BORDERLINE: WHY THE FEDERAL GOVERNMENT MAY USE BACKSCATTER TECHNOLOGY TO SEARCH VEHICLES AND CONTAINERS AT INTERNATIONAL BORDERS, BUT THE FOURTH AMENDMENT MAY BLOCK ITS USE ON PERSONS

I. INTRODUCTION

The Executive's power to secure the borders of the United States is nearly as old as the country itself. ♦ The United States Customs and Border Protection ("CBP") agency is the nation's frontline border agency, and CBP strives to protect United States borders from terrorism and prevent the smuggling of humans, weapons, and drugs. ♦ CBP's mission to control United States borders is of critical importance to the security of the American people and the United States economy. ♦ In recent years, CBP has begun utilizing backscatter technology ("BT") to help combat such problems and enhance border security. ♦

BT is an x-ray technology that is capable of detecting weapons, drugs, explosives, and other contraband concealed on a person's body or inside vehicles or containers. ♦ BT detects such items by utilizing electronically generated x-rays to create photo-like images of the object examined. ♦ BT has the potential to increase national security, but with its ability to see through clothes, vehicles, and walls, BT is poten-

1. See United States v. Flores-Montano, 541 U.S. 149, 153 (2004) (stating that the First Congress gave the Executive the authority to conduct border searches to secure the nation's borders).
3. Id. at 6, 10.
tially one of the most invasive technologies conceivable. To date, no court has tried the issue of whether the use of BT constitutes a search under the Fourth Amendment, or what limitations the Fourth Amendment imposes upon its use, but courts have viewed the use of other high-tech threat detection technologies as searches under the Fourth Amendment. Just as the Supreme Court of the United States has examined the constitutionality of other technologies, this Article attempts to answer the question of how constitutional constraints limit the power of technology to diminish an individual's privacy rights. Specifically, this Article examines the Fourth Amendment's constraints on CBP's use of BT.

This Article's Background section first discusses BT, including how BT works and how CBP is currently using BT at international borders. This Article's Background then discusses some of the concerns surrounding the use of BT in public places, and a few of the options available to those who disapprove the government's use of BT. The Background section also discusses several cases in which courts have discussed the use of high-tech devices and their Fourth Amendment implications, as well as the constitutionality of conducting searches at the international border.

The Argument section shows that the use of BT constitutes a search under the Fourth Amendment, but in most circumstances, the warrantless, suspicionless use of BT does not violate the Fourth Amendment at international borders or their functional equivalents. However, the warrantless, suspicionless use of BT to search a person's body at the border could violate an individual's Fourth Amendment rights if courts consider the use of BT to constitute a non-routine bor-


8. See infra notes 92-171 and accompanying text.

9. See Kyllo v. United States, 533 U.S. 27, 34 (2001) (stating that “[t]he question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy”); see infra notes 165-270 and accompanying text.

10. See infra notes 172-283 and accompanying text.

11. See infra notes 17-62 and accompanying text.

12. See infra notes 63-91 and accompanying text.

13. See infra notes 92-171 and accompanying text.

14. See infra notes 172-283 and accompanying text.
Finally, this Article concludes by arguing that the use of BT enhances CBP's ability to secure the nation's borders, and CBP should continue to use BT to protect the people of the United States from external threats.16

II. BACKGROUND

A. A Description of How Backscatter Technology Works

Dr. Steven W. Smith introduced the first backscatter technology ("BT") security device in 1992.17 BT uses low-level, electronically generated x-rays to generate a photo-like, x-ray image of the object examined.18 By reviewing the images produced, United States Customs and Border Protection ("CBP") agents are able to detect weapons, drugs, explosives, and other contraband that conventional x-ray machines or metal detectors may not be able to detect.19

BT uses a narrow beam of x-rays that quickly scans an object.20 A computer collects data from the scan, and then projects a high-quality image onto a monitor.21 Each scan takes eight to ten seconds to com-

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15. See infra notes 252-75 and accompanying text.
16. See infra notes 284-98 and accompanying text.
During the scan, x-ray photons interact with the object being scanned. As these photons meet the object, they will either be scattered by or absorbed by the object under inspection. Objects made of high-density elements are most likely to absorb the x-ray photons, whereas organic materials and other objects made of low-density elements are most likely to deflect the photons, causing them to scatter. The BT device detects and plots the intensity of photons reflected or scattered back during the scan. A computer measures the varying levels of intensity and converts the data into an electronic image. The computer then displays the image on a monitor, where the image may be reviewed for contraband or potential threats.

Examples of organic or low density materials include cigarettes, drugs, explosives, and human bodies. Because these low density materials cause greater photon scattering than high density materials, they are more clearly visible in the computer image, appearing as bright white objects. According to American Science and Engineering, Inc., a manufacturer of BT devices, this feature allows security personnel to quickly interpret the images and identify both the presence, as well as the exact position, of organic or low density elements located inside the object scanned. High density materials, on the other hand, appear in the image as dark objects. This contrast facil-

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23. See AS&E, Z Backscatter, supra note 18 (indicating that during a BT scan, "X-rays interact with matter" and "X-ray photons ... are scattered from the object undergoing inspection").
24. Id.; TopBits, Backscatter X-Ray, supra note 19.
25. TopBits, Backscatter X-Ray, supra note 19; Pomoni, supra note 18; AS&E, Z Backscatter, supra note 18. High-density elements are typically those elements with high atomic numbers on the periodic table. AS&E, Z Backscatter, supra note 18.
26. AS&E, Z Backscatter, supra note 18; SEARCHSECURITY, Body Scanning, supra note 21.
27. TopBits, Backscatter X-Ray, supra note 19; AS&E, Z Backscatter, supra note 18.
28. See Which Is It: Millimeter Wave or Backscatter?, THE TSA BLOG (May 27, 2008), http://blog.tsa.gov/2008/05/which-is-it-millimeter-wave-or.html (stating that during a BT scan, reflected radiation is "converted into a computer image ... and displayed on a remote monitor"); TopBits, Backscatter X-Ray, supra note 19.
29. AS&E, Z Backscatter, supra note 18.
30. Id.
31. Id.; TSA, How It Works, supra note 18; see also Privacy Impact Assessment Update for TSA Whole Body Imaging, U.S. DEPT. OF HOMELAND SECURITY, 3 (July 23, 2009), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_wbiupdate.pdf (suggesting that transportation security officers using BT are able to identify "the location on the [passenger's] body where a threat item is suspected").
itates detection of high density objects, such as weapons, as scans reveal the form and shape of the objects inspected.33

B. THE VERSATILITY OF BACKSCATTER TECHNOLOGY AND ITS USE IN VARIOUS CONTEXTS

The use of backscatter technology ("BT") is becoming increasingly prevalent.34 For example, BT has been used in diamond mines and prisons for several years.35 The United States government currently uses BT in airports, in city streets, at military bases, and at international borders.36 However, this Article focuses on the government’s use of BT at the border.37

According to the United States Customs and Border Protection ("CBP") agency, United States borders are vulnerable to persons who smuggle drugs and other forms of contraband into the United States.38 A CBP report indicated that in 2009, CBP seized 2.4 million pounds of narcotics and prevented 780,721 illegal or inadmissible aliens from entering the United States.39 CBP uses Z portals and Z backscatter vehicles to help secure international borders.40

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33. AS&E, Z Backscatter, supra note 18; see TopBits, Backscatter X-Ray, supra note 19 (showing backscatter image of handgun in dark form, contrasted against bright form of human body).
34. See Joe Sharkey, Opt Out of a Body Scan? Then Brace Yourself, N.Y. TIMES, Nov. 1, 2010, at B6, available at http://www.nytimes.com/2010/11/02/business/02road.html?_r=1&scp=1&sq=brACE%20YOURSELF&st=cse (stating that United States airports had 317 BT devices in use as of November 2010, with 1000 anticipated by the end of 2011); see also Transportation Agency’s Plan to X-Ray Travelers Should Be Stripped of Funding, ELECTRONIC PRIVACY INFORMATION CENTER (June 2005), http://epic.org/privacy/surveillance/spotlight/0605/ (noting that BT is used by over thirty federal agencies).
37. See infra notes 172-283 and accompanying text.
39. Id. at 6.
40. CBP, Enhanced Screening, supra note 36 (stating that CBP uses Z Portals); CBP, Accountability, supra note 38, at 39 (stating that CBP uses Z Fords, a type of Z
1. Backscatter Portals

One way the United States Border Protection ("CBP") agency uses backscatter technology ("BT") at international borders is with drive-through inspection systems for vehicle checkpoints. These arch-like BT machines, known as "portals," cost up to $2 million each and are capable of screening as many as 120 vehicles per hour. Portals use BT technology to produce high-quality images of cars, trucks, containers, and their contents. Portals create these photo-like images as vehicles pass through the portal at approximately five kilometers per hour. Portals do not cause permanent damage to vehicles scanned, and a vehicle's occupants do not need to exit the vehicle during a portal scan.

Portals scan the whole vehicle or object at once, and create an image depicting three simultaneous views of the object scanned: right, left, and top-down. Agents monitoring the images created by the portal are able to detect explosives, weapons, persons, drugs, and other contraband that may be concealed inside the vehicle scanned.

In August 2008, the Transportation Security Administration ("TSA") began a four-week test of a BT Portal at a ferry terminal near
Havelock, North Carolina. The TSA reported that the presence of the portal did not alarm motorists. Shortly after the TSA concluded its test, CBP began using a BT Portal at San Ysidro, California, the busiest port of entry to the United States. Based upon the performance of the portal at San Ysidro, CBP already anticipates using additional portals in the future.

2. Backscatter Vehicles

Another way the United States Customs and Border Protection ("CBP") agency uses backscatter technology ("BT") is with BT-equipped vehicles. CBP uses BT-equipped vehicles ("ZBVs") to inspect vehicles and containers for security threats and contraband such as car bombs, explosives, smuggled persons, terrorists, trade fraud items, currency, and drugs.

