches usually fall into two judicially created categories: routine searches and non-routine searches.<sup>77</sup> Further, CBP agents may conduct either a manual search or a forensic search of digital devices at the border.<sup>78</sup> The border search exception only applies to border searches that fall within certain spheres of these judicially created categories.

### *1. Routine versus Non-Routine Searches at the Border*

Traditionally, courts analyzed border searches based on whether the searches were routine or non-routine.<sup>79</sup> A routine border search is “a search that does not pose a serious invasion of privacy or offend the average traveler.”<sup>80</sup> Congress permits government officials to conduct routine searches of persons and objects at the border without reasonable suspicion, probable cause, or a warrant.<sup>81</sup> A CBP agent may conduct a routine search on, for example, a border entrant’s purse, suitcase, wallet, or jacket.<sup>82</sup> Additionally, a routine search may include the use of drug-sniffing dogs<sup>83</sup> or a limited pat-down to search for contraband or weapons.<sup>84</sup> Routine searches—following the same logic as the border search exception—are reasonable under the Fourth Amendment because the government’s national security interest significantly outweighs an individual’s interest in privacy when the individual enters the United States.<sup>85</sup>

To distinguish between routine and non-routine border searches, courts focus on the degree of intrusion on an individual’s legitimate expectations of privacy.<sup>86</sup> Courts have articulated several factors to

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77. *Id.*

78. *Id.*

79. *Id.*

80. *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993).

81. *KIM*, *supra* note 11, at 9.

82. *Johnson*, 991 F.2d at 1291.

83. *United States v. Kelly*, 302 F.3d 291, 294–95 (5th Cir. 2002) (holding that a dog sniff at the border constitutes a routine border search).

84. *See, e.g., United States v. Beras*, 183 F.3d 22, 24 (1st Cir. 1999) (holding that the patdown of an international traveler’s legs was a routine border search).

85. *See Carroll v. United States*, 267 U.S. 132, 154 (1925); Gary N. Jacobs, *Border Searches and the Fourth Amendment*, 77 *YALE L.J.* 1007, 1012 (1968) (explaining that border entrants have a lessened reasonable expectation of privacy at the border because they are put on notice when approaching a border that a search of their person or belongings may be imminent).

86. *See Katz v. United States*, 389 U.S. 347 (1967) (describing a legitimate expectation of privacy as one that society is prepared to recognize as reasonable);

consider when determining how to categorize a border search: (1) whether the search exposes intimate body parts; (2) whether the CBP agent made physical contact with the suspect during the search; (3) whether the agent used force; (4) whether the search caused pain or danger; (5) the manner in which the agent conducted the search; and (6) whether the search violated the suspect's reasonable expectation of privacy.<sup>87</sup>

In contrast, non-routine searches include highly intrusive searches that implicate significant dignity and privacy interests, as well as destructive searches of property and searches carried out in particularly offensive manners.<sup>88</sup> Clearly, non-routine searches pose a great intrusion of privacy.<sup>89</sup> For example, courts have found non-routine searches include prolonged detentions, strip searches, body cavity searches, and some x-ray examinations.<sup>90</sup> Given their intrusive nature, non-routine searches require CBP agents to have reasonable suspicion of wrongdoing.<sup>91</sup> Generally, the intrusion of a non-routine search must be "reasonably related in scope to the circumstances which justified it initially."<sup>92</sup> As society becomes more dependent on technology, courts have struggled with categorizing digital border searches as routine or non-routine.

## 2. Manual versus Forensic Searches at the Border

Considering the exceedingly different techniques involved, CBP agents must make the important distinction between manual and forensic searches when conducting a border search.<sup>93</sup> A manual search of an electronic device at the border is less intrusive than a forensic search.<sup>94</sup> During a manual search, CBP agents may scroll through an electronic

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*Johnson*, 991 F.2d at 1291 (citing *United States v. Braks*, 842 F.2d 509, 511–12 (1st Cir. 1988)).

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

88. *United States v. Flores-Montano*, 541 U.S. 149, 154 (2004).

89. *KIM*, *supra* note 11, at 10.

90. *Id.*

91. Reasonable suspicion is "a particularized and objective basis for suspecting the particular person" of wrongdoing. *See United States v. Montoya de Hernandez*, 473 U.S. 541, 541 (1985) (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

92. *Montoya de Hernandez*, 473 U.S. at 542.

93. *United States v. Saboonchi*, 990 F. Supp. 2d 536, 547 (D. Md. 2014).

94. *See, e.g., United States v. Arnold*, 533 F.3d 1003, 1008 (9th Cir. 2008) ("reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage device at the border"); *United States v. Bunty*, 617 F. Supp. 2d 359, 365 (E.D. Pa. 2008) (holding that files on defendant's floppy disk permissible as part of suspicionless border search).

device's contents or use search functions to view specific files.<sup>95</sup> Courts have favorably described these manual searches as conventional inspections of specific files on devices similar to searches of physical papers or suitcases.<sup>96</sup> Further, if a device is password-protected, federal law allows CBP officials to demand technical assistance, including translation or decryption. Indeed, travelers who refuse to give passwords for their devices could be detained for longer periods of time and have their bags searched more intrusively.<sup>97</sup>

Opposed to physical papers or suitcases, however, a forensic search is more invasive because it “involves an exhaustive search of [the device’s] entire hard drive.”<sup>98</sup> A forensic analyst begins a forensic search by creating an exact copy or image of the device.<sup>99</sup> The analyst then uses specialized software to search the data obtained from the electronic device.<sup>100</sup> This obtained information includes the full contents of the hard drive, the properties of the individual files, and deleted files.<sup>101</sup> Access to the data obtained from the device allows for the search of massive amounts of information that a CBP official could never access alone through a manual search.<sup>102</sup> Consequently, forensic searches may take weeks or even months.

Naturally, the revolutionary technology used to forensically search a border entrant’s device has the potential to reveal sensitive and private information about an individual.<sup>103</sup> These searches can gather emails, text messages, financial transactions, computer documents, and internet

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95. *Saboonchi*, 990 F. Supp. 2d at 547.

96. *Id.* at 552.

97. See Cailey Rizzo, *Border Patrol Can Keep Your Devices If You Refuse to Reveal Your Password*, TRAVEL & LEISURE NEWS, <https://www.travelandleisure.com/travel-news/border-patrol-updated-electronics-search-policy> [<https://perma.cc/BC6U-VH3N>] (last updated January 17, 2018). Currently, state court judges disagree as to whether a criminal defendant may lawfully assert the Fifth Amendment protection against self-incrimination as a justification for refusing to provide law enforcement with a password. L.E. Wilson, *Law Enforcement Professionals Need to Evaluate Digital Forensics Practices Amid Looming Constitutional Showdown Regarding Digital Searches*, ACCESSDATA (Mar. 1, 2018), <https://accessdata.com/blog/law-enforcement-professionals-need-to-evaluate-digital-forensics-practices> [<https://perma.cc/UY5S-C8GQ>].

98. *Abidor v. Napolitano*, 990 F. Supp. 2d 260, 270 (E.D.N.Y. 2013).

99. *Saboonchi*, 990 F. Supp. 2d at 547.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 548.

histories from days or even months back for use as evidence.<sup>104</sup> By obtaining this information, forensic searches reduce the amount of control individuals have over their personal data, raising privacy concerns.<sup>105</sup> As a result, the scope and duration of a forensic search far exceed that of a manual search.<sup>106</sup> Although courts agree that manual searches of electronic devices at the border are routine and fall under the border search exception, the question of whether forensic searches of electronic devices at the border require an agent to have reasonable suspicion remains unanswered.

## II. THE CIRCUIT SPLIT

Prior to 2018, federal courts required CBP agents to have some level of suspicion to conduct a digital forensic search at the border.<sup>107</sup> Circuits are now split, however, about whether CBP agents need reasonable suspicion to justify a forensic search of data stored on a device.<sup>108</sup> Consequently, courts disagree on the constitutionality of digital forensic searches at the border.

### *A. Forensic Searches of Electronic Devices at the Border Require Reasonable Suspicion*

The Ninth and Fourth Circuits require that government agents have reasonable suspicion of criminal activity to conduct a forensic search of an electronic device at the border.<sup>109</sup> Both circuits assert that forensic searches of electronic devices at the border are non-routine and pose a greater threat to an individual's privacy interests than manual searches of electronic devices at the border.<sup>110</sup>

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104. National Forensic Science Technology Center, *A Simplified Guide to Digital Evidence*, <http://www.forensicsciencesimplified.org/digital/DigitalEvidence.pdf> [https://perma.cc/N8P4-KLQU] (last visited Sept. 3, 2018).

105. *Saboonchi*, 990 F. Supp. 2d at 547.

106. *Id.*

107. *See generally* *United States v. Cotterman*, 709 F.3d 952, 958 (9th Cir. 2013); *United States v. Kolsuz*, 890 F.3d 133, 147 (4th Cir. 2018).

108. *Cotterman*, 709 F.3d at 958; *Kolsuz*, 890 F.3d at 147; *United States v. Touset*, 890 F.3d 1227, 1232 (11th Cir. 2018).

109. *Cotterman*, 709 F.3d at 958; *Kolsuz*, 890 F.3d at 136.

110. *Cotterman*, 709 F.3d at 958; *Kolsuz*, 890 F.3d at 136.

*I. The Ninth Circuit's Perspective: United States v. Cotterman*

In 2013, the Ninth Circuit became the first federal appellate court to rule on the constitutionality of suspicionless digital forensic border searches. Specifically, the Ninth Circuit held in *United States v. Cotterman* that forensic examinations of electronic devices at the border are highly intrusive, non-routine searches that require a showing of reasonable suspicion under the Fourth Amendment.<sup>111</sup> In *Cotterman*, federal agents seized two laptops and three digital cameras from Howard Cotterman while he was crossing into the United States from Mexico after a search of the border records system, or the TECS system,<sup>112</sup> indicated that Cotterman was a sex offender.<sup>113</sup> Over the course of a few days, border agents conducted a forensic search of Cotterman's electronic devices and found images of child pornography.<sup>114</sup> Cotterman sought to suppress the images based on an unreasonable search under the Fourth Amendment.<sup>115</sup>

In determining the reasonableness of the search, the Ninth Circuit balanced the government's interest in protecting the border with Cotterman's privacy interests.<sup>116</sup> Because CBP agents gather emails, text messages, transactions, computer documents, and internet histories during a forensic search,<sup>117</sup> the Ninth Circuit reasoned that forensic searches implicate constitutionally protected privacy interests. Due to the "uniquely sensitive nature of data on electronic devices," forensic searches require a higher standard of proof than other property.<sup>118</sup> Additionally, the court compared the forensic search to a "computer strip search" and suggested

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111. See *Cotterman*, 709 F.3d at 952.

