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# Border Searches for Investigatory Purposes: Implementing a Border Nexus Standard

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# BORDER SEARCHES FOR INVESTIGATORY PURPOSES: IMPLEMENTING A BORDER NEXUS STANDARD

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Abstract

*Border searches are a commonly used exception to the Fourth Amendment's probable cause and warrant requirements. Using a border search, the government can conduct searches of individuals without any kind of individualized suspicion. Border searches pose a concerning risk to privacy when they are used as a tool for criminal investigations. The Supreme Court has never ruled on searches used in this way, but lower courts are addressing the technique and reaching conflicting decisions. Courts need to take an approach that will protect the privacy interests of individuals while allowing the government to advance its interests in protecting its borders and fighting crime. Courts should adopt a border nexus standard: to be considered a border search, and therefore excepted from probable cause and warrant requirements, the search at a border must have a tie to the historic rationales of border searches or be investigating a transnational crime.*

## Introduction

The average traveler may associate a customs border search only with long lines and travel delays. But the importance of border searches extends far beyond these lines. These searches can be used to bypass the traditional probable cause and warrant restrictions imposed by the Fourth Amendment. Consider for example, an FBI agent who learns that the target of their ongoing criminal investigation will soon be re-entering the United States from travel abroad. Border searches are an exception to the traditional Fourth Amendment requirement that searches conducted by government agents must be supported by a warrant and probable cause.[1] Because of this exception, in the eyes of our hypothetical agent, a border search might seem

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1. *See* United States v. Ramsey, 431 U.S. 606, 621 (1977) (describing the border search exception as a "longstanding, historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained.").

like a convenient tool to uncover considerable amounts of evidence about their target without obtaining a warrant or showing probable cause. As no individualized suspicion is required in a border search, a government agent may search without the customary Fourth Amendment protections that would apply to their target if they conducted the same search away from a border.

The border search exception is clear and easily applied in its traditional use: a person crosses a national border from outside the United States, and an authorized customs agent conducts a warrantless and suspicionless search of the person and their belongings. Courts justify this invasion of individual privacy with the government's need to protect its borders from contraband.[2] When the government uses a border search as a tool of law enforcement rather than border protection, however, the application of the purported exception becomes much more complicated.

The Supreme Court has not spoken directly to the issue of a border search conducted for criminal investigation. The issue, however, is of critical importance following the recent Supreme Court ruling in *Riley v. California*.[3] In *Riley*, the Court held that "a warrant is generally required" to search a suspected criminal's cell phone.[4] The majority reasoned that allowing a warrantless search would "untether the rule from the justifications underlying" search incident to arrest exception.[5]

Border searches conducted as part of a criminal investigation similarly threaten to fatally "untether" border searches "from the justifications underlying" the border search exception.[6] Lower courts that have encountered such searches have reached different results.[7] Courts should develop a well-thought-out and uniform standard to address the important Constitutional implications of searches at the border masquerading as true border searches.

2. *See, e.g.*, *id.*

3. 573 U.S. 373 (2014).

4. *Id.* at 401.

5. *Id.* at 386 (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009)). In *Riley*, the case centered around a search incident to arrest, which is also an exception to the warrant and probable cause requirements.

6. *Id.*

7. *Compare* United States v. Aigbekaen, 943 F.3d 717 (4th Cir. 2019) (requiring individualized suspicion for a non-routine warrantless search of electronic devices at the border) *and* United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013) (holding that a showing of reasonable suspicion was required for a forensic examination of the defendant's computer) *with* United States v. Touset, 890 F.3d 1227 (11th Cir. 2018) (holding the Fourth Amendment does not require any suspicion for warrantless searches of electronic devices at the border).

Going forward, courts confronting a border search executed as part of a criminal investigation should adopt a border nexus standard. To qualify as a border nexus, there must be a connection to a historic rationale for a border search or a transnational crime.[8] If a government official conducts a border search for a traditional law enforcement purpose without a border nexus, the search should be considered constitutionally unreasonable under the Fourth Amendment unless the official has (1) probable cause, and (2) a warrant or a recognized warrant exception. The government's power is vast in the border search, but it cannot be boundless.

This Note will provide a background of the Fourth Amendment issues presented by border searches conducted as part of a criminal investigation. Next, it will explore and discuss the importance of two key factors of a border nexus: personnel conducting the search and the purpose behind the search. Finally, the Note will propose a border nexus reform and demonstrate the application of the proposed border nexus standard through examples.

## Part I: Background

### A. *The Fourth Amendment and the Border Exception*

The Supreme Court has established that warrantless searches are "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[9] The warrant and probable cause requirements are critical to protecting individual privacy from government intrusion. It is for this reason that the Constitution requires "that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police" in the form of a magistrate approving a warrant.[10] For a magistrate to find that a warrant demonstrates probable cause, they must find that there is a "fair probability that contraband or evidence of a crime will be found in a particular place."[11] This "must be particularized with respect to the person to be searched or seized."[12] Bypassing the independent judgment of a magistrate approving a warrant

8. *See Aigbekaen*, 943 F.3d 717 (implementing a transnational crime nexus).
9. Katz v. United States, 389 U.S. 347, 357 (internal citations omitted).
10. Wong Sun v. United States, 371 U.S. 471, 481–82 (1963).
11. Illinois v. Gates, 462 U.S. 213, 238–39 (1983).
12. Maryland v. Pringle, 540 U.S. 366, 371 (2003).

means that "only . . . the discretion of the police" protects individuals from potential Fourth Amendment violations.[13] "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures;"[14] this must include the border.

Currently, however, border searches—searches conducted by customs agents at the United States border or its "functional equivalent"[15]—are generally found to be reasonable even when not supported by a warrant and probable cause.[16] Border searches are part of a larger category of searches that are exempt from the Fourth Amendment probable cause and warrant requirement known as administrative searches.[17] In addition to border searches, administrative searches include health and safety searches of businesses,[18] searches of students in public schools,[19] and searches and seizures of probationers.[20]

The Supreme Court has formulated a balancing inquiry to determine if administrative searches are reasonable: the reasonableness of a search is decided by the "balance between the interests of the Government and the privacy right of the individual."[21] The greater the intrusion on individual privacy, the greater the government interest needs to be to justify the intrusion.[22] Because administrative searches are governed by the articulated reasonableness analysis, "the administrative search exception functions as an enormously broad license for the government to conduct searches free from constitutional limitation."[23] But even within this permissive context, the balance is "struck much more favorably to the Government at the border."[24]

13. Beck v. State of Ohio, 379 U.S. 89, 97 (1964).

14. *Katz*, 389 U.S. at 359 (explaining that Fourth Amendment protections do not disappear based on the location of the search).

15. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973). When an international flight arrives at an airport, even one far from the physical border, that is the functional equivalent of the border for border search purposes. When this Note references border, it means border or functional equivalent.

16. *See, e.g.*, United States v. Vergara, 884 F.3d 1309 (11th Cir. 2018) *cert. denied*, 139 S. Ct. 70 (2018) (holding that a forensic search of a cellphone at the border required neither a warrant nor probable cause).

17. *See* State v. Anderson, 304 Or. 139, 141 (1987) (describing administrative searches as "for a purpose other than the enforcement of laws by means of criminal sanctions.").