ZBVs have three primary operation modes: drive-by mode, stationary scan mode, and personnel scanning mode. In drive-by mode, the ZBV is capable of inspecting vehicles and objects as the ZBV passes them. A ZBV is also able to scan targets as they pass by the ZBV. In stationary scan mode, the ZBV is capable of scanning not

49. Frank, supra note 42.
53. As discussed supra note 40, these BT devices are called "Z" Portals and "Z" backscatter vehicles because AS&E, one of the manufacturers of BT devices, refers to its products with the "Z Backscatter" trademark.
56. AS&E, Backscatter Van, supra note 54.
57. Id.; see also Gyokeres, supra note 55 (indicating that a ZBV is able to create an image "as it drives past a target").
only a targeted vehicle, but also any persons inside the vehicle.\textsuperscript{58} The personnel scanning mode allows ZBV operators to detect weapons or explosives that may be concealed on a person’s body.\textsuperscript{59}

Although ZBV images contain less detail of human bodies than the scanners used in airports, ZBVs are still capable of producing detailed images of vehicles and other objects.\textsuperscript{60} ZBVs allow technicians to see through clothes and inside vehicles, containers, and buildings.\textsuperscript{61} However, the images a ZBV produces are accurate within a range of no more than ten to fifteen feet.\textsuperscript{62}

C. CONCERNS SURROUNDING THE USE OF BACKSCATTER TECHNOLOGY

Although backscatter technology ("BT") scanners have been described as convenient and effective, many citizens and organizations have expressed concern with the use of BT.\textsuperscript{63} Two concerns surrounding the use of BT include safety and privacy.\textsuperscript{64}

1. Safety

The fact that backscatter technology ("BT") scanners use radiation raises health concerns regarding the use of BT.\textsuperscript{65} Although BT scanners expose people to low levels of radiation, those who travel frequently may be concerned about repeated radiation exposure from BT

\textsuperscript{58} AS&E, \textit{Backscatter Van}, supra note 54.
\textsuperscript{59} Gyokeres, supra note 55.
\textsuperscript{60} Gyokeres, supra note 55; see also Gerald McLeod, \textit{Xray Scan Technology Equipped Vehicles Deployed and Now Roving America’s Street}, \textit{AssociatedContent.com}, \url{http://www.associatedcontent.com/article/5744658/xray_scan_technology_equipped_vehicles.html?cat=9} (last visited Dec. 18, 2010) (noting that ZBVs capture less detail of human bodies than the BT devices used in airports).
\textsuperscript{62} Telephone Interview with Dr. Peter Rez, Professor, Department of Physics, Arizona State University (Nov. 12, 2010).
\textsuperscript{64} See infra notes 65-76 and accompanying text.
scanners. Moreover, according to the Nuclear Regulatory Commission, no safe level of radiation exposure may exist.

On the other hand, the organizations that produce and use BT scanners insist that BT scanners are safe for people, cargo, and the environment. American Science and Engineering, Inc. ("AS&E") assures that the level of radiation that BT scanners produce is within the acceptable limits set by government agencies. According to AS&E, BT scanners produce a level of radiation exposure equivalent to one to two minutes of flying in an airplane or fifteen to twenty minutes of naturally-occurring background radiation.

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2. Privacy

The government's use of backscatter technology ("BT") has upset many privacy advocates.\(^7\) For example, the executive director of the Electronic Privacy Information Center ("EPIC") stated that from a privacy perspective, BT may be one of the most invasive technologies conceivable.\(^7\) Moreover, the American Civil Liberties Union ("ACLU") refers to BT as a virtual strip search.\(^7\) Although BT is capable of creating detailed images of naked human bodies, the BT devices the United States Customs and Border Protection ("CBP") agency utilizes, namely portals and BT-equipped vehicles ("ZBVs"), do not produce as much detail of the human body as the BT devices used in airports.\(^7\)


In fact, images of human bodies, as produced by portals and ZBVs are portrayed only as silhouettes. Based upon the image created by a portal or ZBV, a CBP agent would be unable to determine the age, gender, or race of a person scanned.

D. **Countermeasures and Alternatives Available to Those Who Oppose Backscatter Technology**

Due to the multiple concerns surrounding the use of backscatter technology ("BT"), an increasing number of individuals, such as Utah Representative Jason Chaffetz, and organizations, such as the Electronic Privacy Information Center ("EPIC") and the American Civil Liberties Union ("ACLU"), oppose the use of BT. Several alternatives are available to people who wish to combat the government's use of BT, such as opting out of BT scans, filing a lawsuit to challenge the use of BT, and supporting legislation to limit the permissible uses of BT.

1. **Opt Out of Backscatter Technology Scans**

The federal government's position is that anyone can choose to opt out of a backscatter technology ("BT") scan of their body. For example, a person who does not wish to receive a BT scan while traveling...
across the border in a vehicle has the option of exiting the vehicle and allowing a United States Customs and Border Protection ("CBP") agent drive the vehicle through the BT Portal.\(^\text{80}\)

2. **File A Lawsuit Against Entities Utilizing Backscatter Technology**

Advocacy groups, such as the Electronic Privacy Information Center ("EPIC") and the American Civil Liberties Union ("ACLU"), contend that the use of backscatter technology ("BT") violates the Fourth Amendment to the United States Constitution.\(^\text{81}\) Specifically, such organizations argue the use of BT constitutes an unreasonable search without probable cause or a warrant.\(^\text{82}\) In fact, EPIC filed a lawsuit in the District of Columbia to stop the use of BT scanners, arguing that BT scanners are invasive and unlawful.\(^\text{83}\)

3. **Support Legislation to Limit the Use of Backscatter Technology**

Aside from lawsuits, legislation has tried to curb the use of backscatter technology ("BT").\(^\text{84}\) On April 22, 2009, Utah Representative Jason Chaffetz ("Rep. Chaffetz") introduced the Whole-Body Imaging Limitations Act of 2009\(^\text{85}\) ("the Whole-Body Imaging Bill") in the House of Representatives.\(^\text{86}\) The Whole-Body Imaging Bill sought to amend 49 U.S.C. § 44901,\(^\text{87}\) to limit the use of BT for aircraft screening and other purposes; prohibit storing, transferring, sharing, or copying backscatter images; and provide a penalty for persons found guilty of storing, transferring, sharing, or copying backscatter images.

Searching-cars-339292819.htm (noting that CBP allows drivers to have a CBP agent drive through BT scanners at ports of entry).

\(^{80}\) Goodwin, supra note 79.

\(^{81}\) EPIC, Whole Body Imaging Technology and Body Scanners, ELECTRONIC PRIVACY INFORMATION CENTER, http://epic.org/privacy/airtravel/backscatter/ (last visited Nov. 17, 2010) (hereinafter EPIC, Whole Body Imaging); Jay Stanley, Full Body Scanners: From Airports to the Streets?, BLOG OF RIGHTS (Aug. 25, 2010), http://www.aclu.org/blog/technology-and-liberty/full-body-scanners-airports-streets; see also U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated").

\(^{82}\) See Diane Macedo, X-RAY VANS: Security Measure, or Invasion of Privacy?, FoxNEWS.COM (Oct. 22, 2010), http://www.foxnews.com/scitech/2010/10/19/x-ray-vans-security-measure-invasion-privacy/ (suggesting use of BT scanners is a search not founded upon probable cause or a warrant).

\(^{83}\) EPIC, Whole Body Imaging, supra note 81.

\(^{84}\) See infra notes 85-91 and accompanying text.


Id.
The Whole-Body Imaging Bill would not prohibit all use of BT, but would prohibit the Transportation Security Administration's ("TSA") use of BT as the primary screening method at airports. Rep. Chaffetz recognized that BT may be appropriate in terror-related situations, but insisted that such invasive technology is not necessary in the context of aircraft security. On May 26, 2009, the Whole-Body Imaging Bill was referred to the Subcommittee on Crime, Terrorism, and Homeland Security but never left the subcommittee and never became law.

E. HIGH-TECH CASE LAW AND FOURTH AMENDMENT ANALYSIS

Over the past fifty years, courts have decided several cases involving the use of high-tech devices. Examples of such cases include decisions from both the Supreme Court of the United States and the United States Court of Appeals for the Ninth Circuit.

1. Katz v. United States: The Supreme Court Developed the Katz Test to Determine Whether A Search Was Reasonable Under the Fourth Amendment

In Katz v. United States, the Supreme Court of the United States determined that without a warrant, electronic surveillance violated the Fourth Amendment to the United States Constitution. In Katz, Federal Bureau of Investigation ("FBI") agents suspected Charles Katz ("Katz") disseminated information regarding wagering to persons located in other states, in violation of federal law. During
the course of their investigation, the FBI agents attached an electronic
listening device to the exterior of a public telephone booth where Katz
placed his calls.97 The electronic device was capable of listening to
and recording Katz’s side of the conversation, but did not record the
words of the parties with whom Katz spoke.98

Katz was subsequently charged with violating 18 U.S.C. § 1084,99
which prohibited using wire communication devices to transmit gam-
bling information in interstate commerce.100 At trial, the United
States District Court for the Southern District of California admitted
Katz’s recorded telephone conversations into evidence.101 Katz was
convicted.102 Katz appealed, arguing that the FBI agents’ act of re-
cording his telephone conversations violated his rights under the
Fourth Amendment.103 The United States Court of Appeals for the
Ninth Circuit affirmed Katz’s conviction and rejected his argument,
determining that the FBI agents did not violate Katz’s Fourth Amend-
ment rights because the FBI agents had not physically invaded the
phone booth where Katz had engaged in incriminating

The Court reversed the

Katz appealed to the Supreme Court.105 The Court reversed the
lower courts’ decisions because the FBI agents failed to obtain a war-
rant before conducting electronic surveillance of Katz.106 The Court
also noted that none of the exceptions to the Fourth Amendment’s
warrant requirement applied under the facts of the case.107 Finally,
the Court held that obtaining prior justification, as required by the
Fourth Amendment, is a constitutional precondition for conducting a
search involving electronic surveillance.108

Justice John Marshall Harlan II wrote a concurring opinion in the
Katz decision.109 Justice Harlan’s concurring opinion contained what