112. The TECS system is used at border crossings and allows border officials to access records relevant to antiterrorism and law enforcement during searches. When individuals cross the border, they first present themselves to a CBP agent upon arrival into the United States. The CBP agent obtains information directly from the individual by using the travel documents presented by the traveler. The CBP agent then reviews the TECS system to see if the traveler has any prior convictions or CBP violations that indicate a need for further review. U.S. CUSTOMS & BORDER PROT., U.S. DEP'T. OF HOMELAND SEC., PRIMARY IMPACT ASSESSMENT FOR THE TECS SYSTEM: CBP PRIMARY AND SECONDARY PROCESSING (2010).

113. *Cotterman*, 709 F.3d at 957–58.

114. *Id.* at 958.

115. *Id.* at 957.

116. See *id.*

117. *A Simplified Guide to Digital Evidence*, NAT'L FORENSIC SCI. TECH. CTR., <http://www.forensicsciencesimplified.org/digital/DigitalEvidence.pdf> [<https://perma.cc/U9S6-TTAT>] (last visited Sept. 3, 2018).

118. *Cotterman*, 709 F.3d at 966.



in dicta that the government's concerns about child pornography did "not justify unfettered crime-fighting searches or an unregulated assault on citizens' private information."<sup>119</sup> Although the Ninth Circuit imposed a reasonable suspicion standard for forensic searches of digital devices at the border, it ultimately did not suppress the evidence collected during the forensic search of Cotterman's devices because Cotterman's prior child pornography conviction and the TECS alert gave the CBP agents reasonable suspicion to justify the search.<sup>120</sup> Recently, the Fourth Circuit adopted the reasoning of the *Cotterman* court and stipulated that the government needs some level of suspicion.<sup>121</sup>

## 2. *The Fourth Circuit's Perspective: United States v. Kolsuz*

The Fourth Circuit addressed the level of suspicion required to conduct a forensic search of an electronic device at the border in *United States v. Kolsuz*.<sup>122</sup> In *Kolsuz*, CBP agents seized and conducted a forensic search of Hamza Kolsuz's smartphone at the Washington, D.C. airport after finding unlicensed firearms in his luggage.<sup>123</sup> The search lasted over a month and generated an 896-page report that included Kolsuz's contact lists, call logs, messenger conversations, emails, photographs, videos, calendar, and a history of the defendant's physical location.<sup>124</sup> Subsequently, the government indicted and charged Kolsuz with smuggling and attempting to export firearms without a license.<sup>125</sup> Kolsuz sought to suppress the report from the forensic examination, arguing that the privacy interest in his smartphone data outweighed the government's interest in conducting the suspicionless forensic search.<sup>126</sup> The Fourth Circuit used the Ninth Circuit's reasoning from *Cotterman* and held that a forensic search of a digital phone requires individualized suspicion

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119. *Id.*

120. *Cotterman*, 709 F.3d at 966.

121. *See* *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018).

122. *See id.*

123. The CBP agents also searched Kolsuz's luggage and conducted a manual search of his smartphone. *Id.* at 136.

124. *Id.* at 139.

125. *Id.*

126. Kolsuz argued that "the rationales justifying the border exception were not implicated . . . because at the time of the search there was no prospect that either he or his phone – both securely in government custody – would be crossing the border." *Id.* at 140. Kolsuz insisted the forensic search should be treated as a search incident to his arrest, and, under *Riley v. California*, cell phones may be searched only with a warrant based on probable cause. *Id.* at 137.

because cell phones are “fundamentally different” from other property and reveal information that reflects intimate details about an individual’s political, religious, sexual, and familial associations.<sup>127</sup> Emphasizing that a forensic examination of an electronic device requires reasonable suspicion of criminal conduct, the Fourth Circuit ultimately found that the forensic search of Kolsuz’s smartphone was reasonable because the government suspected Kolsuz’s involvement in ongoing illegal firearms exports.<sup>128</sup>

Furthermore, the *Kolsuz* court noted potential issues regarding forensic searches at the border that may arise in the future.<sup>129</sup> For instance, the court considered a DHS policy adopted in January 2018 categorizing forensic searches of electronic devices as non-routine border searches.<sup>130</sup> Under the policy, CBP agents must have reasonable suspicion of activity to forensically search a digital device.<sup>131</sup> The Fourth Circuit emphasized that the policy’s effect on CBP is unknown because it is not constitutionally mandated<sup>132</sup> and the Supreme Court has not ruled on the legal standard for forensic searches of digital devices at the border.<sup>133</sup> The Fourth Circuit also left unanswered the circumstances under which the duration of a digital forensic search would be unreasonable.<sup>134</sup> These considerations emphasize the need for clarity in applying Fourth Amendment protections to forensic searches at the border.

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127. *Id.* at 145. The court ruled in accordance with the Supreme Court’s decision in *Riley v. California*, 134 U.S. 2473 (2014). In *Riley*, the Court stipulated that the search of data on smartphones is a major invasion of privacy due to the quality and quantity of personal information stored on electronic devices. *Id.* Although *Riley* involved a search incident to arrest, the *Kolsuz* Court used the same rationale to rule that “a forensic border search of a phone must be treated as nonroutine, permissible only on a showing of individualized suspicion.” *Kolsuz*, 890 F.3d at 144.

128. *Kolsuz*, 890 F.3d at 148.

129. *Id.*

130. *Id.* at 147.

131. Clary, *supra* note 35.

132. A simple reading of a statute or policy may grant authority to the government to search a person or property, but the statute must be interpreted with the Fourth Amendment requirement that searches be reasonable. Federal courts have not judicially recognized the CBP directive as constitutional. *United States v. Ickes*, 393 F.3d 501, 507 (4th Cir. 2005) (distinguishing between agency practice and constitutional requirements).

133. *Kolsuz*, 890 F.3d at 147.

134. *Id.* at 141.

*B. Forensic Searches of Electronic Devices at the Border Do Not Require Reasonable Suspicion*

Days after the Fourth Circuit's decision in *United States v. Kolsuz*, the Eleventh Circuit ruled in *United States v. Touse* that the Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border.<sup>135</sup> The *Touse* decision extended the border search exception to all electronic devices at the border and created a circuit split regarding whether suspicion is necessary to forensically search and seize devices at the border.

In *Touse*, border agents forensically searched Karl Touse's smartphone and computer in an Atlanta airport after a series of investigations through TECS revealed his involvement with child pornography.<sup>136</sup> The forensic search revealed incriminating evidence, and Touse was subsequently convicted for transporting child pornography.<sup>137</sup> On appeal, the Eleventh Circuit rejected the Fourth and Ninth Circuit's reasoning in *Cotterman* and *Kolsuz*. Instead, it held that courts should treat searches on electronic devices the same as other types of property and that courts should not require reasonable suspicion for these forensic searches at the border. The Eleventh Circuit emphasized the historical purpose of the border search exception and stated that the "expectation of privacy is less at the border, and the Fourth Amendment does not guarantee the right to travel without great inconvenience, even within our border."<sup>138</sup> The majority's reasoning centered on the concept that "border searches are different"<sup>139</sup> and that the Supreme Court has never required reasonable suspicion for searches of other types of property at the border.<sup>140</sup> Furthermore, the Eleventh Circuit disposed of categorizing forensic searches as routine or non-routine because, under its reasoning, there is no forensic search at the border that needs suspicion to be reasonable, no matter how invasive.<sup>141</sup> Accordingly, the Eleventh Circuit insinuated that searches of any property at the border can be suspicionless.<sup>142</sup>

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135. *United States v. Touse*, 890 F.3d 1227, 1231 (11th Cir. 2018).

136. *Id.* at 1230.

137. *Id.*

138. Unlike the Fourth Circuit in *Kolsuz*, the Eleventh Circuit rejected this reasoning using the Supreme Court's holding in *Riley* and argued that the decision in *Riley* only applies under the search-incident-to-arrest doctrine. *Id.* at 1235.

139. *Id.* at 1232.

140. *Id.* at 1233.

141. *See id.* at 1227.

142. *See id.*

Questions regarding the reasonableness requirement of digital forensic searches at the border loom after the Eleventh Circuit's decision in *Touset*. The current circuit split concerns the first step to the Fourth Amendment analysis: whether the government has the requisite level of justification for conducting a search or seizure. Courts and commentators, however, have failed to address the reasonableness of *how* agents conduct a search or seizure. This omission leaves open several unaddressed issues during a time at which technology is essential to society and day-to-day life.<sup>143</sup>

### III. FACTORS CONTRIBUTING TO THE REASONABLENESS OF DIGITAL FORENSIC SEARCHES

The current circuit split overlooks the Fourth Amendment's reasonableness standard.<sup>144</sup> The Supreme Court has provided little guidance because it has never precisely defined what constitutes a reasonable versus an unreasonable border search.<sup>145</sup> In a series of cases, however, the Court has addressed certain factors related to the duration and procedure of a border search to determine its reasonableness under the Fourth Amendment.<sup>146</sup> Examining these compiled factors, such as agent diligence, public safety, and agent discretion, in the context of digital forensic searches at the border will clarify how courts should evaluate the reasonableness of a digital forensic search at the border.

#### *A. Factors Contributing to the Reasonable Duration of a Forensic Search*

The length of time CBP agents detain and search a phone should contribute to the reasonableness of a digital forensic search.<sup>147</sup> Federal

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143. Nick Ismail, *Modern Technology: Advantages and Disadvantages*, INFO. AGE (Apr. 10, 2017), <https://www.information-age.com/modern-technology-advantages-disadvantages-123465637/> [<https://perma.cc/7HN5-9JKR>].

144. Courts' varied opinions regarding forensic searches at the border leave open critical questions. A resolution is important as the number of searches conducted at the border rapidly increases. Dannerman & LaMonica, *supra* note 28.

145. *See generally* United States v. Ramsey, 431 U.S. 606 (1977).

146. *See, e.g.*, United States v. Place, 462 U.S. 696 (1983) (describing an unnecessarily prolonged search as unreasonable because the agents failed to act diligently); House v. Napolitano, No. 11-10852-DJC, 2012 WL 1038816 (D. Mass. Mar. 28, 2012) (stating the number of agents available during a search affects the reasonableness of the search); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602 (1989) (holding imminent harm makes suspicionless searches more reasonable).