18. Michigan v. Clifford, 464 U.S. 287 (1984). *See also* New York v. Burger, 482 U.S. 691 (1987).

19. New Jersey v. T.L.O., 469 U.S. 325 (1985).

20. United States v. Knights, 534 U.S. 112 (2001).

21. United States v. Montoya de Hernandez, 473 U.S. 531, 540 (1985).

22. *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 254–60 (2011).

23. *Id.* at 257.

24. *Montoya de Hernandez,* 473 U.S. at 540.

As the Supreme Court stated in *United States v. Montoya de Hernandez*, the authority to conduct searches at the border has existed "[s]ince the founding of our Republic."[25] The broad border search power has "[h]istorically . . . been necessary to prevent smuggling and to prevent prohibited articles from entry."[26] In modern times, Congress has granted the authority to conduct border searches to certain government officials specified by statute.[27]

The Supreme Court expressed in *United States v. Flores-Montano* that the government's interest "is at its zenith at the international border."[28] The government's interest reaches this zenith at the border because government agents are acting to protect the United States "from entrants who may bring anything harmful" into the United States, including communicable diseases, narcotics, or explosives.[29] Corresponding to the heightened government interest, the Supreme Court stated that individuals' "expectation of privacy is less at the border than it is in the interior."[30] People have come to expect at least some screening while crossing borders, thus reducing their expectation of privacy.

Due to this combination of increased government interest and reduced expectations of privacy, the Supreme Court has never required individualized suspicion for a border search except for those that are physically invasive.[31] The Court has explained that searches at the border have been held to be reasonable simply because they happen at a border, with no level of individualized suspicion required for a

25. *Id.* at 537. *See also Ramsey*, 431 U.S. at 616 ("The Congress which proposed the Bill of Rights, including the Fourth Amendment, to the state legislatures . . . had, some two months prior to that proposal, enacted the first customs statute, Act of July 31, 1789, c. 5, 1 Stat. 29. Section 24 of this statute granted customs officials "full power and authority" to enter and search "any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed . . ."). For a more nuanced view of the originalist perspective on the historic rationales of border searches, *see The Border Search Muddle*, 132 HARV. L. REV. 2278 (2019). These notes rely on the historic rationales that the Supreme Court has cited for decades.

26. United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 125 (1973) (internal citations omitted).

27. 19 U.S.C. § 1581; 19 U.S.C. § 482; 8 U.S.C. § 1357; 18 U.S.C. § 1496; 19 U.S.C. § 1582 (federal statutes that govern border searches and customs employees).

28. United States v. Flores-Montano, 541 U.S. 149, 152 (2004).

29. *Id*. The Court has explained this stems from "the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country." *Id.* (quoting *Ramsey*, 431 U.S. at 616).

30. *Id.* at 154.

31. *Montoya de Hernandez,* 473 U.S. at 541. In *Montoya de Hernandez*, the Court required reasonable suspicion to detain Montoya de Hernandez until she passed the drugs that were suspected to be hidden in her alimentary canal.

basic stop or search.[32] The Supreme Court has not yet reached the issue. There is considerable debate in lower courts, however, over whether an individualized level of suspicion is required for a border search of electronic devices such as cell phones and laptops following the landmark ruling in *Riley v. California*.[33] The Supreme Court has not (yet) extended the individualized suspicion requirement to anything besides invasive physical searches.[34]

Current doctrine has so far placed relatively few limits on agents conducting border searches. Congress has authorized immigration officials "to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States . . . which would be disclosed by such search."[35] Customs and Border Protection (CBP) regulations authorize agents to search all people and baggage that arrive in the United States from outside the country.[36] The extent of this power to search is vast, allowing the government to bypass critical constitutional protections simply because of the location of the search.

### B. *The Problem with the Current Border Search Exception*

With no restraints on the power to conduct searches at the border, government agents can potentially access enormous amounts of information about individuals. This is particularly true given the prevalence of personal electronic devices people travel with such as laptops and cellphones that contain large amounts of personal information.[37]

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32. *Ramsey*, 431 U.S. at 616 (holding that customs officials' search of envelopes suspected of being part of a "heroin-by-mail" operation was reasonable under the border search exception).

33. 573 U.S. 373 (2014) (holding that a warrantless search of a cellphone as a search incident to arrest was unreasonable).

34. *Compare Cotterman*, 709 F.3d 952 *with Touset*, 890 F.3d 1227. While not the focus of this Note, this topic certainly informs the problem of border searches conducted for a criminal investigation, as increasingly evidence of crimes is found on electronic devices. Implementing the standard proposed by this Note could help solve some of the problems with regards to border searches of phones and laptops by requiring a warrant or showing of exigency for those searches conducted for a criminal investigation.

35. 8 U.S.C. § 1357(c) (2012).

36. 19 C.F.R. 162.6 (2017).

37. *See* Laura K. Donohue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 YALE L.J. FORUM 961 (2019). This Note will not focus its discussion

Take for example, a 2019 Fourth Circuit case, *United States v. Aigbekaen*.[38] In *Aigbekaen*, local law enforcement officers found evidence that Aigbekaen was trafficking a minor for sex.[39] The local officers eventually turned the case over to Homeland Security Investigations (HSI), an investigative arm of the U.S. Department of Homeland Security.[40] When HSI agents learned that Aigbekaen had travelled out of the country, they requested that upon Aigbekaen's return, customs agents seize all electronic devices in his possession at the airport to facilitate their investigation, and to find additional evidence of sex trafficking.[41]

Customs complied with this request, seized Aigbekaen's laptop, iPad, and iPhone, and transmitted the devices to HSI. HSI agents then conducted warrantless forensic searches of the devices.[42] A few months after the warrantless searches, the government secured warrants for the devices.[43] Importantly, the investigation prior to this seizure had produced only evidence of *domestic* wrongdoing. In fact, in holding that warrantless searches of Aigbekaen's devices were not covered by the border search exception,[44] the Fourth Circuit found that there was "no reasonable basis to suspect that Aigbekaen's domestic crimes had any . . . transnational component."[45]

The use of border searches of electronic devices for domestic law enforcement purposes raises issues of critical importance. When the government searches electronic devices, it not only gets to search the device, but may also retain information such as "observations or characterizations of the information contained therein."[46] Professor Laura Donohue, in her comprehensive discussion of border searches of electronic devices, contends that leaving courts without guidance on searching devices at the border "leaves rights at the mercy of each agency's regulatory regime."[47] This is especially a concern in a world

on the specific questions about the specific level of suspicion required for electronic device searches, but electronic devices naturally fall under this Note's proposed standard.

38. *Aigbekaen*, 943 F.3d 717.

39. *Id.*

40. *Id. See also Homeland Security Investigations*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Aug. 15, 2019), https://www.ice.gov/hsi ("HSI's international force is the department's largest investigative presence abroad and gives HSI one of the largest international footprints in U.S. law enforcement.").

41. *Aigbekaen*, 943 F.3d at 718.

42. *Id.*

43. *Id.*

44. *Id.* at 721.