97. Id. at 348.
98. Id. at 348, 354, n.14.  
100. Katz, 389 U.S. at 348 & n.1.
101. Id. at 348. Katz objected to the court admitting the recorded telephone conver-
sations, but the court admitted the recordings over Katz’s objection. Id.
102. Id.
103. Id.
104. Id. at 348-49.
105. See id. at 349 (indicating that the Supreme Court granted certiorari).
106. Id. at 356, 359 (stating that before beginning their search, the FBI agents did not “present their estimate of probable cause for detached scrutiny by a neutral

magistrate”).
107. Id. at 357-58 (“It is difficult to imagine how any of [the] exceptions could ever apply to the sort of search and seizure involved in this case”).
108. Id. at 359; see also Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding
search conducted with thermal imager was unreasonable under the Fourth Amendment
because government agents failed to seek a warrant before conducting the search).
has since been labeled as the *Katz* test.\(^{110}\) The *Katz* test asked whether a person had a subjective expectation of privacy and whether society was prepared to recognize such expectation of privacy as reasonable.\(^{111}\)

2. United States v. Ramsey: The Supreme Court Concluded That Customs Officials Do Not Violate the Fourth Amendment by Conducting Warrantless Searches of Packages At the Border

In *United States v. Ramsey*,\(^ {112}\) the Supreme Court of the United States concluded that a customs agent's act of conducting a warrantless search of envelopes entering into the United States did not violate the Fourth Amendment.\(^ {113}\) In *Ramsey*, Charles W. Ramsey ("Ramsey") was involved in a drug trafficking scheme wherein he would receive heroin-filled envelopes from an associate in Bangkok, Thailand.\(^ {114}\) Pursuant to this practice, one of Ramsey's accomplices mailed multiple letter-sized envelopes to a Washington D.C. address.\(^ {115}\)

While the envelopes were in route to Ramsey, a New York City customs inspector spotted the suspicious envelopes and opened one of the envelopes.\(^ {116}\) Upon opening the envelope, the inspector discovered heroin.\(^ {117}\) Drug Enforcement Administration agents delivered six of the envelopes under surveillance.\(^ {118}\) After one of Ramsey's associates collected the envelopes and delivered them to Ramsey, federal agents arrested both Ramsey and his accomplice.\(^ {119}\)

At trial in the United States District Court for the District of Colombia, Ramsey moved the court to suppress the heroin, but the court


\(^{111}\) See *Katz*, 389 U.S. at 361 (1967) (Harlan, J., concurring) (articulating the two-pronged *Katz* test).

\(^{112}\) 431 U.S. 606 (1972).


\(^{114}\) *Ramsey*, 431 U.S. at 608.

\(^{115}\) Id. at 609.

\(^{116}\) Id. The envelopes were suspicious because the addresses on the envelopes all appeared to have been typed by the same typewriter, "were addressed to four different locations in the Washington, D.C. area," were bulky, weighed more than normal airmail letters, and "were from Thailand, a known source of narcotics." *Id.*

\(^{117}\) *Id.* at 609-10.

\(^{118}\) *Id.* at 610.

\(^{119}\) *Id.*
denied Ramsey's motion.\textsuperscript{120} The district court found Ramsey guilty, but the D.C. Circuit reversed Ramsey's conviction, reasoning that the border search doctrine did not apply to the practice of opening international mail without a warrant.\textsuperscript{121}

On appeal, the Supreme Court of the United States reversed the D.C. Circuit's decision.\textsuperscript{122} The Supreme Court reasoned that the initial search of the envelope occurred at the border because it occurred at the point of entry into the United States.\textsuperscript{123} The Court noted that the search of a package at the border is constitutionally distinguishable from domestic searches, and that customs officials would be justified in conducting a warrantless search of an envelope if a person attempted to carry it across the border.\textsuperscript{124} Finding no reason to differentiate between letters carried into the United States and letters mailed into the United States, the Court concluded that the customs official's act of searching the envelopes upon arrival into the United States did not violate the Fourth Amendment.\textsuperscript{125}

3. United States v. Montoya de Hernandez: The Supreme Court Determined that Extensive Searches and Seizures At the Border Are Reasonable When United States Customs and Border Protection Agents Have A Reasonable Suspicion of Wrongdoing

In United States v. Montoya de Hernandez,\textsuperscript{126} the Supreme Court of the United States held that detention at the border is justified if customs officials reasonably suspect the traveler to be smuggling contraband and that an extended detention is reasonable where such detention is necessary to resolve the suspicion.\textsuperscript{127} In Montoya de Hernandez, Rosa Elvira Montoya de Hernandez ("Montoya") traveled to the United States on a flight from Bogotá, Colombia to Los Angeles, California.\textsuperscript{128} United States Customs and Border Protection ("CBP") agents suspected Montoya of having swallowed drug-filled balloons in an attempt to smuggle narcotics into the United States by concealing the balloons in her alimentary canal.\textsuperscript{129} Montoya refused to submit

\begin{footnotes}
\footnotetext[120]{Id. at 610-11.}
\footnotetext[121]{Id. at 611}
\footnotetext[122]{Id. at 625.}
\footnotetext[123]{Id. at 609, n.2.}
\footnotetext[124]{Id. at 619-20; see also United States v. Carreon, 872 F.2d 1436, 1439 (10th Cir. 1989) (noting that searches conducted at the border are governed by different considerations and rules of constitutional law than similar searches conducted in domestic situations).}
\footnotetext[125]{Ramsey, 431 U.S. at 623-25.}
\footnotetext[126]{473 U.S. 531 (1985).}
\footnotetext[127]{Montoya de Hernandez, 473 U.S. at 531, 541, 544 (1985).}
\footnotetext[128]{Montoya de Hernandez, 473 U.S. at 532.}
\footnotetext[129]{Id. at 534.}
\end{footnotes}
to an x-ray, and CBP agents informed Montoya that she would be held until she either agreed to receive an x-ray or until her bowels moved.\textsuperscript{130} After sixteen hours of detention, Montoya's bowels still had not moved.\textsuperscript{131} CBP agents then sought a warrant authorizing medical procedures to resolve the agents' suspicions.\textsuperscript{132} Medical procedures at a nearby hospital confirmed the CBP agents' suspicions, as the procedures revealed a balloon containing cocaine.\textsuperscript{133}

Montoya was charged with violating various controlled substance statutes.\textsuperscript{134} The United States District Court for the Central District of California admitted evidence against Montoya despite her motion to suppress the evidence.\textsuperscript{135} Montoya was convicted, but the United States Court of Appeals for the Ninth Circuit reversed her convictions, explaining that CBP agents had insufficient cause to hold Montoya for sixteen hours and that CBP agents erred by failing to seek a warrant immediately.\textsuperscript{136}

On appeal, the Supreme Court of the United States reversed the Ninth Circuit's decision.\textsuperscript{137} The Court reasoned that a person's expectation of privacy is less at the border than it would be in the interior and that government officials may conduct routine searches at the border without a warrant, probable cause, or even reasonable suspicion of wrongdoing.\textsuperscript{138} Moreover, the Court determined reasonable

\begin{itemize}
\item 130. \textit{Id.} at 534-36. As a basis for refusing the x-ray, Montoya claimed she was pregnant. \textit{Id.} at 534. The Court noted that customs agents would be unable to detect alimentary canal smuggling by frisking the suspect. \textit{Id.} at 543; see also New York v. Earl, 431 U.S. 943, 947 (1977) (equating the terms "pat-down" and "frisk").
\item 131. \textit{Montoya de Hernandez}, 473 U.S. at 534-35. The Ninth Circuit stated that during the course of her detention, Montoya had exhibited "heroic efforts to resist the usual calls of nature." \textit{Id.}
\item 132. \textit{Id.} The warrant consisted of a court order authorizing "a pregnancy test, an x-ray, and a rectal examination." \textit{Id.}
\item 133. \textit{Id.} at 535-36. The balloon was found during a rectal examination. \textit{Id.} at 535. Montoya passed eighty-eight cocaine-filled balloons during the next four days. \textit{Id.} at 536.
\item 135. \textit{Montoya de Hernandez}, 473 U.S. at 536.
\item 136. \textit{Id.;} see also Dunaway v. New York, 442 U.S 200, 214-15 (1979) (noting that the Fourth Amendment was intended to prevent wholesale intrusions against an individual's personal security).
\item 137. \textit{Montoya de Hernandez}, 473 U.S. at 544.
\item 138. \textit{Id.} at 538-39; see also United States v. Beale, 736 F.2d 1289, 1295 (9th Cir. 1984) (Pregerson, J., dissenting) (noting that the reasonable suspicion standard has a low threshold). Subsequent to the Supreme Court's decision in \textit{Montoya de Hernandez}, other courts began using the border search doctrine, which allows CBP agents to conduct routine searches at international borders without a warrant, probable cause, or any degree of suspicion. See United States v. Rivas, 157 F.3d 364, 367 (5th Cir. 1998)
\end{itemize}
suspicion that Montoya was smuggling drugs in her alimentary canal did exist to support the extended detention by CBP agents. The Court also noted that Montoya's extended detention was a result of her own actions. Therefore, the Court concluded that CBP's acts of searching and detaining Montoya were justified and reasonable.

4. United States v. Flores-Montano: The Supreme Court Explained that People Have A Lowered Expectation of Privacy In Their Vehicles at the Border and Border Searches Not Causing Permanent or Irreversible Damage Are Considered Reasonable

In United States v. Flores-Montano, the Supreme Court of the United States concluded that the government had authority to conduct suspicionless inspections of travelers' vehicles at the border. In Flores-Montano, Manuel Flores-Montano ("Flores-Montano") endeavored to enter the United States while carrying thirty-seven kilograms of marijuana in his vehicle's gas tank. When Flores-Montano arrived at the port of entry, a United States Customs and Border Protection ("CBP") agent conducted an initial inspection of Flores-Montano's vehicle and designated the vehicle for a secondary inspection. A second CBP inspector tapped the vehicle's gas tank and noted that it sounded solid. The CBP inspector requested a mechanic to come remove the gas tank for further inspection. After the mechanic removed the gas tank, the inspector discovered thirty-seven kilograms of marijuana concealed within the gas tank.