147. *See generally* Place, 462 U.S. at 696.

courts agree that the government cannot simply seize property under its border search power and confiscate it for weeks, months, or years.<sup>148</sup> Severely prolonged seizures under the border search doctrine raise serious concerns because the duration of the search is not proportionate to the circumstances that justified the search.<sup>149</sup>

The border search exception essentially becomes irrelevant when time is “unbounded” for forensic searches.<sup>150</sup> Without time limits, border searches stray from their purpose of preventing contraband from crossing the border and transform into a general tool to hunt for crimes, which the Fourth Amendment has historically deemed unlawful.<sup>151</sup>

In January 2018, the United States CBP addressed these concerns and issued a directive on border searches of electronic devices.<sup>152</sup> As recognized in *Kolsuz*, the policy dictates that CBP agents may detain devices and copies of their contents for a brief, reasonable period of time, which ordinarily should not be longer than five days.<sup>153</sup> The policy further explains that supervisors may extend detentions and approve further extensions in increments of no more than seven days.<sup>154</sup>

Although the CBP directive places limits on the duration of a forensic search, several issues with the language and authority of the directive leave the reasonableness of the duration of a forensic border search unclear.<sup>155</sup> First, the Constitution does not mandate that courts follow the CBP directive.<sup>156</sup> Second, the directive grants border agents significant discretion to delay the return of digital devices through supervisor approval and “exigent circumstances.”<sup>157</sup> Finally, although the directive

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148. *United States v. Cotterman*, 637 F.3d 1068, 1070, 1082–83 (9th Cir. 2011).

149. *United States v. Saboonchi*, 990 F. Supp. 2d 536, 548 (D. Md. 2014) (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985)).

150. *Id.* at 565 (describing a lack of time limits as “unbounded” time).

151. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

152. U.S. CUSTOMS & BORDER PROT., DIRECTIVE NO. 3340-049A, BORDER SEARCH OF ELECTRONIC DEVICES (2018), <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf> [<https://perma.cc/RK86-6MYE>].

153. *See United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018); *Id.*

154. U.S. CUSTOMS & BORDER PROT., *supra* note 152.

155. *See generally id.*

156. *See generally id.*

157. *Id.* Examples of exigent circumstances include hot pursuit, a fleeing suspect, destruction of evidence, or other situations where speed is essential. *Exigent Circumstances*, in SEARCH & SEIZURE CHECKLISTS (Westlaw Dec. 2018). Recently, 10 U.S. citizens and a permanent lawful resident filed suit alleging that the searches of their devices at the border were unreasonable. The allegations include both manual and forensic searches. Some plaintiffs to the suit received

addresses a duration for detaining the physical devices, it does not mention whether the stipulated time also applies to the copies of the devices' contents.<sup>158</sup> An examination of caselaw involving the reasonable duration of a search at the border or its functional equivalent provides valuable insight on these emerging issues from the CBP directive.

*1. Well-Established Precedent on the Reasonable Duration of Border Searches*

Courts have long held that the duration of a search or seizure must be reasonable.<sup>159</sup> For example, in *Illinois v. Caballes*, the Supreme Court held that a suspicionless canine sniff search during a routine traffic stop is reasonable under the Fourth Amendment if the canine sniff search does not “unreasonably prolong” the overall search.<sup>160</sup> Additionally, the Court stated in *United States v. Jones* that courts should consider the duration of surveillance to determine a search’s reasonableness.<sup>161</sup> Judges have even signed warrants authorizing the forensic search or seizure of an electronic device based on the stipulation that the search must be completed quickly.<sup>162</sup>

Beside contributing to a search’s unreasonableness, the length of time the government holds a device can give rise to a separate Fourth Amendment claim for the length of the seizure.<sup>163</sup> In *United States v. Place*, federal agents seized the defendant’s luggage based on reasonable suspicion and took it to another airport to be examined.<sup>164</sup> The defendant alleged that seizing his luggage for 90 minutes without probable cause violated his constitutional rights.<sup>165</sup> The Supreme Court held that the detention of the defendant’s luggage was unreasonable and that the agents’

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their electronic devices days or even months after the initial seizure at the border. One plaintiff still had not gotten his device back before the initiation of the case. *See Alasaad v. Nielson*, No. 17-CV-11730-DJC, 2018 WL 2170323, at \*5 (D. Mass. May 19, 2018).

158. U.S. CUSTOMS & BORDER PROT., *supra* note 152.

159. *See Illinois v. Caballes*, 543 U.S. 405, 409 (2005); *United States v. Jones*, 565 U.S. 400, 407 (2012).

160. *Caballes*, 543 U.S. at 409.

161. *Jones*, 565 U.S. at 407.

162. *See United States v. Brunette*, 76 F. Supp. 2d 40, 42 (D. Me. 1999) (noting that the judge permitted agents to seize and search the computers of a child pornography suspect on the condition that the agents searched through the computer for no more than 30 days).

163. *See generally United States v. Place*, 462 U.S. 696, 699 (1983).

164. The defendant was not detained with his luggage. *Place*, 462 U.S. at 699.

165. *Id.* at 709.

failure to tell the defendant where they were taking the luggage, how long they would keep it, and how they would return it to him exacerbated the violation.<sup>166</sup>

In its reasoning, the Court in *Place* emphasized the importance of a search's brevity in determining whether the seizure is reasonable under the Fourth Amendment.<sup>167</sup> Additionally, the Court took into account whether the government "diligently pursued" its investigation.<sup>168</sup> Admitting that the agents had reasonable suspicion to seize the defendant's luggage, the Court nevertheless deemed the seizure unreasonable because of the seizure's duration and the agents' failure to adequately inform the defendant of the situation.<sup>169</sup> Although *Place* involved a domestic search, meaning it did not take place at a border or functional equivalent, the Court emphasized that analyzing the seizure's duration is an appropriate consideration under any Fourth Amendment reasonableness analysis.<sup>170</sup>

Likewise, in *House v. Napolitano*, the United States District Court for Massachusetts held that a warrantless border detention of the defendant's digital devices for 49 days was unreasonable.<sup>171</sup> In reaching this holding, the court upheld the defendant's claim disputing the reasonableness of the search's duration, but it rejected the defendant's argument that the CBP agents needed reasonable suspicion for the search.<sup>172</sup> In its analysis, the court took into consideration the number of border agents available who were authorized to conduct the forensic search during the detention of the devices, in addition to expert testimony suggesting that 49 days was unreasonable under the circumstances.<sup>173</sup> Applying these findings, the court upheld the plausibility of a separate Fourth Amendment claim for the length of the seizure.<sup>174</sup>

Caselaw that specifically considers the reasonableness of detaining data copies for a prolonged time remains sparse.<sup>175</sup> The subject of a

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166. *Id.* at 710.

167. *Id.* at 709.

168. *Id.* The agents were not attentive and persistent in conducting the search of the defendant's luggage. According to the Court, agents could have used quicker methods to conduct the search. *Id.*

169. *Id.*

170. *Id.*

171. *House v. Napolitano*, No. 11-10852-DJC, 2012 WL 1038816 (D. Mass. Mar. 28, 2012).

172. *Id.* at \*10.

173. *Id.*

174. *Id.*

175. *United States v. Saboonchi*, 990 F. Supp. 2d 536, 564 (D. Md. 2014).

forensic search is usually an exact copy of the device's data.<sup>176</sup> An imaging machine copies the contents of the electronic device, and the device itself is then placed into evidence storage.<sup>177</sup> Although the CBP directive provides a time limit for detaining an actual device, the directive also stipulates that agents may detain the copies of information contained in the device "for a brief, reasonable period of time to perform a thorough border search."<sup>178</sup> Agents do not have to destroy any device copies until after the forensic search is complete and they decide that there is no probable cause to seize the device.<sup>179</sup> By obtaining copies of the device's contents, border agents may unreasonably extend searches beyond the time a manual search at the border would have been performed, for days or weeks after the physical device has left the agents' control.<sup>180</sup> The factors used to analyze the detention of actual devices at the border, therefore, should also be used to evaluate the detention of data copies.

## 2. *The Circuit Split's Impact on Forensic Search Durations*

Courts have analyzed certain factors to determine the constitutionality of the duration of a search at the border.<sup>181</sup> These factors include the number of border agents available to complete a search, border agents' diligence, expert testimony, and the information given to the individual whose belongings are being searched.<sup>182</sup> An examination of these judicially created factors in the context of digital forensic searches at the border and the effect that *Cotterman*, *Kolsuz*, and *Touset* could have on these factors provides a clear and consistent legal standard to analyze the reasonableness of a forensic search at the border.

Suspicionless searches—as opposed to searches that require reasonable suspicion—allow government agents to search and seize an individual's property without any level of suspicion.<sup>183</sup> If border agents seize and forensically search an electronic device at the border with no

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176. *Id.*

177. *Id.*

178. U.S. CUSTOMS & BORDER PROT., *supra* note 152.

179. *Id.*

180. *Saboonchi*, 990 F. Supp. 2d at 565.

181. *See* *United States v. Place*, 462 U.S. 696 (1983); *House v. Napolitano*, No. 11-10852-DJC, 2012 WL 1038816 (D. Mass. Mar. 28, 2012).

182. *See Place*, 462 U.S. at 696; *Napolitano*, 2012 WL 1038816.

183. *See Terry v. Ohio*, 392 U.S. 1 (1968) (explaining that reasonable suspicion requires officers to describe a specific set of circumstances that would lead any objectively reasonable law enforcement officer to suspect the individual is engaged in criminal activity).



suspicion of criminal activity, analysts could be searching mass amounts of data for any and every kind of incriminating evidence.<sup>184</sup> Without guidance from courts or regulations, agents will likely detain devices longer, making searches less reasonable under Supreme Court precedent.<sup>185</sup> Additionally, without a legal basis to search, federal agents are unable to inform the individuals being searched of important details, such as the reason for the search, what is sought in the search, and the duration of the search.<sup>186</sup> These considerations reveal that there is a greater opportunity for a forensic search to be unconstitutional under *Touset's* ruling, which asserts that agents do not need any suspicion to conduct a digital forensic search at the border.<sup>187</sup> Consequently, even if CBP agents search a device without suspicion, there is a great possibility that the search will still be considered unreasonable under the Fourth Amendment.