45. *Id.*

46. Alasaad v. Nielsen, 419 F. Supp. 3d 142, 150 (D. Mass. 2019).

47. Donohue, *supra* note 37, at 964.

where international travel is increasingly common and the pervasiveness of electronic devices makes government searches more intrusive.[48]

Without a nexus to the border,[49] a search at the border as part of a criminal investigation is simply a tool of a potentially oppressive state. If unconstrained by the Fourth Amendment and appropriate analysis by courts, the government could conduct otherwise unconstitutional searches simply by virtue of the location of the search. Using border searches, Professor Donohue explains that the "executive branch . . . has targeted individuals, using their movement across frontiers to obtain information that otherwise would require a warrant to access."[50] These searches can reveal not only large amounts of information, but also deeply personal information that violates the Constitution. The approach of some courts current border search analysis leaves this gap open.

### 1. Invasions of Privacy

Unreasonable searches violate the Fourth Amendment and an individual's privacy. For instance, a female plaintiff in a recent civil case described that when her phone was searched by male Customs and Border Protection officers, the officers were able to "view photos of her and her daughters without their headscarves as required in public by their religious beliefs."[51] In the same case, a different plaintiff's phone "contained journalistic work product, work-related photos and lists of contacts."[52] This is just the tip of the iceberg of the information that can be found on the average traveler, and a valuable insight into the potential privacy intrusions that can result from a seemingly simple border search.

Searching devices further underscores the importance of reinforcing Fourth Amendment protections against unreasonable searches—even those conducted at the border. Not cabining the use of border searches will allow the federal government to access an enormous amount of information it would otherwise not be privy to. While a warrant requires that items sought be described with particularity, a search of an electronic device at the border, for example,

48. *See id.*
49. In the form of a historic rationale or transnational crime.
50. Donohue, *supra* note 37, at 963.
51. *Alasaad*, 419 F. Supp. 3d at 149.
52. *Id.* at 164.

"allows law enforcement to scour countless areas of an individual's life."[53]

Even outside the invasiveness of electronic devices, the Fourth Amendment guarantees a right to be secure against unreasonable searches of "persons, houses, papers, and effects."[54] If the government's power to search and seize is not cabined by the requirement of a border nexus, the power granted to the federal government will allow unreasonable searches and seizures, and unrelenting invasions of individuals' privacy in the form of a runaround of the Fourth Amendment.

### 2. Incomplete Analysis by Courts Allows Fourth Amendment Violations to Continue

Currently, some courts simply wave through searches that take place at the border as border searches. Some courts avoid the questions of the purpose behind the search, and do not take a border nexus into consideration.

For example, the Second Circuit in *U.S. v. Irving* held that "the validity of a border search does not depend on whether it is prompted by a criminal investigative motive."[55] Upon Irving's return from a trip to Mexico, United States Customs inspectors, recognizing Irving from an ongoing investigation,[56] searched his luggage and found images of child pornography.[57] Irving moved to suppress the results of this search, and the Second Circuit affirmed the trial court's denial of his motion to suppress.[58]

The *Irving* court analogized to searches of vessels by Customs officials in holding that the criminal investigative motive did not invalidate a so-called border search.[59] The *Irving* court reasoned that "it would make little sense to allow random searches of any incoming passenger, without reasonable suspicion . . . but require reasonable

53. Donohue, *supra* note 37, at 965.

54. U.S. CONST. amend. IV.

55. United States v. Irving, 452 F.3d 110, 123 (2d Cir. 2006). *See also* United States v. Levy, 803 F.3d 120, 123 (2d Cir. 2015) (using *Irving* to uphold a border search).

56. The investigation was run by Special Agents from United States Bureau of Immigration and Customs Enforcement. *See Irving*, 452 F.3d. at 115.

57. *Id.*

58. *Id.* at 123 ("With respect to the searches of Irving's luggage and belongings, we find no error.").

59. *Id.*

suspicion for searches of passengers that are suspected of criminal activity."[60]

The Second Circuit is not the only Circuit to take the approach of allowing warrantless and individualized suspicionless searches at the border despite their law enforcement purpose. In *U.S. v. Schoor*, a Ninth Circuit case, Drug Enforcement Administration (DEA) agents informed customs agents when two men implicated in a drug ring were expected to arrive from international travel.[61] The DEA agents not only were present at the search, but instructed customs agents on what to search.[62] In upholding the search, then-Judge Kennedy held that the fact that "the search was made at the request of the DEA officers does not detract from its legitimacy. Suspicion of customs officials is alone sufficient justification for a border search."[63]

Such arguments can be compelling. When courts use such analysis, however, they miss that searches that are truly conducted for a criminal investigation with no border nexus are not tantamount to a "random search[] of any incoming passenger."[64] Rather, these are searches that are conducted for a law enforcement purpose that is untethered from the justification that allows the suspicionless and warrantless border searches to occur. Thus, courts are allowing the continued use of searches that violate the Fourth Amendment rights of the defendants before them.

## Part II: Personnel and Purpose

Part II describes the two background considerations courts must grapple with when evaluating whether a search at the border qualifies for the border search exception: the personnel conducting the search and the purpose behind the search. For instance, if the proper personnel conduct a border search for a proper border search purpose, the search should be deemed acceptable with no additional standard applied. On the other hand, if the search is conducted by

60. *Id.*
61. United States v. Schoor, 597 F.2d 1303, 1305 (9th Cir. 1979).
62. *Id.*
63. *Id.* at 1306. The opinion went on to note that "[i]t is of no consequence that the customs officers did not effect the arrest and seizure themselves, but rather permitted the DEA agents to do so." *Id.* It is worth noting that the Schoor case is from 1979, and it is an open question what the Ninth Circuit might do if a similar case came before it today, especially given the aggressive stance the Circuit has taken in electronic border search cases. *See, e.g.*, United States v. Cano, 934 F.3d 1002 (9th Cir. 2019); *Cotterman*, 709 F.3d 952.
64. *Irving*, 452 F.3d at 123.

non-border officials for a non-border purpose, the Fourth Amendment requirements of probable cause and a warrant should apply. The border nexus standard (described in detail in Part III) operates when border personnel conduct a search for a seemingly non-border purpose.

| | **Purpose** | | |
|---|---|---|---|
| **Personnel** | | Border | Non-Border |
| | Border | Traditional border search, no individualized suspicion required | Border nexus required. If not present, probable cause and warrant (or warrant exception) required |
| | Non-Border | Probable cause and warrant (or warrant exception) required | Probable cause and warrant (or warrant exception) required |

### A. *The Importance of Personnel*

This Section explores and explains the first consideration that courts should look to in determining if a search at the border is truly a border search (and therefore free of the Fourth Amendment requirements of probable cause and a warrant): personnel. Focusing on the identity of the actor conducting the search is consistent with a long history of Congressional policy choices as well as current law. From 1789[65] to today,[66] Congress has vested statutory authority to conduct warrantless, suspicionless searches at the border in customs agents only. As Laura Donohue explains, "Congress did *not* provide an exception for ordinary law enforcement to use the movement of people to look for evidence of criminal activity. To the contrary, only customs agents . . . could exercise authorities narrowly tailored to intercept contraband."[67] Today, as explained on the U.S. Customs and Border Protection website, the Office of Field Operations (OFO) within U.S. Customs and Border Protection is "responsible for border security—including anti-terrorism, immigration, anti-smuggling,