Officials charged Flores-Montano with violating multiple controlled substance-related statutes. Flores-Montano moved the court to suppress the evidence of marijuana having been discovered in

(discussing order search doctrine). See also United States v. Sandler, 644 F.2d 1163, 1167-69 (1981) (assessing whether a pat-down of a suspect was a routine border search).
139. Montoya de Hernandez, 473 U.S. at 542.
140. Id. at 543; see also United States v. Chacon, 330 F.3d 323, 328 (5th Cir. 2003) (noting that under the Fourth Amendment, the length of a border detention has a significant bearing on the reasonableness of the stop).
141. Montoya de Hernandez, 473 U.S. at 541, 544.
144. Flores-Montano, 541 U.S. at 150. Flores-Montano attempted to enter at the Otay Mesa Port of Entry. Id.
145. Id.
146. Id. at 151.
147. Id.
148. Id.
the gas tank.\textsuperscript{150} The United States District Court for the Southern District of California held that for the search to have been justified, CBP agents needed to have had reasonable suspicion.\textsuperscript{151} The district court determined the CBP agents lacked reasonable suspicion and granted Flores-Montano's motion to suppress.\textsuperscript{152} The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.\textsuperscript{153}

On appeal, the Supreme Court of the United States reversed.\textsuperscript{154} The Court declared that CBP's search of the gas tank did not violate Flores-Montano's rights because the government had authority to search any automobile that a driver seeks to bring into the United States.\textsuperscript{155} Additionally, the Court concluded that the removal and search of a vehicle's gas tank is a brief, reversible procedure that does not cause permanent damage to the vehicle.\textsuperscript{156} The Court also noted that while a motorist faces a significant interference with his property when the government removes his gas tank, such interference is justified because the government has a superior interest in protecting its borders.\textsuperscript{157}

5. United States v. Okafor: The Ninth Circuit Upheld the Warrantless X-Ray Search of Luggage at the Functional Equivalent of the Border

In United States v. Okafor,\textsuperscript{158} The United States Court of Appeals for the Ninth Circuit upheld the warrantless x-ray search of a person's luggage at the functional equivalent of the border.\textsuperscript{159} In Okafor, Nzelo Chiedu Okafor ("Okafor") had a layover at the Los Angeles International Airport during a flight from Brazil to Japan.\textsuperscript{160} A customs inspector became suspicious of Okafor after briefly speaking with

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\textsuperscript{150} Flores-Montano, 541 U.S. at 151.

\textsuperscript{151} Id. In determining CBP agents needed reasonable suspicion to search the gas tank, the district court relied upon United States v. Molina-Tarazon, 279 F.3d 709 (9th Cir. 2002). Flores-Montano, 541 U.S. at 151.

\textsuperscript{152} Flores-Montano, 541 U.S. at 151.

\textsuperscript{153} Id.

\textsuperscript{154} Id. at 156.

\textsuperscript{155} Id. at 154; see also United States v. Rivas, 157 F.3d 364, 367 (5th Cir. 1998) (noting that pursuant to the border search doctrine, government actors may conduct routine searches at the border without any level of suspicion).

\textsuperscript{156} Flores-Montano, 541 U.S. at 155.

\textsuperscript{157} Id.

\textsuperscript{158} 285 F.3d 842 (9th Cir. 2002).

\textsuperscript{159} United States v. Okafor, 285 F.3d 842, 845-46 (9th Cir. 2002).

\textsuperscript{160} Okafor, 285 F.3d at 844.
Based upon his suspicions, the customs inspector searched Okafor's luggage. After suspecting one of Okafor's pieces of luggage contained a secret compartment, the customs inspector conducted an x-ray search of Okafor's luggage, which ultimately revealed a secret compartment containing cocaine. Okafor waived his Miranda rights and confessed that he knew the luggage contained drugs.

After a jury trial in the United States District Court for the Central District of California, a jury convicted Okafor of violating federal law relating to controlled substances. The district court denied Okafor's motion to suppress any evidence seized from the search of his luggage, and Okafor appealed.

On appeal, the United States Court of Appeals for the Ninth Circuit held that customs agents may conduct suspicionless x-ray searches of containers at the border. The Court determined that the search of Okafor's luggage was a border search because it occurred at the functional equivalent of the border. The customs inspector became suspicious of Okafor because Okafor bought his ticket only one day before departure, Okafor claimed to be a United States citizen on vacation in Brazil, yet traveling to Korea to study, Okafor could not name the school where he would study in Korea, Okafor's passport lacked a visa to allow Okafor to study in Korea, and the duration of Okafor's anticipated stay in Korea was only a few days. Although Okafor involved a search at an airport conducted with an x-ray device, a magnetometer is another search device that is commonly used in airports. Although Okafor involved a search at an airport conducted with an x-ray device, a magnetometer is another search device that is commonly used in airports. See United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974) (indicating that the use of a magnetometer is a search); see also Horton v. Goose Creek Indp. Sch. Dist., 690 F.2d 470, 478 (5th Cir. 1982) (indicating that the use of a magnetometer is a search because the purpose of a magnetometer is "to search for metal and disclose its presence in areas where there is a normal expectation of privacy"); United States v. Bell, 464 F.2d 667, 669 (2d Cir. 1972) (relating that magnetometers are "designed to detect the presence of metal objects" on people's bodies); 1 WAYNE R. LAFAVÉ, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2 (4th ed. 2004) (stating that the use of an x-ray device is a search).


Okafor, 285 F.3d at 845.

Okafor, 285 F.3d at 845-46.

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161. Id. The customs inspector became suspicious of Okafor because Okafor bought his ticket only one day before departure, Okafor claimed to be a United States citizen on vacation in Brazil, yet traveling to Korea to study, Okafor could not name the school where he would study in Korea, Okafor's passport lacked a visa to allow Okafor to study in Korea, and the duration of Okafor's anticipated stay in Korea was only a few days. Id.

162. Id.

163. Id. The customs inspector suspected Okafor's luggage contained a secret compartment because it weighed more than it should have when empty, it smelled of glue and mothballs, and the bottom of the bag was extraordinarily thick. Id.


166. Okafor, 285 F.3d at 845.

167. Id. at 845-46.

168. Id. at 845; see also United States v. Cardenas, 9 F.3d 1139, 1147 (5th Cir. 1993) (stating that the border search doctrine applies to searches that occur at the functional equivalent of an international border); United States v. Carter, 760 F.2d 1568, 1576 (11th Cir. 1985) (articulating a three-part test for determining whether a search takes place at the functional equivalent of the border). The test for determining whether a search occurs at the functional equivalent of the border is whether (1) CBP agents were reasonably certain that the object searched has recently crossed the border; (2) the
that the x-ray of Okafor's luggage was a routine search. Consequently, the search and x-ray of Okafor's luggage did not require a warrant or any particularized suspicion. Therefore, the Ninth Circuit upheld the search and affirmed Okafor's conviction.

III. ARGUMENT

The government's use of backscatter technology ("BT") at international borders does not violate the Fourth Amendment in most instances. This Article argues that the United States Customs and Border Protection ("CBP") agency's use of BT to secure United States borders is constitutional in most instances, but the use of BT to scan a person's body at the border may violate the Fourth Amendment.

This Article shows that CBP's use of BT is a search under the Fourth Amendment. Although the use of BT is a search, the suspicionless, warrantless use of BT to search vehicles at the border does not violate the Fourth Amendment. Likewise, CBP's use of BT to search containers and effects at the border does not violate the Fourth Amendment. However, the suspicionless, warrantless, and non-consensual use of BT to search a person's body at the border may violate the Fourth Amendment. Finally, this Article argues that CBP may use BT to conduct searches at locations that are the functional equivalent of the border.

A. THE USE OF BACKSCATTER TECHNOLOGY CONSTITUTES A SEARCH UNDER THE FOURTH AMENDMENT

The government's use of backscatter technology ("BT") to screen persons and objects entering into the United States constitutes a search because BT devices allow United States Customs and Border Protection ("CBP") agents to perceive items concealed on a person's body or inside a vehicle or container that would not otherwise be de-

search occurred at the first practicable opportunity after the object crossed the border; and (3) there has been no opportunity or time for the object searched to have been materially altered since the time it crossed the border. Carter, 760 F.2d at 1576. Okafor, 285 F.3d at 845-46; see United States v. Kelly, 302 F.3d 291 (5th Cir. 2002) (defining a routine searches as those that do not seriously invade the privacy of a traveler).

170. Id. at 848.
171. See infra notes 173-283 and accompanying text.
172. See infra notes 201-75 and accompanying text.
173. See infra notes 179-200 and accompanying text.
174. See infra notes 201-28 and accompanying text.
175. See infra notes 229-51 and accompanying text.
176. See infra notes 252-75 and accompanying text.
177. See infra notes 276-83 and accompanying text.
First, while courts have not yet addressed whether the use of BT scanners constitutes a search, such use is a search because the use of BT satisfies both prongs of the test articulated in *Katz v. United States* by Justice John Marshall Harlan II (the "Katz test"). Second, the use of BT also constitutes a search because BT is analogous to other technologies that courts have found to be a search. Even though the use of BT constitutes a search, the border search doctrine allows CBP to conduct routine searches at the border without a warrant or any degree of suspicion.

The *Katz* test is the relevant inquiry for deciding whether a search has occurred. The *Katz* test asks whether a person has a subjective expectation of privacy and whether society is prepared to recognize such expectation of privacy as reasonable. Use of BT scanners satisfies the *Katz* test because individuals have a reasonable expectation of privacy in their bodies, and society will recognize an expectation of privacy in one's body as reasonable.

The government's use of BT also constitutes a search because BT is analogous to other threat-detection technologies that the United States Courts of Appeals have unanimously maintained constitute a search.

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181. See *Katz v. United States*, 389 U.S. 516 (1967) (Harlan, J., concurring) (articulating the two-pronged *Katz* test); see infra notes 184-86 and accompanying text.

182. See infra notes 187-90 and accompanying text.

183. See infra notes 191-200 and accompanying text.


186. Compare *Katz*, 389 U.S. at 516 (articulating two-prong test that asks whether a person has a subjective expectation of privacy and whether society is prepared to recognize such expectation of privacy as reasonable), with Albarado, 495 F.2d at 803 (stating that people have "a normal expectation of privacy" in the intimate areas of their bodies), and Glen W. Fewkes, *How Far Can Public Surveillance Go?*, SECURITYINFOWATCH.COM (Nov. 3, 2009), http://www.securityinfowatch.com/Features/how-far-can-public-video-surveillance-go (suggesting that society is likely prepared to recognize an individual's right to privacy underneath their clothes as reasonable).
search. To illustrate, the use of a magnetometer, a metal detector commonly used in airports, constitutes a search because magnetometers detect metal items located within the most intimate areas of the body. Like magnetometers, BT is also capable of detecting items concealed within intimate areas of the human body. Therefore, the use of BT to detect concealed objects constitutes a search and is subject to the Fourth Amendment.