Under *Cotterman* and *Kolsuz*, which require reasonable suspicion to conduct a forensic search at the border, an agent's specific reason for initiating a forensic search may justify the duration of the forensic search.<sup>188</sup> Agents can inform individuals subjected to a digital forensic search under reasonable suspicion why the government is searching their electronic devices and the types of evidence for which the agents are searching.<sup>189</sup> Under the Court's reasoning in *Place*, access to this information will make the forensic search more reasonable.<sup>190</sup> Second, narrowing a forensic search based on suspicion of a certain type of criminal activity will clarify the probable cause requirement necessary for agents to seize and preserve incriminating evidence from the device under the CBP directive.<sup>191</sup> Although the requirements in *Kolsuz* and *Cotterman*

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184. Without specific facts or justification for a search, CBP agents blindly dig for evidence of criminal activity. *See generally id.*

185. Sean E. Goodison et al., *Digital Evidence and the U.S. Criminal Justice System, Identifying Technology and Other Needs to More Effectively Acquire and Utilize Digital Evidence*, RAND CORP. (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248770.pdf> [<https://perma.cc/5HAE-226X>]; *see Place*, 462 U.S. at 696 (identifying the length of a search or seizure at the border a critical factor in determining the reasonableness of the search).

186. *See Terry*, 392 U.S. at 1 (explaining that reasonable suspicion requires officers to describe a specific set of circumstances that would lead any objectively reasonable law enforcement officer to suspect that the individual is engaged in criminal activity).

187. *United States v. Touset*, 890 F.3d 1227, 1231 (11th Cir. 2018).

188. *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir. 2013); *United States v. Kolsuz*, 890 F.3d 133, 136 (4th Cir. 2018).

189. *See Terry*, 392 U.S. at 1.

190. *Place*, 462 U.S. at 710.

191. U.S. CUSTOMS & BORDER PROT., *supra* note 152.

provide more clarity, agents are still likely to conduct unreasonably long forensic searches under these standards because there is no policy mandating the duration and detention of data copies, and prior cases suggest that the government unreasonably deprives border entrants of their electronic devices for weeks and months even when a heightened level of justification to conduct a forensic search at the border is required. Consequently, courts should use factors to analyze the constitutionality of forensic border searches.<sup>192</sup>

Regardless of the legal standard, evaluating the constitutionality of digital forensic border searches using judicially created reasonableness factors from previous border search cases creates a stronger likelihood that forensic searches at the border will be reasonable.<sup>193</sup> A reasonable forensic search at the border would require agents to thoroughly inform travelers why CBP agents are searching their devices and when they can expect to regain possession of them.<sup>194</sup> Furthermore, agent diligence and availability of forensic analysts to accelerate the search will heighten the reasonableness requirement.<sup>195</sup> Criminal defendants involved in a Fourth Amendment claim concerning a forensic digital device search at the border may also present expert testimony showing the duration of the border search or seizure was unreasonable under the circumstances.<sup>196</sup> With this standard in place, forensic searches conducted without suspicion would be regulated and scrutinized.<sup>197</sup> After examining the duration of a forensic search at the border, courts should analyze the reasonableness of the procedure used to conduct the forensic search.

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192. See *Alasaad v. Nielson*, No. 17-CV-11730-DJC, 2018 WL 2170323, at \*7–8 (D. Mass. May 19, 2018) (emphasizing that the government seized one plaintiff’s phone for two months and another plaintiff’s phone for 56 days at the border); *Janfeshan v. United States Customs & Border Prot.*, No. 16-CV-6915(Arr)(LB), 2017 U.S. Dist. LEXIS 151058, at \*2–3 (E.D.N.Y., Aug. 21, 2017) (noting the plaintiff’s phone was seized for five weeks).

193. Reasonableness is a generalized standard that courts evaluate on a case-by-case basis. *KIM*, *supra* note 11, at 6. By using certain factors to evaluate reasonableness that courts have recognized as critically important in a Fourth Amendment analysis, courts’ authority will be more consistent and predictable in the digital forensic search context.

194. See *Place*, 462 U.S. at 699 (holding quality information given to a suspect makes a border search more reasonable).

195. See *Place*, 462 U.S. at 696; *House v. Napolitano*, No. 11-10852-DJC, 2012 WL 1038816 (D. Mass. Mar. 28, 2012).

196. *Napolitano*, 2012 WL 1038816, at \*10.

197. See *generally* Part III.

*B. Factors Contributing to Reasonable Procedures for Forensic Searches*

Recently, DHS released statistics suggesting an increase in warrantless border searches of electronic devices.<sup>198</sup> Consequently, it is of rising importance for courts to assess the reasonableness of CBP procedure to ensure that agents are appropriately and efficiently conducting forensic searches.<sup>199</sup>

Generally, administrative policies and procedures provide a roadmap for day-to-day operations and promote compliance with laws and regulations.<sup>200</sup> Structured procedure gives authorities guidance for decision-making and ensures efficient management of an organization's time and resources.<sup>201</sup> Currently, CBP agents exercise authority and follow procedure under federal statutes and regulations.<sup>202</sup> CBP relies on agents' judgment and discretion to implement and monitor forensic searches.<sup>203</sup> The government uses certain targeting techniques and technology to justify a border search of entrants or their belongings.<sup>204</sup> According to CBP, their officers "use diverse factors to refer individuals for targeted examinations and there are instances when [the agents'] best judgments prove to be unfounded."<sup>205</sup> These systems and other targeting techniques prevent agent bias and make the procedure of a forensic search more

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198. Currie et al., *supra* note 23.

199. Danneman & LaMonica, *supra* note 28.

200. Matt Gasior, *Following Policies and Procedures and Why It's Important*, POWER DMS (May 2, 2018), <https://www.powerdms.com/blog/following-policies-and-procedures-why-its-important/> [<https://perma.cc/NTV7-QBV9>].

201. *Id.*

202. *See generally* 8 U.S.C. §1225(d)(1) (2018) (giving agents authority to board and search any vehicle believed to be bringing aliens into the country); 19 U.S.C. § 482 (2018) (allowing the search of vehicles and persons regarding merchandise); *id.* § 1467 (providing for special inspection, examination, and search); *id.* § 1496 (allowing the examination of baggage); *id.* § 1499 (sanctioning the examination of merchandise); *id.* § 1581 (discussing the boarding of vessels and searching of vehicles); *id.* § 1582 (regulating the search of persons and baggage); Gretchen C.F. Shappert, *The Border Search Doctrine: Warrantless Searches of Electronic Devices after Riley v. California*, USA BULLETIN (Nov. 2014), <https://www.justice.gov/sites/default/files/usao/legacy/2014/11/14/usab6206.pdf> [<https://perma.cc/SP74-2KZ9>].

203. *CBP Search Authority*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/travel/cbp-search-authority> [<https://perma.cc/F47Q-2PMJ>] (last modified Jan. 5, 2018).

204. *Id.*

205. *Id.*

reasonable.<sup>206</sup> Accordingly, it is critical to articulate factors recognized by courts that affect the reasonableness of border procedure regarding digital forensic searches.

Permanent traffic stops are another category of border searches that serve the sovereign's interest in national self-protection.<sup>207</sup> CBP agents routinely conduct warrantless stops of vehicles near the border at fixed checkpoints.<sup>208</sup> Considering the national interest in protecting the sovereign,<sup>209</sup> border agents do not need reasonable suspicion to stop vehicles traveling through the fixed checkpoints.<sup>210</sup> Accordingly, examining the Supreme Court's opinions on permanent traffic stops near the border helps identify certain factors to consider when evaluating the reasonableness of seizing and forensically searching electronic devices at the border.

At the border, the established procedure controlling permanent traffic stops limits inconvenience and intrusion on the public.<sup>211</sup> First, a motorist arrives at a permanent traffic stop.<sup>212</sup> Next, the traveler drives through the checkpoint.<sup>213</sup> Then, border agents may conduct either an inquiry with the driver or a visual examination of the car.<sup>214</sup> After agents decide that a vehicle is secure, the driver continues through the checkpoint.<sup>215</sup> The Supreme Court addressed the constitutionality of this procedure in *United States v. Martinez-Fuerte*.<sup>216</sup>

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206. See generally *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir. 2013) (holding a search reasonable because the TECS system identified the defendant as a past offender).

207. *CBP Search Authority*, *supra* note 203.

208. *What Are the Search and Seizure Rules at Permanent Interior Immigration Checkpoints?*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-the-search-seizure-rules-permanent-interior-checkpoints.html> [<https://perma.cc/425H-96R4>] (noting the government must use signs, cones, or flashing lights to warn drivers of an upcoming permanent checkpoint).

209. *United States v. Martinez-Fuerte*, 428 U.S. 555, 554 (1976).

210. See *id.* at 555.

211. *What Are the Search and Seizure Rules at Permanent Interior Immigration Checkpoints?*, *supra* note 208.

212. Jesus A. Osete, *The Praetorians: An Analysis of U.S. Border Patrol Checkpoints Following Martinez-Fuerte*, 93 WASH. U. L. REV. 803, 811 (2016).

213. *Id.*

214. *Id.* A visual examination of a car can be analogized to a manual search of an electronic device; the border agent may briefly examine the exterior of the vehicle. See generally *id.* A CBP agent may conduct a search of a vehicle if the agent has probable cause or the motorist consents. *Id.*

215. *Id.*

216. See generally *United States v. Martinez-Fuerte*, 428 U.S. 555, 554 (1976).

In *Martinez-Fuerte*, the Court found that stopping individuals without probable cause or reasonable suspicion at permanent vehicle checkpoints does not violate the Fourth Amendment.<sup>217</sup> In its reasoning, the Court recognized that the “detention” of travelers at permanent checkpoints is minimally intrusive because the stops are brief and involve basic questioning.<sup>218</sup> Additionally, because the government must give advance warning of permanent checkpoints,<sup>219</sup> motorists are fully aware of permanent checkpoint locations.<sup>220</sup> Experienced officials select the checkpoint locations to promote efficiency and save law enforcement resources.<sup>221</sup> The Court suggested that permanent checkpoints provide clarity and leave less room for agents to abuse or harass individuals during these stops.<sup>222</sup> Notably, the Court determined that permanent traffic stops advance Fourth Amendment interests by minimizing the intrusion on the general motoring public.<sup>223</sup>

The *Martinez-Fuerte* Court also identified a number of factors that contribute to the reasonableness of suspicionless searches at permanent traffic stops.<sup>224</sup> Indeed, the Court recognized that permanent stops are reasonable because they are brief, routine, and minimally intrusive.<sup>225</sup> Moreover, permanent checkpoints provide more predictability because individuals receive some notice of checkpoint locations and understand that exterior inspections of their cars may occur.<sup>226</sup> Additionally, travelers expect to answer questions regarding their nationality or immigration status when driving through a permanent checkpoint.<sup>227</sup> This increased likelihood of reasonableness arises because permanent checkpoints operate under detailed rules that limit agent discretion.<sup>228</sup> For example, agents can only stop cars passing through the checkpoint and minimally question each individual.<sup>229</sup> Additionally, border agents cannot search a

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217. *Id.* at 566.