65. *See Ramsey*, 431 U.S. at 616.
66. 8 U.S.C. § 1357(c) (2018); 19 C.F.R. 162.6 (2020).
67. Donohue, *supra* note 37, at 963 (emphasis in original).

trade compliance, and agriculture protection—while simultaneously facilitating the lawful trade and travel at U.S. ports of entry."[68]

The statutory limitation to customs agents is less restrictive than it may seem, as Congress has deemed that category of "customs agents" may encompass more than just those with that job title.[69] Non-customs government officials can be delegated the authority to conduct border searches.[70] In the context of boarding vessels, customs officers are defined as "any officer of the United States Customs Service of the Treasury Department . . . or any commissioned, warrant, or petty officer of the Coast Guard, or any agent or other person authorized by law or designated by the Secretary of the Treasury to perform any duties of an officer of the Customs Service."[71] In *United States v. Victoria-Peguero*, the court noted a plain language reading of the statute suggests that "any person may act as a customs officer, subject only to the limitation of proper delegation."[72]

The limitation to persons acting under proper delegation nonetheless carries real weight in establishing permissible classes of actors at the border.[73] Professor Orrin Kerr argued that the legality of what he calls "cross-enforcement" of the Fourth Amendment (analyzing federal government agents applying state law and vice versa), "should depend on whether the government that enacted the criminal law to be enforced has authorized it."[74] In the border search context, the enacting government official is the Secretary of Treasury or another official of the federal government.[75]

In *United States v. Thompson*, the Fifth Circuit found that "[b]y a series of proper delegations, border patrol officers have been designated by the Treasury Secretary as customs agents" and "a border patrol officer may be validly authorized to act simultaneously as a customs agent."[76] The "delegation of authority must be clear" and won't be implied without a formal agreement, order, or statutory

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68. US Customs and Border Protection, *Executive Assistant Commissioners' Offices*, US DEP'T OF HOMELAND SECURITY (NOV. 19, 2019) https://www.cbp.gov/about/leadership-organization/executive-assistant-commissioners-offices.

69. *See* 19 U.S.C. § 1401(i).

70. *See id.*

71. *Id.*

72. United States v. Victoria-Peguero, 920 F.2d 77, 81 (1st Cir. 1990) (finding that Puerto Rican police officers had been properly designated as customs officers for the purposes of searching a ship one and a half miles from shore).

73. *Id.*

74. Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471, 519 (2018).

75. *See* United States v. Thompson, 475 F.2d 1359, 1363 (5th Cir. 1973).

76. *Id.*

authority.[77] The importance that Congress has placed on the identity of personnel matters, as shown by the court's attention to the factor. The delegation requirement allows for institutional accountability of the actions of agents and the prospect that agents will be supervised under delegation.

Courts have repeatedly held that the "border search exception applies only to searches conducted primarily by officers authorized by statute to conduct border searches."[78] The Ninth Circuit case *United States v. Soto-Soto* makes clear that law enforcement agents cannot use border search authority that they do not have as an excuse or shield for acting without probable cause or a warrant.[79] Just as customs agents are not permitted to enforce traditional law enforcement agency responsibilities, law enforcement agents are not permitted to infringe on the statutory duties of customs and border agents.

In *Soto-Soto*, the Ninth Circuit held that a suspicionless and warrantless stop of the defendant's pickup truck at the border by a Federal Bureau of Investigation (FBI) agent was unreasonable.[80] The court found the search impermissible because an FBI agent—not customs or immigrations official—conducted the search[81] The identity of the agent was dispositive because "Congress and the courts have specifically narrowed the border searches to searches conducted by customs officials in enforcement of customs laws," and the mere fact that a search takes place at a border does not make it a border search.[82] Notably, the Ninth Circuit found that the exclusion of evidence uncovered by the search was the proper remedy to ensure "FBI agents and other general law enforcement officers will know that they will not succeed in any attempt to expand their authority by searching at a border."[83]

This emphasis on deterring FBI agents from using searches at the border to expand their investigative capabilities is significant. It underscores the importance that Congress has put on personnel and

77. United States v. Brown, 858 F. Supp. 297, 300 (D.P.R. 1994) (holding a warrantless search conducted by a municipal guardsman was not a border search). *See also Victoria-Peguero*, 920 F.2d at 83 (finding a legitimate delegation of authority where the Customs Service entered into a formal agreement with Puerto Rican police that allowed Puerto Rican police officers to act as customs officers with certain restrictions after receiving training).

78. Kerr, *supra* note 74, at 485–86.

79. United States v. Soto-Soto, 598 F.2d 545 (9th Cir. 1979).

80. *Id.* at 550.

81. *Id.* at 549.

82. *Id. See also* B. The Purpose of the Search, *infra*. Significantly, the reasoning of the court in *Soto-Soto* was that the "FBI agent surpassed his authority as an FBI agent and can claim no additional authority from other statutes."

83. *Soto-Soto*, 598 F.2d at 550.

should serve as a guide for other courts considering what factors to highlight going forward. Unless further investigation reveals that a law enforcement officer was properly delegated authority to conduct a border search, judges should feel comfortable assuming that the search was not a traditional border search. To hold otherwise would be to grant law enforcement officers nearly unrestrained power to conduct a search near a border and be contrary to statutory law.

In determining whether to apply the border search exception, courts should focus on the personnel involved in a search because of the important Congressional policy decisions made with regards to personnel. In *United States v. Sandoval-Vargas*, the Ninth Circuit reaffirmed a key part of the *Soto-Soto* holding and emphasized the significance of the Congressional policy choices: "Congress has given the authority to conduct border searches *only* to this limited group of [Customs Service, Border Patrol, and Coast Guard] officials. . . . Searches conducted by other law enforcement agents are not considered border searches . . . and must therefore meet the traditional demands of the fourth amendment."[84]

Other courts should follow this holding. It protects individuals' privacy rights while remaining eminently administrable and easy for agents on the ground to understand. Because Customs, Border Patrol, and Coast Guard officials are still authorized to conduct warrantless and suspicionless searches to seek contraband or evidence of transnational crimes under the proposed standard, the ability to control contraband entering the United States should be only minimally affected. If other law enforcement agents seek to conduct a search at the border, they can do so subject to the traditional Fourth Amendment restrictions—as they do throughout the rest of the country. If the search is conducted by the proper personnel (customs agents or others with properly delegated authority), courts should then turn to the next key factor: the purpose behind the search.

### B. *The Purpose of the Search*

Broadly speaking, the underlying purpose of the Fourth Amendment is to constrain "unreasonable" searches by government actors.[85]

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84. United States v. Sandoval Vargas, 854 F.2d 1132, 1136 (9th Cir. 1988) (emphasis in original), *disapproved of on other grounds by* United States v. Taghizadeh, 41 F.3d 1263 (9th Cir. 1994).