However, the Fourth Amendment only protects individuals from unreasonable searches and seizures. Consequently, determining that a body scan is a search is only part of the inquiry. To determine whether the use of BT is a reasonable search in compliance with the Fourth Amendment, courts must determine whether a person’s privacy interest outweighs the government’s need to conduct the search to protect its territorial integrity. Integral to making this reasonableness inquiry, courts must also determine whether the search is a routine or a non-routine search when conducted at the border.

The border search doctrine is an important exception to the Fourth Amendment’s warrant requirement. Pursuant to the border search doctrine, United States Customs and Border Protection (“CBP”) agents may conduct routine searches at international borders.

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187. Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 478 (5th Cir. 1982); see also infra notes 188-90 (arguing that the use of BT to search for weapons concealed on the human body is analogous to the use of magnetometers to detect the presence of weapons concealed on the human body).

188. Albarado, 495 F.2d at 803.

189. Compare Greenberg, supra note 179 (stating that BT devices are "capable of seeing through clothes"), with Bell, 464 F.2d at 669 (relating that magnetometers are "designed to detect the presence of metal objects on the person of an embarking passenger").

190. Compare Greenberg, supra note 179 (stating that BT devices are "capable of seeing through clothes"), with Bell, 464 F.2d at 669 (relating that magnetometers are "designed to detect the presence of metal objects on the person of an embarking passenger"), and Albarado, 495 F.2d at 806 (indicating that "the use of a magnetometer is a . . . search"). See also LaFave, supra note 179 §§ 2.2, 10.6 (suggesting that the use of BT is a search under the Fourth Amendment).

191. See United States v. Ramsey, 431 U.S. 606, 617-18 (1972) (stating that "[t]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable").


193. See Albarado, 495 F.2d at 805 (stating that "[i]n determining the reasonableness of a search, one must . . . balance the need for the search against the invasion of privacy involved").

194. See e.g., United States v. Okafor, 285 F.3d 842 (9th Cir. 2002) (deciding whether an x-ray inspection of luggage was routine or non-routine when conducted at the functional equivalent of the border).

195. United States v. Cardenas, 9 F.3d 1139, 1147 (5th Cir. 1993).
without a warrant, probable cause, or any degree of suspicion.\textsuperscript{196} In \textit{United States v. Montoya de Hernandez},\textsuperscript{197} the United States Supreme Court analyzed the reasonableness of a border search in terms of whether the search was "routine."\textsuperscript{198} A routine search is a search that does not seriously invade the privacy of a traveler.\textsuperscript{199} The following Parts of this Argument will discuss whether various types of BT searches violate the Fourth Amendment by assessing the "routine-ness," and therefore, the reasonableness of each type of border search.\textsuperscript{200}

B. USING BACKSCATTER TECHNOLOGY TO SEARCH VEHICLES ENTERING THE UNITED STATES DOES NOT VIOLATE THE FOURTH AMENDMENT

Using backscatter technology ("BT") to search vehicles entering the United States does not violate the Fourth Amendment because the government's interest in securing its borders outweighs the lowered expectation of privacy at international borders.\textsuperscript{201} First, the border search doctrine does not require courts to balance national security interests against the privacy interest in a person's vehicle, and the Supreme Court has significant precedent upholding suspicionless vehicle searches that occur at the border.\textsuperscript{202} Moreover, BT searches of vehicles at the border cause neither permanent nor irreversible damage to vehicles.\textsuperscript{203} Finally, BT provides a safe, effective method for screening vehicles and preventing people from smuggling contraband into the United States.\textsuperscript{204}

Under the border search doctrine, United States Customs and Border Protection ("CBP") agents may search vehicles at the border without a warrant or any degree of suspicion.\textsuperscript{205} In \textit{United States v. Flores-Montano},\textsuperscript{206} the Supreme Court asserted that the United States Court of Appeals for the Ninth Circuit erred when it applied a
“routineness” analysis to the search of a vehicle at the border. Thus, in the case of vehicle searches occurring at the border, no balancing of individual privacy interests is required and CBP agents may search vehicles entering the United States, even without individualized suspicion that the automobile or the occupants therein are involved in a crime. Likewise, vehicles having received an initial inspection at the border may be referred for secondary inspection without individualized suspicion.

Courts are likely to find the use of backscatter portals ("BT Portals") to conduct suspicionless searches of vehicles at the border is permissible as a matter of stare decisis because the Supreme Court has a long tradition of allowing other forms of suspicionless vehicle searches at the border. Although CBP currently uses BT Portals for secondary vehicle inspections, it would make no difference whether BT were used as a primary or secondary screening method for conducting vehicle searches at the border because CBP agents are authorized to stop and search vehicles at the border without any individualized suspicion.

Second, courts should find the use of BT to conduct vehicle searches at the border does not violate the Fourth Amendment because the Supreme Court has approved of methods for searching vehicles where the procedure is completely reversible and causes no permanent damage to the vehicle searched. In United States v. Flores-Montano, the Supreme Court upheld the removal and inspection of a car's gas tank because the procedure was reversible and did

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207. See United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (stating that "[c]omplex balancing tests to determine what is a 'routine' search of a vehicle . . . have no place in border searches of vehicles").


210. See Flores-Montano, 541 U.S. at 154 ("We have long recognized that automobiles seeking entry into this country may be searched") (citing Carroll, 267 U.S. at 154).


212. Compare Flores-Montano, 541 U.S. at 155-56 (upholding the removal and inspection of a car's gas tank because the procedure was reversible and did not damage the operation or safety of the vehicle), with United States v. Carreon, 872 F.2d 1436, 1442, 1444 (10th Cir. 1989) (suggesting that reasonable suspicion was necessary before CBP agent was justified in drilling a hole into the side of a camper presented at the border).

not damage the operation or safety of the vehicle. In contrast, in United States v. Rivas, the Court of Appeals for the Fifth Circuit disapproved of a border search in which a CBP agent drilled into the body of an automobile without reasonable suspicion. Therefore, CBP agents may search passengers' vehicles at the border without reasonable suspicion as long as the search method that agents use is reversible and causes no permanent damage to the traveler's vehicle. By quickly producing multiple images that allow operators to see a vehicle's contents, BT Portals not only improve CBP's ability to detect contraband crossing the border without causing irreversible or permanent damage to vehicles, but also facilitate the flow of legitimate border traffic. Therefore, courts should find BT Portal scans are constitutional because BT Portal scans cause no permanent damage, and BT Portals allow CBP agents to identify contraband concealed inside vehicles that would otherwise be discoverable only by drilling or otherwise disassembling a vehicle.

Finally, courts should find the use of BT is permissible at the border because BT is an effective tool for preventing people from smuggling contraband into the United States. The use of BT at the

215. 157 F.3d 364 (5th Cir. 1998).
217. Compare Rivas, 157 F.3d at 367-68 (disapproving of a border search where customs official drilled into the body of an automobile without reasonable suspicion), with Flores-Montano, 541 U.S. at 155-57 (approving of a border search that involved removing the gas tank of an automobile because the procedure of removing and replacing a gas tank was reversible and caused no permanent damage to the vehicle).
218. See CBP, Vehicle Imaging System, supra note 211 (discussing the ability of BT Portals to quickly produce multiple images of vehicles being examined and facilitate the flow of legitimate border traffic); Compare Z Portal, AMERICAN SCIENCE AND ENGINEERING, INC., http://www.as-e.com/products_solutions/portal.asp (last visited Nov. 16, 2010) [hereinafter AS&E, Z Portal] (stating that BT Portals are "safe for . . . subject vehicles"), with Safe Definition, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/safe (defining "safe" as "free from harm or risk" and "not threatening danger") (last visited Jan. 7, 2011). A BT scan of a vehicle takes only thirty to forty-five seconds to complete, whereas the removal of a vehicle's fuel tank can easily take up to two hours. Compare AS&E, Z Portal, supra (stating that a Z Portal is capable of scanning 80 to 120 vehicles per hour), with Flores-Montano, 541 U.S. at 155, n.3 (acknowledging that a search involving the disassembly and reassembly of a gas tank may take one to two hours).
219. Compare AS&E, Z Portal, supra note 218 (stating that BT Portals are "safe for . . . subject vehicles"), with Safe Definition, MERRIAM WEBSTER, supra note 218 (defining "safe" as "free from harm or risk" and "not threatening danger") (last visited Jan. 7, 2011). See also Flores-Montano, 541 U.S. at 155 (approving of CBP agent's disassembly of vehicle's gas tank where the removal of the gas tank caused no permanent damage to the vehicle); CBP, Vehicle Imaging System, supra note 211 (stating that BT Portals can detect contraband "that may be hidden in car fenders, tires, trunks, gas tanks, or under the hood").
220. Compare Montoya de Hernandez, 473 U.S. at 544 (upholding search of a person entering the United States from an international flight where the search was reasona-
border furthers the government's paramount interest in protecting the territorial integrity of the United States because BT devices help prevent people from smuggling contraband into the United States. \[221\] The fact that the First Congress gave the federal government broad authority to conduct searches at the border to prevent the entry of contraband into the United States is indicative of the government's compelling interest in preventing people from carrying contraband into the country. \[222\] BT helps promote CBP's efforts to secure United States borders and prevent people from smuggling contraband or other external threats into the United States. \[223\]

Accordingly, courts need not consider individual privacy rights when evaluating the constitutionality of searching vehicles entering the United States. \[224\] The border search doctrine allows CBP agents to search vehicles at the border, even where CBP agents lack individualized suspicion that the automobile or its occupants are involved in a crime. \[225\] Courts will likely find the use of BT to search vehicles at the border is permissible because well-established Supreme Court precedents to prevent the suspect from smuggling contraband into the United States), \[221\] with Frequently Asked Questions, TRANSPORTATION SECURITY ADMINISTRATION, http://www.tsa.gov/approach/tech/ait/faqs.shtml (last visited Nov. 15, 2010) [hereinafter TSA, FAQ] (referring to BT as “a highly effective security tool”), and CBP, Vehicle Imaging System, supra note 211 (describing Z Portal's capability of assisting CBP agents in preventing people from bringing various forms of contraband into the United States).