218. *Id.* at 558.

219. *What Are the Search and Seizure Rules at Permanent Interior Immigration Checkpoints?*, *supra* note 208 (noting that the government must use signs, cones, or flashing lights to warn drivers of an upcoming permanent checkpoint).

220. *Martinez-Fuerte*, 428 U.S. at 559.

221. *Id.*

222. *Id.* at 560.

223. *Id.*

224. *Id.*

225. *See id.* at 555.

226. *Id.* at 558.

227. *Id.*

228. *See generally id.* at 555.

229. *Id.* at 558.

vehicle's contents or the person without probable cause.<sup>230</sup> As a result, agents follow structured procedure, leaving less room for harassment or agent abuse.<sup>231</sup> Because stipulated rules and procedures constrain border agents' actions when conducting a search, permanent checkpoints "minimally intrude" on the general public.<sup>232</sup>

Because digital forensic searches at the border and permanent traffic stops aim to achieve similar goals, courts evaluating the reasonableness of forensic searches at the border should follow the *Martinez-Fuerte* Court.<sup>233</sup> That is, situations involving limited agent discretion and heightened predictability increases the likelihood that a forensic search at the border is reasonable.<sup>234</sup> Examining the potential effect a suspicionless digital forensic search at the border may have on agent discretion and predictability will clarify the impact of the *Cotterman*, *Kolsuz*, and *Touset* decisions on the reasonableness of forensic search procedure.

Removing a reasonable suspicion standard to conduct digital forensic searches would eliminate a primary tool used to monitor searches at the border.<sup>235</sup> Under *Touset's* ruling, suspicionless searches provide agents ample discretion.<sup>236</sup> Instead of narrowing forensic searches to possible bad actors, *Touset's* holding has the potential to intrude on the general public's privacy interests.<sup>237</sup> In the absence of a suspicion requirement, border

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

231. *Martinez-Fuerte*, 428 U.S. at 560.

232. Theodore Levitt, an academic at Harvard Business School, has described employee discretion "as the enemy of order, standardization, and equality." THEODORE LEVITT, *MARKETING FOR BUSINESS GROWTH* 56 (1974). Levitt suggested employee discretion is controlled by employee motivation, organizational commitment, knowledge, and mood states. *Id.* He suggested that procedures that increase employee motivation and happiness lead to less deviant behavior. *Id.* Therefore, establishing policies that promote positivity and understanding at the border may control agent discretion. See Scott W. Kelley, *Discretion and the Service Employee*, U. KY. J. RETAILING (1993).

233. See *Martinez-Fuerte*, 428 U.S. at 554 (defining the purpose of permanent traffic stops); KIM, *supra* note 11, at 1 (defining the purpose of the border-search exception).

234. See generally *Martinez-Fuerte*, 428 U.S. at 558.

235. See generally Andrew Guthrie Ferguson, *Predictive Policing and Reasonable Suspicion*, 62 EMORY L.J. 259 (2012).

236. Because agents do not have to articulate specific facts or circumstances to conduct a search, agents' discretion can go unchecked. See generally *id.*

237. *CBP Search Authority*, *supra* note 203 (emphasizing that even with targeting techniques, agent suspicion is sometimes unfounded).

agents need no justification for conducting a forensic search.<sup>238</sup> The *Martinez-Fuerte* Court specifically discouraged this type of intrusion.<sup>239</sup> This unfettered agent discretion creates more room for incidental or intentional harassment.<sup>240</sup> Additionally, crossing the border inconveniences individuals because they do not know if they will be forensically searched, what information will be accessed, the duration of the search, or when their devices will be returned.<sup>241</sup> Lacking this information could result in unexpected missed flights or other aggravations. In short, suspicionless digital forensic searches create vast unpredictability.<sup>242</sup> Applying the reasonableness factors from *Martinez-Fuerte*, it appears suspicionless forensic searches could lead to unconstrained agent discretion, making searches less reasonable under the Fourth Amendment.

Under *Cotterman* and *Kolsuz*'s reasoning, requiring reasonable suspicion creates more predictability in the border search context.<sup>243</sup> Border entrants are informed why they are subjected to a forensic search, which may give them a better understanding of what content will be revealed during the search and what questions they will be asked.<sup>244</sup> Additionally, innocent border entrants are confident that agents will not unreasonably search their devices because border agents must provide

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238. See generally *United States v. Touset*, 890 F.3d 1227, 1230 (11th Cir. 2018).

239. *Martinez-Fuerte*, 428 U.S. at 560.

240. See generally *Martinez-Fuerte*, 428 U.S. at 558.

241. Because the public is not warned of the potential inconvenience, and agents do not need to articulate why they are forensically searching an individual's electronic devices, information is not readily available. See *supra* Section III.A.2.

242. Written rules and regulations give employees little autonomy. Procedure makes employee behavior more predictable because employees respond to problems in similar ways across the organization, which leads to consistency and efficiency. Consequently, unpredictability leaves more opportunity for inconsistency. See generally MASON CARPENTER ET AL., *PRINCIPLES OF MANAGEMENT* (2012).

243. See *United States v. Kolsuz*, 890 F.3d 133, 147 (4th Cir. 2018) (holding that agents must have reasonable suspicion to conduct a digital forensic search at the border). Because reasonable suspicion requires agents to articulate specific facts and circumstances for conducting a search, border entrants are provided with more information, which makes the detention and search of entrants' devices more predictable. See generally *id.*

244. See *Terry v. Ohio*, 392 U.S. 1 (1968) (stating that because reasonable suspicion requires officers to describe a specific set of circumstances that would lead any objectively reasonable law enforcement officer to suspect the individual is engaged in criminal activity, there is more information available).

justification for searches or seizures.<sup>245</sup> Parsing prior caselaw, limiting agent discretion by procedure or a reasonable search requirement appears to decrease unreasonable searches.<sup>246</sup> When evaluating the reasonableness of the procedure used to implement a forensic search, courts should also consider the state's interest in preventing certain types of harm.

### *C. Public Safety and Reasonable Forensic Searches*

Courts often consider public safety when evaluating the reasonableness of a suspicionless search or seizure.<sup>247</sup> When assessing the reasonableness of digital forensic searches at the border, courts should inquire as to the kind, degree, and imminence of harm the state aims to prevent.<sup>248</sup> If the digital forensic search at the border was unnecessary to prevent the type of harm at stake, the search should be deemed less reasonable.<sup>249</sup>

In *Skinner v. Railway Labor Executives' Association*, the Supreme Court ruled that suspicionless searches do not violate the Fourth Amendment when law enforcement needs to render probable cause and warrant requirements impracticable.<sup>250</sup> In *Skinner*, a railway association filed suit to challenge the constitutionality of suspicionless employee alcohol and drug tests.<sup>251</sup> The Court considered the risks railroad operations pose and concluded that suspicionless drug tests of railroad employees are reasonable because the government has a strong public safety interest in regulating railroad employees' conduct.<sup>252</sup> Furthermore, "one undetected instance of wrongdoing could have injurious consequences for a great number of people . . . [and] even one drug-or alcohol-impaired train operator can lead to the 'disastrous consequences' of a train wreck."<sup>253</sup> The Court also acknowledged that if a reasonable suspicion requirement would not place the government's objectives in jeopardy, the requirement should

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245. See generally *id.* at 1.

246. See *United States v. Martinez-Fuerte*, 428 U.S. 555 (1976) (listing factors that contribute to a reasonable suspicionless search at the border).

247. See *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989).

248. See generally *id.* at 634 (noting that the type and imminence of harm at stake are critical factors in making suspicionless searches reasonable).

249. See *id.* at 602.

250. *Id.*

251. *Id.* at 607.

252. *Id.* at 620.

253. "Blanket" of "General" Suspicionless Searches Held Intolerable and Unreasonable, LAWREADER (Dec. 31, 2016), <https://lawreader.com/?p=17291#BORDERDETENTION> [<https://perma.cc/TVM3-7FA7>] (quoting *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989)).



stand.<sup>254</sup> The government was therefore justified in implementing the drug tests without suspicion because it sought to prevent intoxicated railway operators from causing serious harm.<sup>255</sup>

Courts disagree on the types of public safety concerns that validate a suspicionless search.<sup>256</sup> Although Congress primarily created the CBP to protect society from terrorist threats, courts have ruled that a general threat of terrorism, as opposed to a specific threat, cannot justify a suspicionless search or seizure.<sup>257</sup> In *Bourgeois v. Peters*, a city instituted a policy mandating individuals engaged in annual protests on public property to submit to a search before entering the protest area.<sup>258</sup> The court reasoned that a general threat of terrorism cannot justify a suspicionless search.<sup>259</sup> According to the Eleventh Circuit, the city could not subject innocent people who show no indication of possessing contraband or weapons to a search.<sup>260</sup> Additionally, the court reasoned that “a search intended to enforce a given law would be permissible so long as the government officially maintained that its purpose was to secure the objectives that motivated the law’s enactment in the first place (e.g., public safety) . . .”<sup>261</sup> Because the degree of harm is minimal absent a definite, imminent threat of terrorism, citizens’ right to be free from unreasonable searches and seizures outweighs the government’s interests in national security.<sup>262</sup>

The *Bourgeois* court did not discuss airport or border searches, but, months later, a New York federal district court in *Stauber v. City of New York* differentiated between security threats at populous protests and airports.<sup>263</sup> The *Stauber* court emphasized that, unlike a “general invocation of terrorist threats,” airport searches are “implemented in

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254. *Skinner*, 489 U.S. at 624.

255. *See id.* at 602.

256. *See Bourgeois v. Peters*, 387 F.3d 1303, 1307 (11th Cir. 2004); *Stauber v. City of New York*, 2004 U.S. Dist. LEXIS 13350, at \*3 (S.D.N.Y. July 19, 2004).

257. *Preventing Terrorism Overview*, HOMELAND SEC., <https://www.dhs.gov/topic/preventing-terrorism> [<https://perma.cc/GY5X-R6HC>] (last visited Oct. 13, 2018); *see Bourgeois*, 387 F.3d 1303.