85. U.S. CONST. amend IX. *See also* United States v. Humphries, 308 F. App'x 892, 896 n.1 (6th Cir. 2009) ("The purpose of the Fourth Amendment is to constrain "unreasonable"

To be reasonable, the purpose of a border search (without a warrant or showing of probable cause) must be proper.[86] To determine if the border search is proper, a court must first analyze whether the search was conducted for a non-border purpose (i.e., for the purpose of law enforcement). If the purpose is for law enforcement, the court must then apply the border nexus standard (described in detail in Part III). This Section describes the purpose-based approach that courts must take to determine whether a border nexus is necessary.

Courts have already been looking at the purpose of border searches. In *Victoria-Peguero*, for example, the court expressly considered the purpose of the search in evaluating its permissibility.[87] While police officers were part of the team conducting the search, the court found that the police officers' "sole purpose was to conduct a customs search" and defendants couldn't "seriously contend that [the team of officers] was operating as part of a non-customs-related venture or that it was not cooperating with the Customs Service."[88] There, although the court found the personnel were properly delegated authority to conduct border searches, they still analyzed the purpose of the search.[89] If the purpose had been law enforcement-related, the search should not have been permissible as a border search.

This analysis is not and should not be limited to the First Circuit. The Ninth Circuit conducted a similar inquiry in *Soto-Soto*, although it reached the opposite result.[90] In *Soto-Soto*, an FBI agent conducted the search in question, and the Ninth Circuit held it was not a border search despite occurring near a border.[91] In addition to the analysis of the identity and authority of the agents performing the search as explored in Part II.A, the *Soto-Soto* court also looked at the purpose of the search. Helpfully for the defense, the officer who completed the contested search testified that "his sole purpose in conducting the search was not to enforce importation laws but rather to check whether the defendant's car was stolen."[92] Thus, the officer "acted for

searches by government actors."). *See also* Thomas K. Clancy, *The Purpose of the Fourth Amendment and Crafting Rules to Implement That Purpose*, 48 U. RICH. L. REV. 479, 480 (2014) (explaining the Supreme Court has vacillated between holding the Fourth Amendment is "designed to regulate law enforcement practices or . . . to protect individuals from overreaching governmental intrusions").

86. *See Flores-Montano,* 541 U.S. at 152 (2004).

87. *Victoria-Peguero*, 920 F.2d at 81.

88. *Id.* at 82.

89. *Id.* at 81–82.

90. *Soto-Soto*, 598 F.2d 545.

91. *Id.* at 550 ("The search is therefore illegal, the exclusionary rule applies, and the district court properly suppressed the evidence.").

92. *Id.* at 549.

general law enforcement purposes, not for enforcement of customs laws."[93] This was an important factor in the Ninth Circuit's decision that the search was illegal and unreasonable, and should guide other courts evaluating border searches conducted as part of a criminal investigation.

Purpose will not always be as simple to discover without the candid testimony of a forthright officer, but this does not mean courts should disregard it. Purpose is important so as not to "untether the [border search] rule from [its] justifications."[94] In the Eleventh Circuit, Judge Jill Pryor explored the purpose of a border search in her dissent in *United States v. Vergara*.[95] Judge Pryor would have held that a forensic search of a cell phone at a port unreasonable in Fourth Amendment terms.[96] She rejected the idea that forensic searches of cell phones should be exempt from warrant requirements "because those searches may produce evidence helpful in future criminal investigations."[97] Further, Judge Pryor stated this exemption would be unconnected from its justifications and unreasonable.[98]

Some courts, however, have gone further. The Ninth Circuit in *United States v. Cano* drew a distinction between border searches for the purpose of uncovering evidence and those for the purpose of finding contraband.[99] The court explained that "[t]here is a difference between a search for contraband and a search for evidence of border-related crimes."[100] For example, the court said that hypothetically, "if U.S. officials reasonably suspect that a person who has presented himself at the border may be engaged in price fixing . . . they may not conduct a forensic search of his phone or laptop. Evidence of price fixing . . . is not itself contraband whose importation is prohibited by law."[101] The *Cano* court thus constrained border searches to contraband only.

This approach is too extreme and limits customs agents too much. The historic reasons for border searches are undoubtedly important and part of the border nexus analysis that this Note posits. But a

93. *Id.*

94. *Vergara*, 884 F.3d at 1317 (Pryor, J., dissenting), *cert. denied*, 139 S. Ct. 70 (2018) (quoting *Riley*, 573 U.S. at 386). There are two Judge Pryors (no relation) on the Eleventh Circuit. Judge William Pryor wrote the majority opinion in Vergara, Judge Jill Pryor wrote the dissent. Unless otherwise noted, when this Note references Judge Pryor, it is referring to Judge Jill Pryor.

95. *Vergara*, 884 F.3d at 1317 (Pryor, J., dissenting).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Cano*, 934 F.3d 1002.

100. *Id.* at 1017.

101. *Id.* (internal citations omitted).

standard limited to contraband unduly constrains customs agents to say that they can *never* look for evidence, even if the crime is one that is border-related or transnational in nature.[102]

*Victoria-Peguero*, *Soto-Soto*, and Judge Pryor's dissent in *Vergara* show three important points. First, courts are already applying a purpose-of-search analysis to their border search cases. Second, and relatedly, using the purpose of the search as a factor will not be burdensome to the administration of justice. The purpose inquiry courts are already conducting can easily be incorporated as part of the border nexus analysis. Third, as *Victoria-Peguero* demonstrates, a purpose inquiry will not hinder custom agents or the Customs Service unnecessarily, nor will it always lead to a finding that a search was unconstitutional. This is particularly true if courts reject the distinction between evidence and contraband drawn in *Cano*, as this Note suggests they should. The purpose of a search at the border is always important, even if the search is conducted by customs agents. If the underlying purpose is non-border, such as for a law enforcement investigation, then the border nexus must be present.

### 1. The Appropriateness of Examining Subjective Intent

While purpose of the search is an essential component of evaluating searches at the border, not all courts are willing to consider the purpose of a border search in analyzing its validity under the Fourth Amendment. Some courts have rejected a reliance on the "subjective motives" of the agent conducting the search.[103] For example, in *United States v. Smasal*, the District of Minnesota rejected the defendant's arguments that "agents were motivated solely by general law enforcement concerns, rather than customs enforcement," because "the Supreme Court has repeatedly held that the validity of a search or seizure under the Fourth Amendment does not depend on the subjective motives of government officials."[104]

To support this proposition, the *Smasal* court pointed to cases such as *Whren v. United States*, in which the Court was "unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers."[105] *Whren* pertained to a traffic stop where

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102. *See infra* Part III.
103. United States v. Smasal, No. CRIM. 15-85 JRT/BRT, 2015 WL 4622246, at *10 (D. Minn. June 19, 2015).
104. *Id.*
105. Whren v. United States, 517 U.S. 806, 813 (1996).

officers had probable cause to pull over a driver, but the driver thought the stop was animated by racial stereotypes.[106] The Court held that they would not investigate additional reasons for the stop when probable cause was present.[107]

The Court, however, demonstrated a willingness to look at purpose or motive when "addressing the validity of a search conducted in the *absence* of probable cause."[108] The Supreme Court has repeatedly examined subjective motives of officials in the administrative search context.[109] For example, in *Michigan v. Clifford*, the Supreme Court held that for administrative searches, "the object of the search determines" what kind of warrant is required, if any.[110] Since border searches are administrative searches, this standard should extend to border searches.