221. \[221\] Compare Flores-Montano, 541 U.S. at 153 (describing the government's interest in protecting the territorial integrity of its borders as “paramount”), with CBP, Vehicle Imaging System, supra note 211 (describing Z Portal's capability of assisting CBP agents in preventing people from bringing various forms of contraband into the United States).

222. \[222\] See Flores-Montano, 541 U.S. at 153 (stating that the Executive's authority to conduct routine, suspicionless searches at the border was granted by the First Congress, which "reflects the 'impressive historical pedigree' of the Government's power and interest" in securing its borders).

223. \[223\] See CBP, Vehicle Imaging System, supra note 211 (stating that the use of BT at the border assists CBP agents in preventing illegal drugs, terrorist weapons, and other security threats from entering into the United States); compare Carreon, 872 F.2d at 1440 (noting the existence of a national crisis caused by the smuggling of illicit narcotics into the United States), with Jeanne Meserve, High-Tech Portals To Aid Border Screenings, CNN (Oct. 16, 2008), http://articles.cnn.com/2008-10-16/tech/border.portals_backscatter?_s=PM:TECH (indicating that BT devices help detect the presence of drugs and other contraband hidden inside vehicles seeking entry into the United States).

224. \[224\] See Flores-Montano 541 U.S. at 152 (declaring that "the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person . . . simply do not carry over to vehicles").

225. \[225\] See Rivas, 157 F.3d at 367 (indicating that the border search doctrine allows CBP agents to conduct suspicionless searches of vehicles at the border); see also Chacon, 330 F.3d at 326 (stating that CBP agents "may stop a vehicle, question its occupants about citizenship, and conduct a visual inspection of the vehicle without any individualized suspicion that the vehicle or its occupants is involved in a crime").
dent allows suspicionless vehicle searches at the border. Courts should allow CBP agents to utilize BT to search vehicles at the border because BT causes no permanent or irreversible damage to vehicles. Courts should also find the use of BT to conduct vehicle searches at the border is constitutional because BT is an effective tool for protecting the territorial integrity of the United States, and BT helps prevent people from smuggling contraband into the United States.

C. USING BACKSCATTER TECHNOLOGY TO SEARCH CONTAINERS AT THE BORDER DOES NOT VIOLATE THE FOURTH AMENDMENT

Using backscatter technology ("BT") to search containers at international borders does not violate the Fourth Amendment because searching such containers promotes the interest of securing national borders and preventing contraband from being smuggled into the United States. Courts should also uphold the use of BT to search containers at the border because BT searches are routine searches at the border that do not require force, entail no risk, and do not cause harm to the container searched. Therefore, courts should find the United States Customs and Border Protection ("CBP") agency's use of BT to conduct warrantless, suspicionless searches of containers at the border does not violate the Fourth Amendment.

The government has a compelling interest in preventing unwanted effects from entering into the United States. The time-honored practice of inspecting containers at national borders is inti-

See e.g., Flores-Montano, 541 U.S. at 152 (citing Carroll, 267 U.S. at 154) (declaring that "[w]e have long recognized that automobiles seeking entry into this country may be searched").

Compare AS&E, Z Portal, supra note 218 (stating that BT Portals are "safe for ... subject vehicles"), with Flores-Montano, 541 U.S. at 155 (upholding removal an inspection of a vehicle's gas tank at the border, in part because "[a] gas tank search involves a brief procedure that can be reversed without damaging the safety or operation of the vehicle"), and Safe Definition, MERIAM WEBSTER, supra note 218 (defining "safe" as "free from harm or risk" and "not threatening danger") (last visited Jan. 7, 2011).

Compare Montoya de Hernandez, 473 U.S. at 538, 544 (upholding search of a person entering the United States from an international flight where the search was reasonable to prevent the suspect from smuggling contraband into the United States), with TSA, FAQ, supra note 220 (referring to BT as "a highly effective security tool"), and CBP, Vehicle Imaging System, supra note 211 (describing Z Portal's capability of assisting CBP agents in preventing people from bringing various forms of contraband into the United States).

See infra notes 230-51 and accompanying text.

See infra notes 237-42 and accompanying text.

See infra notes 243-51 and accompanying text.

See United States v. Flores-Montano, 541 U.S. 149, 153 (2004) (declaring that the federal government has "a paramount interest in protecting" the territorial integrity of the United States).
Consequently, the standard for searching containers at international borders is different from the standard applied to the search of containers in a domestic context. The border search doctrine allows CBP agents to conduct "routine" searches at the border without suspicion of wrongdoing. Consistent with the interest of preventing contraband from entering the United States, CBP may conduct routine warrantless, suspicionless searches of the effects of any person attempting to enter the United States.

In order to conduct a suspicionless search of containers and effects at the border, unlike searches of automobiles conducted at the border, searches of containers must be routine. A search is considered routine when the search does not seriously invade the privacy of the traveler. A non-routine border search of a container would occur where the CBP agent conducting the search uses excessive force, risks some level of harm by conducting a search, or potentially damages the container. Courts consider the visual inspection of a container and its contents at the border to be routine. Likewise, an x-ray search of a container at the international border is routine because an x-ray search of a container does not require force, entails no risk, and does not cause harm to the container. Therefore, courts...

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233. See United States v. Ramsey, 431 U.S. 606, 616-17, 617, n.12 (1972) (noting that the First Congress, the same Congress that established the Fourth Amendment, gave customs officials "full power and authority" to search through goods at the border).

234. See United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (stating that "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior"); see also Ramsey, 431 U.S. at 618-19 (indicating that persons already lawfully inside the country generally have a right to travel without interruption or search, but persons seeking entry into the United States are subject to being stopped and searched).

235. United States v. Rivas, 157 F.3d 364, 367 (5th Cir. 1998) (citing United States v. Cardenas, 9 F.3d 1139, 1147-48 (5th Cir. 1993)).

236. See Montoya de Hernandez, 473 U.S. at 538 (suggesting that there exists a "longstanding concern for the protection of the integrity of the border" and that routine searches of people and effects at the border "are not subject to any requirement of reasonable suspicion, probable cause, or warrant").

237. See United States v. Okafor, 285 F.3d 842, 845 (9th Cir. 2002) (stating that "it is well established that a border search can be conducted without a warrant and without any articulable level of suspicion, so long as the search is routine").

238. Rivas, 157 F.3d at 367 (citing Cardenas, 9 F.3d at 1148, n.3).

239. See Okafor, 285 F.3d at 845 (citing United States v. Molina-Tarazon, 279 F.3d 709 (9th Cir. 2002) (holding a search of a container "was non-routine because of the force used in conducting the search, the risk of harm the search posed, and the potential fear instilled in the truck's owner if left no choice but to drive a reassembled truck").

240. See e.g., Okafor, 285 F.3d at 845 (stating that "the emptying of Okafor's bag and its visual inspection was clearly routine").

241. Compare Z-Portal Vehicle Imaging System, UNITED STATES CUSTOMS AND BORDER PROTECTION (Aug. 2008), http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/port_security/z_portal.ctt/z_portal.pdf [hereinafter CBP, Vehicle Imaging System] (noting that BT is used to search vehicles at the border and that the use of BT is a...
should find BT searches conducted at the border are routine because BT searches do not require force, entail no risk, and do not cause harm to the container searched.\textsuperscript{242}

The primary purpose of BT devices is to search vehicles and containers for contraband and potentially threatening items.\textsuperscript{243} The fact that BT uses x-rays to see the contents of a container causes no constitutional complication because the United States Court of Appeals for the Ninth Circuit has previously upheld suspicionless x-ray searches of containers at the border.\textsuperscript{244} For example, in \textit{United States v. Okafor},\textsuperscript{245} the Ninth Circuit reasoned that an x-ray search of a passengers' luggage at an international airport was a routine search.\textsuperscript{246} Thus, BT searches of containers should also be considered a routine search at the border because BT uses x-rays to conduct searches.\textsuperscript{247} The Ninth Circuit even foreshadowed the permissible use of BT to search containers at the border, when the court stated that the use of x-rays or other technological means to examine containers would require no particularized suspicion when such examination takes place at the border.\textsuperscript{248}

Therefore, courts should find CBP's use of BT to search containers at the border is permissible as a routine search because courts have previously held x-ray border searches to be routine.\textsuperscript{249} Moreover, BT

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\begin{itemize}
\item safe x-ray inspection method), \textit{with Okafor}, 285 F.3d at 845 (stating that "an x-ray examination of luggage requires no force, poses no risk to the bag's owner or to the public, and does not harm the baggage").
\item \textit{Compare Z Backscatter}, \textsc{American Science and Engineering, Inc.}, http://www.as-e.com/products_solutions/z_backscatter.asp (last visited Nov. 15, 2010) [hereinafter AS&E, Z Backscatter] (indicating that BT uses x-ray technology), \textit{with Okafor}, 285 F.3d at 845 (stating that x-ray searches require no force, pose no risk, and do not harm the container searched).
\item \textit{Compare AS&E, Z Backscatter}, supra note 242 (explaining that BT uses "electronically generated X-rays" to inspect objects), \textit{with Okafor}, 285 F.3d at 845 (holding that x-ray searches are permissible at the border, even without reasonable suspicion or probable cause).
\item 245. 285 F.3d 842 (9th Cir. 2002).
\item 246. United States v. Okafor, 285 F.3d 842, 845-46 (9th Cir. 2002).
\item \textit{Compare CBP, Vehicle Imaging System, supra note 241 (stating that BT is a non-intrusive, x-ray inspection technology), \textit{with Okafor}, 285 F.3d at 845-46 (opining that x-ray examinations of containers are routine searches at the border).
\item \textit{Compare CBP, Vehicle Imaging System, supra note 241 (indicating that CBP uses gamma-ray and x-ray devices, such as Z Portals, to conduct searches at the border), \textit{with Okafor}, 285 F.3d at 846 (emphasis added) (holding that "examination of... containers by x-ray or other technological means may be done at the border with no required showing of particularized suspicion").
\item \textit{Compare AS&E, Z Backscatter, supra note 242 (stating that BT inspects objects through the use of electronically-generated x-rays), \textit{with Okafor}, 285 F.3d at 845-46 (suggesting that x-ray searches of containers are routine, permissible searches at the border).}
\end{itemize}
\end{footnotesize}
searches of containers satisfy the standard for routineness because such searches do not require force, entail no risk, and do not cause harm to the container searched. Therefore, courts should find that CBP's use of BT to conduct suspicionless searches of containers at the border does not violate the Fourth Amendment.