258. *Bourgeois*, 387 F.3d at 1307. The search was similar to airport screening: each person had to walk through a metal detector.

259. *Id.* at 1316.

260. *Id.* at 1311.

261. *Id.* at 1313.

262. *Id.* at 1311. If searches were justified by general threats of terrorism, the government could conduct suspicionless searches at almost any large event. *Id.*

263. *Stauber v. City of New York*, 2004 U.S. Dist. LEXIS 13350, at \*3 (S.D.N.Y. July 19, 2004).

response to specific information about the threats faced by officials.”<sup>264</sup> As a result, CBP agents must respond to real and concrete threats at airports.<sup>265</sup> Absent reasonable suspicion, forensic searches at the border mirror a tool used to combat general terrorism more than an enforcement tool used to contest specific threats—a situation the court deemed unreasonable in *Bourgeois*. By engaging in risk assessment and identifying specific threats at the border prior to conducting a forensic search, government agents ensure their actions comply with the Fourth Amendment.

*1. Clarifying the Meaning of “Reasonable Suspicion” in the Public Safety Context*

By considering public safety in a Fourth Amendment reasonableness analysis, courts can provide clarity to the abstract concept of reasonable suspicion in the border search context. Neither *Cotterman* nor *Kolsuz* clarified if the relevant question for courts is: (1) whether CBP agents had reasonable suspicion that evidence was presently on the digital device they seized; or (2) whether the CBP agents had reasonable suspicion to believe the digital device’s owner was currently engaged in criminal activity at the border.<sup>266</sup> If the government is aiming to prevent digital contraband from entering the state, the proper inquiry should be the former: whether CBP agents had reasonable suspicion that contraband was on the digital device itself.<sup>267</sup> Otherwise, anyone could simply ship their devices or give them to a third party to avoid a border search.<sup>268</sup> Under this reasoning, a digital forensic search conducted in response to suspicion that an individual is engaged in child pornography would be more reasonable than a digital forensic search conducted on someone who is caught smuggling, for example, illegal cigarettes. Consequently, courts must determine if CBP agents gathered sufficient facts to believe an individual posed a danger to

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264. *Id.* at \*83–84.

265. *Id.*

266. *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir. 2013); *United States v. Kolsuz*, 890 F.3d 133, 147 (4th Cir. 2018).

267. Orin Kerr, *Every Computer Border Search Requires Case-by-Case Reasonableness, DC Court Holds*, WASH. POST (Mar. 12, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/12/every-computer-border-search-requires-case-by-case-reasonableness-dc-court-holds/?utm\\_term=.6feb512e87d1](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/12/every-computer-border-search-requires-case-by-case-reasonableness-dc-court-holds/?utm_term=.6feb512e87d1) [<https://perma.cc/RP97-AH4M>].

268. *Id.*

society and to evaluate if the specific digital forensic search was necessary to stop the harm at risk.<sup>269</sup>

## 2. *The Circuit Split's Impact on Public Safety*

Under *Cotterman* and *Kolsuz*'s rulings that digital forensic searches require reasonable suspicion, courts must decipher the kind and degree of harm that the CBP was attempting to prevent when conducting the search. For example, if an agent receives notice that the government is investigating an individual for child pornography, his search is more likely to be reasonable because it intends to prevent a serious harm.<sup>270</sup>

On the contrary, if an agent conducts a digital forensic search without suspicion, the agent may be unaware of the kind and degree of harm, if any, he is trying to prevent.<sup>271</sup> Furthermore, the government may be able to prevent that harm by performing less invasive searches. In short, conducting forensic searches on individuals who present no risk or threat abuses the purpose of the border search exception and leads to unreasonable government surveillance.<sup>272</sup>

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269. The first inquiry into the proposed public safety test is equivalent to reasonable suspicion. Reasonable suspicion is "a particularized and objective basis for suspecting the particular person" of wrongdoing. *United States v. Montoya de Hernandez*, 473 U.S. 541, 541 (1985) (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

270. A violation of a federal child pornography law is a serious crime, and convicted offenders serve years in prison. *Citizen's Guide to U.S. Federal Law on Child Pornography*, U.S. DEP'T OF JUST., <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography> [<https://perma.cc/3KWW-6N2T>] (last updated December 12, 2017). Digital forensic searches for this purpose seek to prevent severe abusive and sexual harm to minors. *Id.*

271. Without suspicion, there may not be articulated facts or circumstances to identify what contraband the government is seeking.

272. Border searches are considered administrative searches, or searches that are carried out to enforce compliance with regulations or laws pertaining to security or health. *See People v. Madison*, 520 N.E.2d 374 (Ill. 1988). The government may not use an administrative inspection to search for evidence of criminal violations. *Id.* A suspicionless forensic search of an individual's electronic device could potentially transform into a tool used to generally fight crime, instead of a tool used to prevent contraband from entering the United States. *See generally id.*

#### *D. Policy Considerations*

Suspicionless digital forensic searches at the border have wide-ranging consequences in other areas of the law, as well as to the economy as a whole, that CBP must take into account.<sup>273</sup> In particular, suspicionless searches often affect claims of intentional discrimination under the equal protection clauses of the Fifth and Fourteenth Amendments and result in CBP resource depletion.<sup>274</sup>

##### *1. The Circuit Split's Impact on Equal Protection*

As the government passes new laws and regulations to monitor immigration and foreign travel, border security intensifies, and searches of electronic devices at the border continue to escalate.<sup>275</sup> Disagreement on the handling of race relations and immigration persists.<sup>276</sup> If CBP agents do not need any suspicion to conduct a digital forensic search as stipulated

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273. See generally *Janfeshan v. United States Customs & Border Prot.*, No. 16-CV-6915(ARR)(LB), 2017 U.S. Dist. LEXIS 151058 (E.D.N.Y. Aug. 21, 2017).

274. *Title VI Legal Manual—Section VI: Proving Discrimination—Intentional Discrimination*, U.S. DEP'T JUST., <https://www.justice.gov/crt/fcs/T6Manual6> [<https://perma.cc/7Q29-4X7S>] (last updated Feb. 10, 2017) (“[A] discriminatory intent claim alleges that a recipient intentionally treated persons differently or otherwise knowingly caused them harm because of their race, color, or national origin.”). The Fifth and Fourteenth Amendments seek to limit the power of the government to discriminate. The Fifth Amendment explicitly requires the federal government not to deprive individuals of life, liberty, or property without due process of law and contains a guarantee that each person receives equal protection of the laws. U.S. CONST. amend. V. Similarly, the Fourteenth Amendment prohibits states from depriving citizens of due process or equal protection. U.S. CONST. amend. XIV.

275. See *President Donald J. Trump's Administration Is Working to Build Stronger Borders*, WHITE HOUSE (Mar. 13, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-administration-working-build-stronger-borders/> [<https://perma.cc/DJ2K-FTY9>].

276. Anthony Salvanto, *Poll: One Year After Charlottesville, Majority of Americans See Racial Tensions on the Rise*, CBS NEWS (Aug. 12, 2018), <https://www.cbsnews.com/news/poll-one-year-after-charlottesville-americans-see-racial-tensions-on-increase/> [<https://perma.cc/TH6T-EZVX>] (finding 61% of Americans believe racial tensions have increased in the last year and 58% of Americans disagree with President Trump's handling of racial issues).

in *Touset*, they may forensically search a person's devices solely on the basis of their ethnicity, nationality, or background.<sup>277</sup>

In addition to criminal lawsuits, private parties are beginning to challenge the constitutionality of digital forensic searches in civil suits. Recently, courts have confronted intentional discrimination and selective enforcement claims involving digital forensic searches at the border.<sup>278</sup> In November of 2016, Hemad Janfeshan, a lawful permanent resident of the United States, arrived at Kennedy International Airport in New York after traveling abroad in Egypt and Yemen for 16 months with his wife and children.<sup>279</sup> After deplaning, CBP agents apprehended Janfeshan to obtain information about his travels and escorted him to a separate room to conduct a full body search.<sup>280</sup> After consistently asking Janfeshan about his religion, the agents asked for Janfeshan's passcode to his smartphone.<sup>281</sup> Janfeshan refused to reveal his passcode, alleging that he had confidential information protected by attorney-client privilege on his device.<sup>282</sup> Instead of conducting a manual search, the agents retained his smartphone for six weeks and conducted a forensic examination of its contents.<sup>283</sup> Janfeshan filed suit and alleged a violation of his Fourth and

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277. The Transportation Security Agency (TSA) is a branch of the DHS that controls the security of the traveling public in the United States. TSA documents reveal a disproportionate focus on or bias against Muslims, Arabs, and people of Middle Eastern descent. Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable – But Still It Continues*, ACLU (Feb. 8, 2017, 11:45 AM), <https://www.aclu.org/blog/national-security/discriminatory-profiling/new-documents-show-tsa-program-blamed-profiling> [<https://perma.cc/4Z5V-3KCU>]. Further, records of investigations into alleged profiling behavior by TSA detection officers revealed that many officers refer minority passengers for additional screening more than others. *Id.* Giving CBP agents discretion to search individuals without justification could lead to implicit prejudice. Agents may unintentionally discriminate based on subconscious ideas and associations. *See generally* Calvin K. Lai et al., *Reducing Implicit Prejudice*, 7 SOC. & PERSONALITY PSYCHOL. COMPASS 315 (2013).

278. *See Janfeshan*, 2017 U.S. Dist. LEXIS 151058.

279. *Id.* at \*2–3.

280. *Id.* at \*3.

281. *Id.* at \*4.

282. *Id.* The border agents told Janfeshan that if he gave the agents his passcode, they would be able to conduct a forensic search that day and he would be able to take his phone home. *Id.* Because Janfeshan refused to provide the confidential information to access his device, the agents retained his phone for two weeks. *Id.*

283. *Id.* The technology used to forensically search devices does not require the suspect's passcode to effectively conduct the search. *See generally Forensic*

Fifth Amendment rights.<sup>284</sup> Specifically, Janfeshan alleged the agents questioned him and forensically searched his phone because he was a Muslim of Afghan origin.<sup>285</sup>

The district court judge concluded that Janfeshan adequately pleaded a Fifth Amendment intentional discrimination claim, articulating that “it is reasonable to infer from the agent’s focus on Janfeshan’s faith and national origin in his questioning that he subjected Janfeshan to extensive questioning and then decided to seize and search his phone at least in part because of those protected characteristics.”<sup>286</sup> Janfeshan’s case survived an early motion to dismiss, revealing that the court recognized unfettered agent discretion of digital forensic searches could lead to unreasonable and prejudiced searches.<sup>287</sup> As *Janfeshan* illustrates, intentional discrimination at the border posed a problem even before *Touset*’s ruling.<sup>288</sup> Allowing law enforcement officers to conduct forensic searches at the border without any suspicion only justifies and encourages discriminatory behavior similar to *Janfeshan*. Furthermore, freely permitting suspicionless forensic searches puts CBP resources at stake.