Therefore, *Whren* does not present an obstacle to courts evaluating the purpose of a search. If the agents had probable cause to conduct the search, then the Fourth Amendment probable cause requirement will be met, and the court will not inquire into the underlying motives under *Whren*. If the probable cause requirement is *not* met, then an inquiry into the purpose is appropriate, both under *Whren* and under the proposed border nexus standard.

As noted by Professor Kerr, "*Whren* does not foreclose articulating objective tests that distinguish real government interests from false ones."[111] If tests are permissible to distinguish real government interests from false ones, then surely it is permissible for a court to examine which real government interest a government agent was pursuing. The point is not that law enforcement is not a real government interest, but rather that it must be constrained by its constitutional limits of probable cause and a warrant. Looking into the purpose of a search will help courts distinguish when a search at the border is truly a border search and when it is an ordinary law enforcement search masquerading as a border search.

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106. *Id.* at 808–09.

107. *Id.* at 818–19.

108. *Id.* at 811 (emphasis in original).

109. *See*, *e.g.*, Wyman v. James, 400 U.S. 309 (1971); Camara v. Mun. Court of City & Cty. of San Francisco, 387 U.S. 523 (1967). *See also* Donna Mussio, Comment, *Drawing the Line Between Administrative and Criminal Searches: Defining the "Object of the Search" in Environmental Inspections*, 18 B.C. ENVTL. AFF. L. REV. 185 (1990).

110. *Clifford*, 464 U.S. at 294 (1984).

111. Kerr, *supra* note 74, at 524. Professor Kerr went on to note that "[s]uch tests are routine in Fourth Amendment law . . . *Whren*'s rejection of subjective intent as a test to invalidate pretextual searches does not stop courts from crafting objective rules that limit government powers to the promotion of 'genuine' and 'legitimate' government interests."

Looking at purpose will also allow courts to consider bad faith and pretext. Bad faith and pretext should consistently be core concerns when a customs agent conducts a border search connected with traditional law enforcement interests. While some courts won't evaluate bad faith or pretext at the border, others have recognized the importance.[112] Courts should be concerned and vigilant that border searches do not become "a purposeful and general means of discovering evidence of crime," and look to the purpose behind the search.[113]

Courts must look to the purpose of the search—including if the search is being used as a pretext or being conducted in bad faith. Rather than turning away from looking at the questions of who conducted the search at the border and why, courts should elevate these questions. If a search is conducted by border personnel for an apparent non-border purpose, courts need to evaluate if a border nexus is present.

## Part III: The Border Nexus Standard

Part III describes the proposed border nexus standard, which should apply when proper border personnel conduct a search for a seemingly non-border purpose. Historically, the need to "regulate the collection of duties and to prevent the introduction of contraband into this country" justifies this large grant of authority to government agents during a border search.[114] Therefore, to fit within the border search exception, there must be a tie to these historic rationales (such as protecting national security, preventing the import or export of contraband, or collecting duties), or to a transnational crime as described by the Fourth Circuit's holding in *United States v. Aigbekaen*.[115] This border nexus standard goes beyond *Aigbekaen*, as it also provides the reason *why* a transnational crime fits within the

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112. *See* United States v. Boumelhem, 339 F.3d 414, 424 (6th Cir. 2003) ("Customs had its own interest in the suspected export of weapons as a possible violation of laws that it is charged with enforcing, and was acting in *good faith* in pursuing this interest."); United States v. Fogelman, 586 F.2d 337, 344 (5th Cir. 1978) (in evaluating a team of customs agents, local officers, and DEA agents working together, the court noted that "[a]ny pretext or bad faith on the party of local officers in having the Customs agents participate as a 'portable search warrant' ha[d] not been shown.").

113. Colorado v. Bertine, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring) (discussing another Fourth Amendment exception, inventory searches).

114. *Montoya de Hernandez*, 473 U.S. at 537; *see Ramsey*, 431 U.S. at 616–17 (1977) (citing Act of July 31, 1789, ch. 5, 1 Stat. 29).

115. *Aigbekaen*, 943 F.3d at 721.

exception. The standard would provide necessary limits to protect individual privacy rights while still being administrable for border agents.

### A. *Detailed Border Nexus Standard*

Courts should adopt the proposed approach of holding that border searches are not exempt from the probable cause and warrant requirements unless they have a border nexus or connection to a transnational crime. *United States v. Aigbekaen*'s holding comes closest to the analysis that this Note proposes courts should undertake when law enforcement officials work with Customs and Border Protection officers as part of an ongoing investigation.[116] *Aigbekaen* is closest to the correct approach because it will protect important privacy interests while still allowing for an administrable approach for agents on the ground.

In *Aigbekaen*, the existence of a border nexus was critical to the Fourth Circuit's analysis of whether a customs agent search to assist another law enforcement agency, which would otherwise be permissible as a border search, violated the Fourth Amendment.[117] The Fourth Circuit held that for a border search to be reasonable, "the Government must have individualized suspicion of an offense that bears some nexus to the border search exception's purposes of protecting national security, collecting duties, blocking the entry of unwanted persons, or disrupting efforts to export or import contraband."[118]

This is the proper approach to analyzing such a search. A border search should be constrained by the historic rationales (such as protecting national security, preventing the import or export of contraband, or collecting duties) for the border search exception.[119] The border search exception is subject to the "general rule" that "the scope of a warrant exception should be defined by its justifications."[120] If a border search becomes too far "attenuated" from the historic rationales that justify an exception from the Fourth Amendment, border searches will function as a limitless authorization for

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116. *Id.*
117. *Id.*
118. *Id.*
119. *See id. See also Ramsey*, 431 U.S. at 616–17.
120. United States v. Kolsuz, 890 F.3d 133, 143 (4th Cir. 2018), *as amended* (May 18, 2018).

investigating law enforcement officials to conduct warrantless searches wherever there is a border.[121]

The Supreme Court has repeatedly placed emphasis on the historical background of the border search exception and the fact that the border search exception is "long-standing."[122] In *Ramsey*, the Court noted that the same "Congress which proposed the Bill of Rights, including the Fourth Amendment . . . had, some two months prior to that proposal, enacted the first customs statute."[123] The Court deemed this historical fact of "manifest" importance.[124] Thus, to remain within the scope of the warrant exception, border searches must remain tethered to the historic justifications.

A border nexus standard provides limitation to this power while still allowing customs officials to fulfil their duties. Otherwise, law enforcement agents could sit back and wait for the target of their investigation to travel abroad and return to the US to seize evidence for which they would otherwise need a warrant—regardless of the crime. By bypassing the warrant requirement, law enforcement officials also sidestep the independent judgment that probable cause for the search or seizure exists, based solely on the location of the search. This is surely not reasonable, nor what was envisioned when the border search exception began to develop. Because a border search gives the government such broad search power, limitations on this power must be strictly enforced.