D. USING BACKSCATTER TECHNOLOGY TO SEARCH PERSONS ENTERING THE UNITED STATES DOES NOT VIOLATE THE FOURTH AMENDMENT

Body scans conducted at the border do not violate the Fourth Amendment because if courts consider body scans to be routine border searches, then United States Customs and Border Protection ("CBP") agents may conduct body scans without any degree of suspicion. However, if courts consider body scans to be non-routine searches under the border search doctrine, CBP agents must establish reasonable suspicion or obtain consent before conducting body scans at the border. As discussed above, the border search doctrine allows CBP agents to conduct "routine" searches at the border without any suspicion of wrongdoing. Thus, courts deciding the constitutionality of using backscatter technology ("BT") to conduct body searches at the border must first determine whether such use of BT is a routine or non-routine border search. If BT is considered routine at the border, then the border search doctrine allows CBP agents to use BT to conduct suspicionless body searches of travelers at the border.  

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251. Compare CBP, Vehicle Imaging System, supra note 241 (noting that BT uses x-rays and that BT is a non-intrusive search technology used at the border), with Okafor, 285 F.3d at 845-46 (stating that x-ray searches are routine and are permissible at the border), and Rivas, 157 F.3d at 367 (defining routine border searches as those that do not seriously invade the privacy of a traveler crossing the border).

252. See infra notes 255-62 and accompanying text.

253. See infra notes 263-67 and accompanying text.

254. United States v. Rivas, 157 F.3d 364, 367 (5th Cir. 1998) (citing United States v. Cardenas, 9 F.3d 1139, 1147-48 (5th Cir. 1993)).

255. See e.g., United States v. Montoya de Hernandez, 473 U.S. 531, 537-41 (1985) (determining whether extended search and seizure of suspect was routine at the border); United States v. Sandler, 644 F.2d 1163, 1167-69 (1981) (assessing whether a pat-down of a suspect was a routine border search); Cardenas, 9 F.3d at 1147-48 (addressing routineness of a search of suspect's person); United States v. Kelly, 302 F.3d 291, 294-95 (5th Cir. 2002) (determining whether canine search of suspect was a routine search at the border).

However, if BT searches are considered non-routine at the border, then CBP agents’ use of BT to conduct suspicionless body searches violates the Fourth Amendment.257

The real question, then, is whether courts will consider a BT body scan to be a “routine” screening at the border.258 The United States Court of Appeals for the Fifth Circuit defined routine searches as searches that do not seriously invade the privacy of a traveler.259 For example, pat-downs, also known as frisks, are routine searches when conducted at the border.260 The use of concealed weapons detection technology, such as BT scanners, has been referred to as an “electronic frisk.”261 If courts view BT searches as analogous to electronic frisks,

538 (suggesting that the Fourth Amendment allows suspicionless searches at the border where the search is considered routine).

257. Compare CBP, Vehicle Imaging System, supra note 256 (noting CBP’s use of BT at the border), with Montoya de Hernandez, 473 U.S. at 541, n.4 (suggesting that involuntary x-ray searches are non-routine).

258. See e.g., Montoya de Hernandez, 473 U.S. at 537-41 (determining whether extended search and seizure of suspect was routine at the border when supported by reasonable suspicion); Sandler, 644 F.2d at 1167-69 (assessing whether a pat-down of a suspect was a routine border search); Cardenas, 9 F.3d at 1147-48 (addressing routine-ness of a search of suspect’s person); Kelly, 302 F.3d at 294-95 (determining whether canine search of suspect was a routine search at the border).

259. Rivas, 157 F.3d at 367 (citing Cardenas, 9 F.3d at 1148, n.3).

260. See New York v. Earl, 431 U.S. 943, 947 (1977) (equating the terms “pat-down” and “frisk”); see also Montoya de Hernandez, 473 U.S. at 551 (Brennan, J., dissenting) (suggesting that pat-downs are routine at the border); see also Kelly, 302 F.3d at 294 (citing United States v. Vega-Barvo, 729 F.2d 1341, 1345 (11th Cir. 1984)) (stating that ordinary pat-downs are routine searches at the border).

261. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2 (4th ed. 2004) (citing David A. Harris, Superman’s X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology, 69 TEMP. L. REV. 1 (1996)) (referring to weapons detection technologies, such as BT, as an “electronic frisk”). Although such sources refer to the use of body scanners as an electronic frisk, the ACLU describes body scanners as a “virtual strip search.” ACLU Backgrounder on Body Scanners and “Virtual Strip Searches,” AMERICAN CIVIL LIBERTIES UNION (Jan. 8, 2010), http://www.aclu.org/technology-and-liberty/aclu-backgrounder-body-scanners-and-virtual-strip-searches [hereinafter ACLU, Backgrounder]. The term “electronic frisk” would be more appropriate for the BT Portals currently used by CBP because unlike their airport counterparts, the BT Portals do not produce detailed images of a person’s body or face; they produce only a silhouette, and are incapable of identifying a person’s identity, age, race, or gender. Jeanne Meserve, High-Tech Ports To Aid Border Screenings, CNN (Oct. 16, 2008), http://articles.cnn.com/2008-10-16/tech/border.portal_1_border-agents-cbp-backscatter?_s=PM:TECH. The term “virtual strip search” would be appropriate for the scanners used in airports, however, because the scanners produce a detailed image of the passenger’s naked body, contrasted with potentially-threatening items. See Sandler, 644 F.2d at 1166 (defining a strip search as the “examination of the person after removal of inner clothing but not including a search of body cavities”); Transportation Agency’s Plan to X-Ray Travelers Should Be Stripped of Funding, ELECTRONIC PRIVACY INFORMATION CENTER (June 2005), http://epic.org/privaicy/surveillance/spotlight/0605/ (stating that BT shows “the outlines of nipples and genitalia”); Bootie Coagrove-Mather, Feds Want See-Through Security, CBSNews (June 26, 2003), http://www.cbsnews.com/stories/2003/06/26/tech/main560541.shtml (quoting Susan Hallowell, director of the TSA’s security laboratory, as saying, “It does basically make you look fat
then courts should find the use of BT at the border is constitutional due to the routine and acceptable practice of frisking individuals who wish to cross the border.262

Alternatively, if courts view BT searches of a person as more analogous to a “virtual strip search,” then CBP agents must establish at least reasonable suspicion before conducting a BT search of a person at the border.263 Although routine searches require no suspicion, non-routine searches require at least reasonable suspicion of wrongdoing to comply with constitutional mandates.264 The Supreme Court of the United States considers strip searches to be non-routine searches, even when conducted at the border.265 Thus, if courts determine that BT scans are analogous to “virtual strip searches,” then courts must find the use of BT at the border to be a non-routine search that must be supported by at least reasonable suspicion.266 However, the reasonable suspicion standard is a low threshold and CBP agents will easily meet this standard in many situations.267

BT searches of persons at the border would not violate the Fourth Amendment where CBP obtains the person’s consent to conduct the.

262. Compare Cardenas, 9 F.3d at 1147 (“a governmental officer at the international border may conduct routine stops and searches without a warrant or probable cause”), and Earl, 431 U.S. at 947 (describing a frisk as “a detailed manual exterior probe of the subject’s clothing and body”), with LaFave, supra note 261, § 2.2 (referring to weapons detection technologies, such as BT, as an “electronic frisk”).

263. Compare Montoya de Hernandez, 473 U.S. at 541, 544 (majority opinion) (holding strip search justified where customs agents suspected defendant of smuggling drugs in her alimentary canal), with ACLU, Backgrounder, supra note 261 (referring to a BT search as a “virtual strip search”).

264. Cardenas, 9 F.3d at 1147; Kelly, 302 F.3d at 294; Rivas, 157 F.3d at 367.

265. See Montoya de Hernandez, 473 U.S. at 541, n.4 (suggesting that strip searches, body cavity searches, and involuntary x-ray searches are all non-routine searches at the border). However, BT scans of a person’s body may not necessarily be the type of x-ray search that the Supreme Court would consider non-routine. Compare Montoya de Hernandez, 473 U.S. at 540, n.3 (noting that the Fourth Amendment forbids intrusions that extend beyond the body’s surface), with Backscatter Body Scanning, SearchSecurity.com, http://searchsecurity.techtarget.com/sDefinition/0,,sid14_gcil117044,00.html (last visited Nov. 15, 2010) (stating that x-rays from BT devices reflect off the object scanned), and Fred Reed, Scanner Virtually Disrobes Passenger, The Washington Times, May 21, 2003, http://www.washingtontimes.com/news/2003/may/21/20030521-094809-8963r/ (indicating that the x-rays emitted from BT devices “penetrate only about a 10th of an inch into the skin”).

266. Compare Montoya de Hernandez, 473 U.S. at 541 (suggesting that strip searches are non-routine searches, even when occurring at the border), with ACLU, Backgrounder, supra note 261 (referring to a BT search as a “virtual strip search”).

267. See United States v. Beale, 736 F.2d 1289, 1295 (9th Cir. 1984) (Pregerson, J., dissenting) (stating that the “reasonable suspicion” standard has a low threshold, and is easily met).
BT search. The Supreme Court of the United States has long-recognized consent as an exception to the Fourth Amendment’s warrant requirement. CBP sometimes conducts consensual BT searches at the border. If CBP agents obtain a person’s consent prior to conducting a BT search of the person’s body, then such a search would not violate the Fourth Amendment.