## 2. The Circuit Split’s Impact on CBP Resource Optimization

A structured reasonableness test could serve to alleviate the stress on CBP resources.<sup>289</sup> In 2015 and 2016, CBP agents processed more than 380 million arriving travelers.<sup>290</sup> To accommodate these numbers, the CBP needs to increase agents. Nonetheless, border patrol staffing has steadily declined since 2011.<sup>291</sup> According to the Government Accountability

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*Examination of Digital Devices in Civil Litigation: The Legal, Ethical and Technical Traps*, ABA (June 14, 2017), [https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-1/forensic\\_examination\\_digital\\_devices\\_civil\\_litigation\\_legal\\_ethical\\_and\\_technical\\_traps/](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/forensic_examination_digital_devices_civil_litigation_legal_ethical_and_technical_traps/) [<https://perma.cc/8HFC-KNTM>]. Because Janfeshan refused to relinquish his passcode for the manual search, the border agents conducted the forensic search. See *Janfeshan*, 2017 U.S. Dist. LEXIS 151058.

284. See *Janfeshan*, 2017 U.S. Dist. LEXIS 151058, at \*11.

285. *Id.* at \*25.

286. *Id.* at \*27–28.

287. See *id.*

288. *Janfeshan* was filed before *Touset* was decided. See *id.*

289. Gasior, *supra* note 200.

290. Patrick G. Lee, *What Customs and Border Officials Can and Can’t Do*, PAC. STANDARD (Mar. 13, 2017), <https://psmag.com/news/what-customs-and-border-officials-can-and-cant-do> [<https://perma.cc/6CHF-A6RS>].

291. *Border Patrol Agent Nationwide Staffing by Fiscal Year*, U.S. BORDER PATROL, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP>

Office report, CBP was more than 1,100 officers short in 2017 due to competition and attrition.<sup>292</sup>

Political leaders are aware of CBP's lack and misuse of resources.<sup>293</sup> Representative Bennie Thompson, a democratic member of the House Homeland Security Committee, stated that "if CBP was able to prioritize the staffing and infrastructure of our border, we would be able to better process individuals at the border."<sup>294</sup> Additionally, this lack of resources has led to overworked CBP employees, which negatively impacts agent behavior and leads to deviant discretion.<sup>295</sup>

Thus, in a time of dwindling CBP capacity, effective procedure limiting agent discretion can create predictable resource management.<sup>296</sup> Forensic searches are more costly and time-consuming than manual searches,<sup>297</sup> and border patrol does not have the capability to conduct meaningless digital forensic searches.<sup>298</sup> By eliminating the need for CBP agents to justify their forensic searches at the border, agents may forensically search innocent civilians, which leads to inefficiency and frivolous searches.<sup>299</sup>

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%20Staffing%20FY1992-FY2017.pdf [https://perma.cc/XHX3-YUSX] (last updated Dec.12, 2017).

292. CBP faced challenges deploying agents because of these staffing shortages. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-618, CUSTOMS AND BORDER PROTECTION: IMPROVED PLANNING NEEDED TO STRENGTHEN TRADE ENFORCEMENT (2017). In 2017, the CBP did not meet its authorized staffing levels for its trade positions. *Id.*

293. Joe Davidson, *Immigration Cop Shortage and a Caution Against Hiring Too Quickly*, WASH. POST (July 23, 2018), [https://www.washingtonpost.com/news/powerpost/wp/2018/07/23/immigration-cop-shortage-a-caution-against-hiring-too-quickly/?utm\\_term=.08173e4effce](https://www.washingtonpost.com/news/powerpost/wp/2018/07/23/immigration-cop-shortage-a-caution-against-hiring-too-quickly/?utm_term=.08173e4effce) [https://perma.cc/GF8J-27GT].

294. *Id.*

295. *Discretion and the Service Employee*, U. KY. J. RETAILING (1993) (stating that employee discretion is controlled by employee motivation, organizational commitment, knowledge, and mood states); Davidson, *supra* note 293.

296. *See infra* Part IV.

297. *See* United States v. Saboonchi, 990 F. Supp. 2d 536, 547 (D. Md. 2014).

298. *See* Davidson, *supra* note 293.

299. *CBP Search Authority*, *supra* note 203 (explaining that agents use techniques such as technology to track suspicious activity). Without a requirement of suspicion, agents do not rely on facts to forensically search an individual. *Id.* Instead, agents rely on their own discretion. *Id.* This reliance leaves ample room for mistakes.

Hiring more CBP agents appears to be the best solution to CBP's resource problem.<sup>300</sup> A 2017 American Immigration Council<sup>301</sup> report, however, stated that "the last time the Border Patrol received a large infusion of money to hire thousands of new agents, cases of corruption and misconduct spiked in the agency. New hires were not sufficiently vetted, novice agents were not adequately supervised, and agents who abused their authority acted with impunity."<sup>302</sup> Consequently, if CBP hires more border agents to account for the increase in comprehensive searches, the possibility of misconduct and corruption would also increase.<sup>303</sup> This potential for misconduct is even more alarming in the forensic search context due to the sensitive nature of the information accessed during a forensic analysis.<sup>304</sup> The unpredictability associated with creating suspicionless forensic searches in a time of advancing technology could lead to larger problems, such as discrimination.<sup>305</sup> For these reasons, courts should analyze the impact that procedure has on resource optimization when considering the reasonableness of a digital forensic search at the border.

#### IV. CLEARLY DEFINING REASONABLE DIGITAL FORENSIC SEARCHES

Whether digital forensic searches are implemented through reasonable suspicion of criminal activity or no suspicion at all, they must pass the Fourth Amendment's general test of reasonableness.<sup>306</sup> Reasonableness—the "touchstone of the constitutionality of a governmental search"—

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300. Davidson, *supra* note 293.

301. The American Immigration Council is a non-profit that collects facts and statistics to educate the public on immigration in America. The American Immigration Council frequently reports on the effects of immigration policies. *About the American Immigration Council*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/about/our-mission> [https://perma.cc/CD23-2724] (last visited Oct. 26, 2018).

302. Davidson, *supra* note 293.

303. Between 2006 and 2009, CBP hired 8,000 new agents. Josiah Heyman, *Why Caution Is Needed Before Hiring Additional Border Patrol Agents and ICE Officers*, AM. IMMIGR. COUNCIL (Apr. 24, 2017); Davidson, *supra* note 293. The number of CBP employees arrested for misconduct increased 44% between 2007 and 2012. *Id.*

304. *United States v. Saboonchi*, 990 F. Supp. 2d 536, 548 (D. Md. 2014).

305. *See Janfeshan v. United States Customs & Border Prot.*, No. 16-CV-6915(Arr)(LB), 2017 U.S. Dist. LEXIS 151058, at \*3 (E.D.N.Y. Aug. 21, 2017).

306. *See generally* U.S. CONST. amend. IV (protecting individuals from unreasonable searches and seizures).



depends on the totality of circumstances.<sup>307</sup> Generally, reasonableness involves balancing the need for a search against an individual's reasonable privacy interests.<sup>308</sup> This standard, however, has proven impractical and has led to inconsistent law for digital forensic border searches.<sup>309</sup> Although courts must interpret reasonableness in light of established Fourth Amendment principles, the constitutionality of digital forensic searches has been determined by courts' personal opinions about the governmental and privacy interests at stake.<sup>310</sup>

A solution to the nation's conflicting law involving digital forensic searches at the border lies in a principled multi-factor reasonableness test, which courts should apply on a case-by-case basis. Using this test, courts should analyze the reasonableness under the Fourth Amendment by balancing the duration and procedure of the search with the harms that the state aims to prevent by conducting the search. In turn, CBP discretion will be limited, minimizing the likelihood of intentional discrimination and selective enforcement at the border. Further, CBP resources will be efficiently distributed. A more structured reasonableness test will make the criteria for evaluating digital forensic searches more predictable and place a limitation on court and agent discretion.<sup>311</sup>

#### *A. Duration*

The first factor courts should consider involves examining the duration of the digital forensic search.<sup>312</sup> In analyzing duration, courts should focus on CBP agent behavior during the detention of the border entrant's electronic devices. Particularly, analyzing agents' due diligence in pursuing the forensic search, reviewing the quality of information given to the suspect, and considering the number of agents available to conduct the forensic search during the detention period will advise courts on the reasonableness of the search's duration.<sup>313</sup>

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307. *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002).

308. KIM, *supra* note 11.

309. *See generally* *United States v. Cotterman*, 637 F.3d 1068 (9th Cir. 2011); *United States v. Touse*, 890 F.3d 1227 (11th Cir. 2018); *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018).

310. *Bourgeois v. Peters*, 387 F.3d 1303, 1313 (11th Cir. 2004).

311. The multi-factor reasonableness test is illustrative. Other factors may be considered, especially in light of the scope of the forensic search.

312. *Supra* Section II.A.

313. *Supra* Section II.A.

Due diligence refers to “earnest and persistent application to accomplish something.”<sup>314</sup> An agent acts diligently in a forensic search when he or she exercises reasonable care to avoid harm to the individual or their property.<sup>315</sup> CBP agents diligently pursuing a forensic search should arrange their investigation to minimize the intrusion on an individual’s Fourth Amendment interests.<sup>316</sup> Indeed, agents acting with diligence plan their courses of action and pursue it with great attention and vigor.<sup>317</sup> Agents failing to exercise due diligence unnecessarily prolong forensic searches or may damage electronic devices due to their carelessness or negligence.<sup>318</sup> For example, the agent who forensically searched Mr. Alasaad’s phone in *Alasaad v. Nielson* did not act with due diligence because the agent’s search destroyed Mr. Alasaad’s graduation video. In this instance, the agent conducted a less-reasonable search of Mr. Alasaad’s phone.<sup>319</sup>

Moreover, a forensic search is more reasonable when CBP agents give the suspect quality information regarding the duration and purpose of the search.<sup>320</sup> An agent’s failure to inform the suspect where they are taking the electronic devices, how long they are keeping the devices, and how they will return the devices exacerbates an unreasonable search.<sup>321</sup> Quality information establishes predictability, which creates less inconvenience for suspects.<sup>322</sup> In the Alasaads’ case, the officers did not inform the Alasaads why they were being searched or precisely how long the search would take.<sup>323</sup> Under these circumstances, the search was more unreasonable because the agents subjected the Alasaads to a disruption in their travel plans without any indication of whether to wait for their phones or leave them behind.<sup>324</sup>

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314. *Diligence Law and Legal Definition*, US LEGAL, <https://definitions.uslegal.com/d/diligence/> [<https://perma.cc/DTC2-BHST>] (last visited Oct. 14, 2018).