While the nexus must be tied to the historic rationales underlying border searches, the Fourth Circuit in *Aigbekaen* was correct in holding that crimes with a "transnational" connection should also be considered to have a sufficient nexus to the border.[125] This transnational element is, as of now, only used in the Fourth Circuit. The Fourth Circuit's explanation for the transnational element was that the government's interest in preventing crime cannot be allowed to "categorically eclipse[] individuals' privacy interests . . . when the suspected offenses have little or nothing to do with the border."[126] This is normatively true and a compelling reason to adopt the transnational nexus. Additionally, it may be difficult for law enforcement to

121. *Aigbekaen*, 943 F.3d at 721. *See Kolsuz*, 890 F.3d at 143. Because the "functional equivalent" of a border includes international airports, this greatly expands the reach of border searches. *See also* Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

122. *Ramsey*, 431 U.S. at 616. *See also* Boyd v. United States, 116 U.S. 616, 623 (1886); Carroll v. United States, 267 U.S. 132 (1925).

123. *Ramsey*, 431 U.S. at 616.

124. *Id.* at 616–17.

125. *Aigbekaen*, 943 F.3d at 721.

126. *Id.* at 722.

coordinate searches and investigate crimes that do not solely occur within United States borders. This caveat allows for a government-friendly investigative technique to continue while still meaningfully limiting the scope of the exception.

However, the transnational nexus also goes beyond normative reasonings because searching for evidence of a transnational crime connects to the historical justifications for border searches in ways that domestic crimes do not. The border search exception reflects a "longstanding concern for protection of the integrity of the border."[127] Allowing the investigation of transnational crimes allows this concern to continue. Moreover, one of the core justifications for border searches is searching for contraband. Materials used to commit a transnational crime can often be considered, as they will often be considered contraband. In addition, it goes toward protecting the national security of the country to prevent the entry of persons using the border crossing as part of committing a transnational crime. This is distinguished from people committing domestic crimes, where crossing the border is a matter of happenstance, not a part of the furtherance of the crime under investigation.

### 1. Beyond *Aigbekaen*

While the Fourth Circuit and this Note's standard both propose a transnational nexus, this Note's border nexus standard goes beyond the Fourth Circuit in key respects. First, this Note provides a definition of transnational crimes that would apply in all cases. Second, this Note argues that the government should have to show probable cause for a search for which they cannot show a border nexus (of either historic or transnational nature).

#### a. *Transnational Crimes*

The Fourth Circuit in *Aigbekaen* did not provide a definition of a transnational crime. Courts should adopt the definition used by the United Nations Convention Against Transactional Organized Crime. A crime should be understood to be transnational if:

(a) It is committed in more than one State;

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127. *Montoya de Hernandez*, 473 U.S. at 538.

> (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
> (c) It is committed in one State but involves . . . [a group or person] that engages in criminal activities in more than one State; or
> (d) It is committed in one State but has substantial effects in another State.[128]

It should not be sufficient to argue, as the government did in *Aigbekaen*, that the crime itself "commonly involve[s] cross-border movements."[129] In *Aigbekaen*, the defendant was suspected of sex trafficking, a crime that often crosses international borders. At the time of the search, however, the government had "no reasonable basis to suspect that Aigbekaen's domestic crimes had any such transnational component."[130] This should not be enough to sustain the search as reasonable.

The government should have to make a showing that there was reason to suspect that the *particular person* in question was involved in a crime with the required border nexus, through historic rationales or a transnational nexus. The transnational nexus is appropriate because while not among the original reasons for the border search exception, it is closely related to those reasons and is a meaningful constraint on government actors but still allows for some flexibility.

This is a step farther than the Fourth Circuit went in *Aigbekaen*, for three reasons. First, in *Aigbekaen*, the decision was limited to the circumstances of the case, involving the forensic search of Aigbekaen's electronic devices. But the rationale for the holding is not limited to electronic device searches and it should provide persuasive authority for applying the *Aigbekaen*-inspired approach that this Note proposes to all types of evidence searched and/or seized as part of a larger law enforcement investigation.

Second, the Fourth Circuit opinion would only apply the nexus requirement in "nonroutine" searches, where the search is particularly invasive.[131] Past examples of non-routine searches include "strip,

128. G.A. Res. 55/25, annex I, United Nations Convention Against Transnational Organized Crime, art. 3.2 (Nov. 15, 2000). The definition has been slightly adapted for use in this Note. In this context, State means country. Note that substantial effect has particular meanings in the international law context beyond the scope of this note. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

129. *Aigbekaen*, 943 F.3d at 721 (internal quotation marks omitted).

130. *Id.*

131. *Id.* at 720 (citing *Flores-Montano*, 541 U.S. at 152).

body cavity, or involuntary x-ray searches."[132] In his concurrence criticizing the majority *Aigbekaen* opinion, Judge Robinson argued that it "may be challenging to maintain a principled reason for not" extending the rationale to routine searches as well.[133] Judge Robinson is right that the same rationale should extend to routine searches.

But Judge Robinson's fear that this extension will "eviscerate"[134] the border search exception (by creating too many exceptions to the exception) misses the important point: that this is only relevant for the kind of scenario presented in *Aigbekaen*, where customs agents are conducting a search pursuant to a request from a separate law enforcement agency for an express purpose of uncovering evidence for a criminal investigation with no border nexus. Thus, extending the requirement will not "eviscerate" the border search exception as Judge Robinson feared.[135]

### b. *Level of Suspicion*

This Note's standard requires a showing of probable cause at the border if that same search away from the border would require probable cause and a warrant (or a recognized warrant exception). Probable cause must be shown when (1) the search is conducted as part of a criminal investigation or at the direction of traditional law enforcement officers and (2) the required border nexus is absent. This is because such searches are not really border searches—they are searches for law enforcement that happen to take place at the border and therefore should be subject to the Fourth Amendment's warrant and probable cause requirements. In *Aigbekaen*, the Fourth Circuit avoided ruling on the level of required suspicion because the government failed to show even reasonable suspicion.[136]

Courts have considered the proper standard to assign searches at the border before. As the Ninth Circuit stated in *United States v. Cano*, "no court has required more than reasonable suspicion to justify" a border search—including those with a law enforcement purpose.[137]

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132. *Montoya de Hernandez*, 473 U.S. at 541 n.4.
133. *Aigbekaen*, 943 F.3d at 729 (Robinson, J., concurring).
134. *Id.*
135. *Id.*
136. *Id.* at 734 n.6 ("The Majority holds that the government lacked reasonable suspicion, leaving open what level of suspicion is generally necessary for this type of search.").
137. *Cano*, 934 F.3d at 1015 (9th Cir. 2019). The Ninth Circuit went on to hold that "manual searches of cell phones at the border are reasonable without individualized suspicion, whereas

The Fifth Circuit explained in *Molina-Isidoro*, "[f]or border searches both routine and not, no case has required a warrant."[138] *Molina-Isidoro*, like *Aigbekaen* and *Cano*, deals with the vexing question of border searches of electronic devices after the Supreme Court's ruling in *Riley v. California*, which recognized increased privacy interests in electronic devices in the context of a search incident to arrest.[139] In *Molina-Isidoro,* the Fifth Circuit "decline[d] the invitation" to promulgate a rule about border searches of electronic devices post-*Riley* because the "search of Molina's cell phone at the border was supported by probable cause."[140] This is evidence that the probable cause standard can be met, but courts are declining to require it, as they are resistant to abandon what they see as a traditional Fourth Amendment exception. Courts should require probable cause and a warrant or recognized warrant exception for searches at the border that are not truly border searches because they lack a border nexus.