Accordingly, courts should find that the use of BT to search persons at the border does not violate the Fourth Amendment because BT searches would be permissible under the border search doctrine if considered routine. Even if courts consider body scans to be non-routine, CBP agents may still conduct body scans on the basis of reasonable suspicion. Although the Supreme Court of the United States still balances the privacy interests of the individual against the government’s interests in securing the border in cases involving personal searches occurring at the border, people have a lower expectation of privacy at the border than they would have within the United States. This lowered expectation of privacy, together with the government’s interest in securing its borders, would justify any BT body search conducted at the border as long as CBP agents establish at least reasonable suspicion before conducting the search.

268. See infra notes 269-71 and accompanying text.
269. See Katz v. United States, 389 U.S. 347, 357, 358, n.22 (1967) (suggesting that consensual searches do not violate the Fourth Amendment, and recognizing consent as one of the “few specifically established and well-delineated exceptions” to the Fourth Amendment’s warrant requirement).
271. Compare id. (noting that CBP uses BT vehicles to conduct consensual searches), with Katz, 389 U.S. at 358, n.22 (indicating that consensual searches do not violate the Fourth Amendment).
272. Compare Montoya de Hernandez, 473 U.S. at 551 (Brennan, J., dissenting) (referring to the routine nature of pat down searches at the border), with LAFAVE, supra note 261, § 2.2 (referring to weapons detection technologies, such as BT, as an “electronic frisk”).
273. See Montoya de Hernandez, 473 U.S. at 541, 544 (majority opinion) (holding strip search justified where customs agents suspected defendant of smuggling drugs in her alimentary canal); see also United States v. Okafor, 285 F.3d 842, 846 (2002) (stating that “[a] non-routine border search will still be upheld if it was based on reasonable suspicion of criminal activity”).
274. See Montoya de Hernandez, 473 U.S. at 539-40 (acknowledging that people have a lower expectation of privacy at international borders than in the interior of the country, but still balancing individual privacy interests against the government’s need to conduct a search at the border).
275. See Montoya de Hernandez, 473 U.S. at 539-40 (noting a lowered expectation of privacy at the border); see also United States v. Flores-Montano, 541 U.S. 149, 153 (2004) (discussing the government’s paramount interest in securing its borders); see also Okafor, 285 F.3d at 846 (stating that “[a] non-routine border search will still be upheld if it was based on reasonable suspicion of criminal activity”).
E. **Using Backscatter Technology To Search Vehicles, Persons, and Effects Not Located at an International Border Does Not Violate the Fourth Amendment Where the Location of the Search Is Considered the Functional Equivalent of the Border**

The United States Customs and Border Protection ("CBP") agency may use backscatter technology ("BT") to conduct searches at the functional equivalent of the border. A border search does not have to occur at the actual border to constitute a border search, but may be conducted anywhere that can be considered the functional equivalent of an international border. A search conducted at the functional equivalent of the border is subject to the same standards of reasonableness as a search that actually takes place at an international border. Such a standard of reasonableness usually favors the government because the government has a compelling interest in securing its borders and protecting the nation's territorial integrity.

According to the United States Court of Appeals for the Eleventh Circuit, a border search occurs at the functional equivalent of the border when: (1) CBP agents are reasonably certain that the object searched has recently crossed the border; (2) the search occurred at the first practical opportunity after the object crossed the border; and (3) there has been no opportunity or time for the object searched to have been materially altered since the time it crossed the border. When these three elements are satisfied, CBP agents may conduct border searches at locations removed from the border, but functionally equivalent to the border.

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276. See infra notes 2767-83 and accompanying text.


278. See e.g., United States v. Okafor, 285 F.3d 842, 845-48 (9th Cir. 2002) (allowing suspicionless search of personal effects at Los Angeles International Airport because the airport, although not located at an actual international border, was Okafor's point of entry into the United States); see also United States v. Ramsey, 431 U.S. 606, 609 n.2 (1972) (upholding search of international mail "at the General Post Office in New York City, where incoming international air mail landing at Kennedy Airport is taken for routing and customs inspections" as the functional equivalent of the border).

279. See United States v. Carreon, 872 F.2d 1436, 1439 (10th Cir. 1989) (indicating that the balancing of interests favors the government at the border because the government has a right to examine persons and property in order to secure the nation's border); see also United States v. Flores-Montano, 541 U.S. 149, 153 (2004) (noting the government's paramount interest in protecting the territorial integrity of the United States).

280. Carter, 760 F.2d at 1576.

281. See id. at 1576-77 (upholding CBP officials' search of airplane that recently crossed the United States border because the three elements of a search occurring at the functional equivalent of the border were all shown).
CBP has the capability of conducting BT searches at the functional equivalent of the border. Consequently, where CBP officials can show that an otherwise permissible BT search takes place at a location that is removed from the border, but which is the functional equivalent of the border, the BT search will not violate the Fourth Amendment.

IV. CONCLUSION

The government’s use of backscatter technology (“BT”) at the border does not violate the Fourth Amendment in most situations, but the use of BT potentially violates the Fourth Amendment when used to conduct a suspicionless search of a person’s body at the border. Although no court has yet addressed the issue, the use of BT constitutes a search under the Fourth Amendment because people have a reasonable expectation of privacy in their bodies and effects, and society is willing to recognize such expectations as reasonable. Consequently, courts should find the use of BT is a search because BT allows United States Customs and Border Protection (“CBP”) agents to perceive otherwise undetectable items concealed on a person’s body, in vehicles, and inside containers.


283. Compare CBP, Accountability, 29, supra note 282 (indicating that CBP has the capability of conducting BT searches at locations that are removed from the border), with Carter, 760 F.2d at 1576 (articulating a three-part test for determining whether a search occurs at the functional equivalent of the border), and United States v. Montoya de Hernandez, 473 U.S. 531, 538 (suggesting that routine border searches do not violate the Fourth Amendment).

284. See supra notes 172-283 and accompanying text.

285. Compare Katz v. United States, 389 U.S. 347, 516 (1967) (Harlan, J., concurring) (suggesting that in order to receive Fourth Amendment protection, an expectation of privacy must be that society is prepared to recognize as legitimate), with Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 478 (5th Cir. 1982) (noting that both society and the courts recognize that people have an interest in bodily integrity).

Using BT to search vehicles and containers entering the United States does not violate the Fourth Amendment because the government's interest in securing its borders outweighs the lowered expectation of privacy at international borders.\textsuperscript{287} CBP's practice of conducting suspicionless searches of vehicles at the border does not violate the Fourth Amendment because courts are not required to balance the interest of national security against an individual's privacy interest in a vehicle, and BT scans do not cause permanent or irreversible damage to vehicles.\textsuperscript{288} Likewise, CBP's practice of conducting suspicionless BT searches of containers at the border does not violate the Fourth Amendment because courts have upheld technologically analogous searches of containers at the border as routine border searches, and BT searches do not require force, entail no risk, and do not cause harm to the container.\textsuperscript{289} Despite the government's compelling interest to secure the nation's borders, using BT to conduct a search of a person's body without a reasonable suspicion of wrongdoing violates the Fourth Amendment if courts consider BT searches to constitute non-routine searches at the border.\textsuperscript{290} However, if courts consider the use of BT to conduct body searches to be a routine search at the border, then CBP agents are not required to establish any degree of suspicion to conduct a BT search at the border.\textsuperscript{291}

Furthermore, CBP may conduct BT searches at the functional equivalent of the border.\textsuperscript{292} BT searches conducted at the functional equivalent of the border are held to the same standard of reasonableness as searches conducted at actual borders.\textsuperscript{293}

One alternative for overcoming the potential constitutional issues surrounding CBP's use of BT to conduct body searches is for CBP agents to either establish a reasonable suspicion of wrongdoing or obtain the person's consent before using BT to search a person's body at the border. Establishing a reasonable suspicion of wrongdoing would allow the use of BT to fit within the limits of the Fourth Amendment because the United States Supreme Court has determined that the Fourth Amendment requires only reasonable suspicion of wrongdoing.

\textsuperscript{5} WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.6 (4th ed. 2004) (suggesting that the use of BT is a search under the Fourth Amendment).

\textsuperscript{287} See supra notes 201-51 and accompanying text.
\textsuperscript{288} See supra notes 201-28 and accompanying text.
\textsuperscript{289} See supra notes 229-51 and accompanying text.
\textsuperscript{290} See supra notes 252-62 and accompanying text.
\textsuperscript{291} See supra notes 263-75 and accompanying text.
\textsuperscript{292} See supra notes 276-83 and accompanying text.
\textsuperscript{293} See supra note 278 and accompanying text.
to justify the non-routine search of a person’s body at the border.\textsuperscript{294} Likewise, the Supreme Court has also noted that consensual searches do not violate the Fourth Amendment.\textsuperscript{295} Therefore, CBP can ensure its use of BT complies with the Fourth Amendment and Supreme Court precedent by instituting a policy that requires CBP agents to either establish a reasonable suspicion of wrongdoing or obtain the person’s consent before using BT devices to search a person’s body at the border.

CBP is committed to securing United States borders and protecting the American people.\textsuperscript{296} BT supports this effort because BT has proven to be very effective at helping CBP agents secure United States borders.\textsuperscript{297} The government has an unparalleled interest in protecting its borders, and the balance between personal privacy interests and the government’s need to secure its borders most often favors the government.\textsuperscript{298} Because BT is an effective tool for securing United States borders, CBP should continue to use BT and other security-promoting technologies to further its long-recognized duty to protect the United States and its citizens from external threats.

\textit{William M. Bradshaw – ’11}

\textsuperscript{294} Compare U.S. Constitution amend. IV (requiring searches to be reasonable), with United States v. Kelly, 302 F.3d 291, 294 (5th Cir. 2002) (stating that “[a] stop and search that is not routine requires a reasonable suspicion of wrongdoing to pass constitutional muster”).

\textsuperscript{295} See Katz, 389 U.S. at 358, n.22 (stating that “[a] search to which an individual consents meets Fourth Amendment requirements”).


\textsuperscript{298} See United States v. Flores-Montano, 541 U.S. 149, 153 (2004) (describing the government’s interest in protecting the territorial integrity of its borders as “paramount”); see also United States v. Montoya de Hernandez, 473 U.S. 531, 539-40 (1985) (noting that people have a lower expectation of privacy at international borders than in the interior of the country, and that “the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is . . . struck much more favorably to the Government at the border”).