315. *Id.*

316. *See generally* United States v. Place, 462 U.S. 696 (1983) (describing a disorganized plan to search as a lack of agent diligence).

317. *Id.*

318. *See generally id.* (describing an unnecessarily prolonged search as unreasonable because the agents failed to act diligently).

319. *See id.*

320. *Supra* Section III.A.2.

321. *Supra* Section III.A.2.

322. *Supra* Section III.A.2.

323. *Alasaad v. Nielson*, No. 17-CV-11730-DJC, 2018 WL 2170323, at \*5 (D. Mass. May 19, 2018).

324. *See generally id.*

Courts should also consider the number of CBP agents available to conduct the search.<sup>325</sup> In many instances, there are a limited number of agents certified in computer forensics, thus requiring more time for agents to forensically search devices.<sup>326</sup> If the government produces evidence that the limited number of available agents caused the search duration to be more prolonged, courts may deem the forensic search more reasonable.<sup>327</sup> On the contrary, if the government fails to show a relationship between the limited number of agents and the duration of the search, the search is more likely unreasonable.<sup>328</sup>

Lastly, criminal defendants may present expert testimony from a forensic investigator suggesting the unreasonableness of a given search.<sup>329</sup> An expert's specialized opinion can clarify whether agents acted diligently or whether the number of available agents reasonably prolonged a search. Taking agent diligence, quality information, and the number of available agents into account, courts will analyze the reasonableness of the duration of a forensic search fairly, consistently, and lawfully.

### *B. Procedure*

When determining a search's reasonableness, courts should also analyze the procedure used to implement and conduct the digital forensic search.<sup>330</sup> Focusing on agent discretion, predictability, and resource optimization will direct courts' attention to the reasonable or unreasonable execution of a digital forensic search.<sup>331</sup>

Discretion is a key component to border enforcement. Courts should evaluate agents' vigilance in deciding what and whose devices to forensically search<sup>332</sup> because unfettered discretion may lead to harassment or agent abuse during digital forensic searches.<sup>333</sup> Some discretion, however, is unavoidable because the law cannot anticipate

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325. See *House v. Napolitano*, No. 11-10852-DJC, 2012 WL 1038816 (D. Mass. Mar. 28, 2012) (stating that the number of agents available during a search affects the reasonableness of the search).

326. *Id.*

327. *Supra* Section III.A.2.

328. *Supra* Section III.A.2.

329. *House v. Napolitano*, No. 11-10852-DJC, 2012 WL 1038816, at \*9 (D. Mass. Mar. 28, 2012) (presenting defendant's expert testimony that showed the duration of the search was unreasonable under the circumstances).

330. *Supra* Section II.B.

331. *Supra* Section II.B.

332. Levitt, *supra* note 232.

333. *United States v. Martinez-Fuerte*, 428 U.S. 555, 560 (1976).

every event at the border.<sup>334</sup> Forensic searches take longer, are less routine, and are more intrusive than permanent checkpoints.<sup>335</sup> Consequently, society must trust competent agents to exercise discretion to avoid prejudice or inequality.<sup>336</sup> CBP agents should make similar decisions in similar cases to prevent disparity in the law.<sup>337</sup> Nevertheless, agents sometimes intentionally or inadvertently abuse their discretion and needlessly infringe an individual's rights.<sup>338</sup> To illustrate, if CBP agents use their discretion to target individuals based on nationality or conduct a forensic search simply because "they feel like it," courts should find the search unreasonable.<sup>339</sup> Courts should consider how and why CBP agents conducted a digital forensic search on a case-by-case basis to legitimize the reasonableness of the forensic search.<sup>340</sup>

Moreover, CBP could use systematic sampling<sup>341</sup> or other probability methods to limit agent discretion at the border.<sup>342</sup> Systematic sampling is a type of probability sampling method by which members of a population are selected according to a random starting point but with a fixed, periodic interval.<sup>343</sup> Using this sampling method allows each person crossing international borders to have a known and equal probability of selection.

In sum, predictable digital forensic searches are more reasonable.<sup>344</sup> Policies and procedures create certainty and put people on notice of the possibility of a forensic search.<sup>345</sup> Notice reduces travelers' expectations of privacy, which would therefore make a forensic search more

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334. Jon Roland, *Abuse of Judicial Discretion*, CONST. SOC'Y, [http://www.constitution.org/abus/discretion/judicial/judicial\\_discretion.htm](http://www.constitution.org/abus/discretion/judicial/judicial_discretion.htm) [<https://perma.cc/TL92-GNZJ>] (last visited Oct. 14, 2018).

335. *Martinez-Fuerte*, 428 U.S. at 555.

336. Roland, *supra* note 334.

337. *Id.*

338. *See, e.g., Martinez-Fuerte*, 428 U.S. at 560.

339. Targeting based on nationality may lead to intentional discrimination or selective enforcement, both of which violate the equal protection clauses of the Fifth and Fourteenth Amendments. U.S. CONST. amends. V, XIV.

340. *Supra* Section III.B.

341. Adam Hayes, *Systematic Sampling*, INVESTOPEDIA (Mar. 20, 2019), <https://www.investopedia.com/terms/s/systematic-sampling.asp> [<https://perma.cc/PQC7-3MYX>].

342. An agent could derogate from the systematic sampling method if he forms reasonable suspicion to forensically search an individual's digital device. *See generally id.*

343. *Id.*

344. *See, e.g., Martinez-Fuerte*, 428 U.S. at 560 (holding predictability limits agent discretion).

345. Gasior, *supra* note 200.

reasonable.<sup>346</sup> Courts should determine the border entrant's expectation of privacy and the notice provided to the entrant before he or she crossed the border.<sup>347</sup> Using these considerations, travelers would be protected from unconstitutional or frivolous searches and seizures at the border.

### C. Harms at Stake

Courts should lastly consider public safety through a multi-factor reasonableness analysis<sup>348</sup> that analyzes the kind, degree, and imminency of harm the state is trying to prevent with the search.<sup>349</sup> The more important the harms at stake, the more likely the court should find the resultant searches reasonable.<sup>350</sup>

An ideal public safety analysis occurs in two steps. First, courts would determine if CBP agents gathered facts to believe an individual posed a danger to society.<sup>351</sup> Second, courts would evaluate whether the digital forensic search was necessary to stop the harm at risk. In many cases, manual searches can prevent certain harms.<sup>352</sup> For example, a digital forensic search of an individual that the government suspects is bringing batteries or knitting needles onto an airplane may not be necessary to prevent harm. On the other hand, a digital forensic search of an individual suspected of internet fraud or identity theft would likely be reasonable considering the location of possible incriminating evidence.<sup>353</sup>

Using the foregoing factors, a digital forensic search at the border is more likely to be reasonable under *Cotterman* and *Kolsuz*'s rulings. Even a suspicionless forensic search, however, must meet the Fourth

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346. See generally KIM, *supra* note 11.

347. *Supra* Section III.B.

348. *Supra* Section III.C.

349. See *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989) (holding suspicionless drug tests of railroad operators were necessary and reasonable to protect the public).

350. *Supra* Section III.C.

351. The first step to the proposed public safety analysis is equivalent to reasonable suspicion. Reasonable suspicion is "a particularized and objective basis for suspecting the particular person" of wrongdoing. *United States v. Montoya de Hernandez*, 473 U.S. 541, 541 (1985) (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

352. See generally *United States v. Saboonchi*, 990 F. Supp. 2d 536, 552 (D. Md. 2014).

353. *Scams and Safety: Internet Fraud*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/scams-and-safety/common-fraud-schemes/internet-fraud> [<https://perma.cc/6DJT-RMWU>] (last visited Oct. 27, 2018).

Amendment's long-standing reasonableness requirement.<sup>354</sup> Courts should use this test even under *Touset*'s ruling to reduce prejudiced border enforcement. It is crucial that courts have some mechanism to prevent race, nationality, and other socioeconomic characteristics from affecting the execution of forensic searches.<sup>355</sup> A structured reasonableness test gives courts a tool to eliminate potential discrimination caused by implicit or explicit agent bias.<sup>356</sup> Furthermore, limiting agent discretion will ensure the efficient use of CBP resources.<sup>357</sup>

### CONCLUSION

Adopting a structured multi-factor reasonableness test to determine the reasonableness of a digital forensic search under the Fourth Amendment will provide redress to individuals and families, such as the Alasaads.<sup>358</sup> In a time at which digital searches at the nation's border are increasing,<sup>359</sup> courts and agents need principled guidance to salvage Fourth Amendment protections in a technology-driven society.<sup>360</sup> Courts should use a principled test to analyze the reasonableness of digital forensic searches.<sup>361</sup> Agent diligence, the quality of information available, and resource optimization are just a few of many specific factors courts can use to accurately and fairly analyze the reasonableness of digital forensic searches at the border.<sup>362</sup> By using this test, courts will provide a principled distinction between reasonable and unreasonable digital forensic searches, delivering clarity to a part of the Fourth Amendment search and seizure analysis that courts have overlooked for some time.<sup>363</sup>

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354. *See generally* U.S. CONST. amend. IV.

355. *Supra* Section III.D.1.

356. *Supra* Section III.C.2.

357. *Supra* Section III.D.2.

358. *Alasaad v. Nielson*, No. 17-CV-11730-DJC, 2018 WL 2170323, at \*5 (D. Mass. May 19, 2018).

359. *Currie et al.*, *supra* note 23.

360. Karehka Ramey, *Technology and Society – Impact of Technology on Society*, TECHUCATION (Nov. 12, 2012), <https://www.useoftechnology.com/technology-society-impact-technology-society/> [<https://perma.cc/JXB9-FDCH>].

361. *Supra* Part III.

362. *See United States v. Place*, 462 U.S. 696, 710 (1983) (considering agent diligence and the quality of information available to the border entrant as factors contributing to the reasonableness of a search).

363. *Supra* Section III.B.