Courts should adopt a uniform standard outlining that when a search is conducted by border personnel (usually customs agents) for a criminal investigation, there must be a tie to a historic rationale or probable cause to suspect a transnational crime. Without this border nexus, the search (or seizure) should not be treated as a border search and therefore should be subject to the Fourth Amendment requirements of probable cause and a warrant or warrant exception. This standard will be easy for courts to implement, as it pulls from considerations they are already analyzing. The standard is also administrable for customs agents on the ground, while still applying meaningful limits to the otherwise limitless power of border searches. Section B applies this standard to concrete examples.

### B. *Application of the Border Nexus Standard*

As Judge Pryor noted in *Vergara*, a warrant requirement does not mean that suspected criminals are "search-proof," but rather that the government will have to take preemptive steps to avoid "boundlessly intruding on individuals' privacy."[141] The standard applied will

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the forensic examination of a cell phone requires a showing of reasonable suspicion." *Id.* at 1016.

138. United States v. Molina-Isidoro, 884 F.3d 287, 291 (5th Cir. 2018).

139. *Id.* at 289. *See also Riley*, 573 U.S. 373.

140. *Molina-Isidoro*, 884 F.3d at 289.

141. *Vergara*, 884 F.3d at 1317 (Pryor, J., dissenting), *cert. denied*, 139 S. Ct. 70 (2018).

protect the privacy interests of individuals without unduly burdening customs agents, making it an appealing option to courts.

Let's start with an easy case: the hypothetical FBI agent from the introduction is investigating real estate fraud and asks customs agents to search their target. This is clearly an impermissible unreasonable search. There is no transnational nature to the crime. Real estate fraud has no connection to any historical reason for the border search exception. Such a search conducted by a customs agent would likely be conducted in bad faith or as a pretext to avoid seeking a warrant. Thus, a search conducted to further an investigation of real estate fraud would be held unreasonable under the reformed standard.

Some searches upheld by courts that looked to neither a border nexus, pretext, nor bad faith may nevertheless be upheld under a border nexus standard. For example, the search in *Irving,* where customs agents were tipped off that Irving would be returning from a trip he took for the purpose of engaging in sex with children,[142] may still be permissible. First, the agents conducting the search and running the investigation were customs agents.[143] Second, while the purpose of the search was for a criminal investigation, the investigation was run by customs, and the search had a connection to both a transnational crime and a historic rationale for the border search exception.[144] Because Irving was suspected of travelling to Mexico to commit the crime for which he was under investigation,[145] there was a transnational nexus, as the crime was committed in more than one State. Furthermore, agents searched Irving's belongings not only to find evidence of a crime but to stop the introduction of contraband (here, diskettes containing child pornography) into the country.[146] Thus, customs agents were acting under the umbrella of the justification to "prevent the introduction of contraband into this country."[147]

142. *See Irving*, 452 F.3d at 114.
143. *See id.* at 115.
144. *See id.*
145. *Id.* at 114.
146. *See id.* at 115.
147. *Montoya de Hernandez*, 473 U.S. at 537; *see Ramsey*, 431 U.S. at 616–17 (citing Act of July 31, 1789, ch. 5, 1 Stat. 29.).

*Irving:*

| | | Purpose | |
|---|---|---|---|
| | | Border | Non-Border |
| | Border | Traditional border search, no individualized suspicion required | Border nexus required. If not present, probable cause and warrant (or warrant exception) required |
| Personnel | Non-Border | Probable cause and warrant (or warrant exception) required | Probable cause and warrant (or warrant exception) required |

*Aigbekaen* provides a useful contrast to *Irving*, because in *Aigbekaen* there was no suspicion that Aigbekaen was involved in a transnational crime.[148] The only evidence of his crimes was domestic.[149] There is no transnational nexus even though the crime he was suspected of committing, sex trafficking, often crosses international borders. Thus, the government must obtain a warrant before searching or seizing Aigbekaen's property (or ex post show probable cause and a recognized warrant exception, such as exigency).

*Aigbekaen:*

| | | Purpose | |
|---|---|---|---|
| | | Border | Non-Border |
| | Border | Traditional border search, no individualized suspicion required | Border nexus required. If not present, probable cause and warrant (or warrant exception) required |
| Personnel | Non-Border | Probable cause and warrant (or warrant exception) required | Probable cause and warrant (or warrant exception) required |

148. *Aigbekaen*, 943 F.3d at 721.
149. *Id.*

In *Schoor*, where DEA agents told customs agents when to expect the arrival of suspected drug traffickers,[150] the search would also likely be permissible under a border nexus standard. The crime was transnational in nature because of the international drug ring involved. The crime likely took place in multiple States, and if not, the planning for the crime may have taken place in a different State than where the crime took place.[151] The motive of customs agents to stop the entry of contraband into the country, including illegal drugs, is tied to historic rationales for the border search exception. Thus, the border search exception would still apply, even if the Ninth Circuit adopted the standard this Note proposes. However, if the investigators in *Schoor* had only uncovered evidence of a domestic drug ring, the search would not have been permissible without a warrant. This is so even if many, or even the vast majority, of drug rings are international. If the government was similarly unable to show they had probable cause for their belief the drug ring was international, the search would also fail.

*Schoor:*

| | | **Purpose** | |
|---|---|---|---|
| **Personnel** | | Border | Non-Border |
| | Border | Traditional border search, no individualized suspicion required | Border nexus required. If not present, probable cause and warrant (or warrant exception) required |
| | Non-Border | Probable cause and warrant (or warrant exception) required | Probable cause and warrant (or warrant exception) required |

## Conclusion

While the border search exception plays an important role in maintaining the security of the United States, it cannot come at the cost of unreasonable intrusions into the lives of travelers, even those suspected of committing crimes. Searches conducted for a criminal investigatory purpose cannot be allowed to function as a runaround of the warrant and reasonableness requirements of the Fourth

150. *Schoor*, 597 F.2d at 1305.
151. *See* G.A. Res. 55/25, annex I, supra note 128.

Amendment simply because the searches occur at the border. This is particularly important because, with advances in technology, a border search has the power to reveal tremendous information about the person being searched. The proposed limits on border searches—that they be conducted by approved personnel, for a proper purpose, or with a tie to a border nexus—are not extreme. However, they will play an important role in protecting individual liberty throughout the United States, including at the border.

The standard this Note proposes is similar to standards that some courts have already adopted. Thus, it will be administrable for the justice system to incorporate into use. It will also be workable for law enforcement agencies seeking to use border searches to gather evidence and for the customs agents carrying out the searches. While it is not as easy to administer as a bright-line rule, the standard is clear and not unduly burdensome for government agents to adopt. Incorporating the standard into training materials on border searches would be a particularly helpful step.

Given the vast power that a warrantless and suspicionless search gives the government, it is appropriate to have enforceable limits. This is especially true on the margins of such power, such as when border searches are being conducted for the purpose of a criminal investigation. Cabining these searches by personnel, purpose, and border nexus is the best way to balance the government's interest in protecting the United States and crime enforcement with individual privacy interests.