Laptop Search at Border Was Illegal

By Erwin Chemerinsky

Can the police engage in a warrantless search of a person's laptop just because the individual is crossing the border into the United States? A recent decision of the U.S. District Court for the Central District of California says no and that seems exactly right. In *United States v. Arnold*, Case No. CR 05-00772 (A)(DDP) (C.D.Cal. Oct. 3, 2006), Judge Dean Pregerson granted the defendant's motion to suppress evidence gained through a warrantless search of a laptop. Although the U.S. Supreme Court has given the government broad authority to engage in warrantless and suspicionless searches at the border, this should not be deemed to include searching the contents of a person's computer.

The case involved Michael Arnold who arrived at Los Angeles Airport after a 20 hour flight from the Philippines. A customs officer, Laura Peng, selected Arnold for secondary screening. The record indicates no reason to believe that this was other than a routine and random selection. Arnold was asked where he had been and why he had been there.

Peng inspected Arnold's luggage, which contained his laptop computer, a separate hard drive, a computer memory stick (a "flash drive"), and six compact disks. Peng asked Arnold to turn on the computer so that she could see that it was functioning. After booting up, the computer screen showed many icons and folders. Two folders were entitled "Kodak Pictures" and one was entitled "Kodak Memories." The customs officers clicked on these folders and looked at the photographs.

While looking at these photographs, the officers saw two pictures of nude women. The customs officers then called in supervisors, who then called in special agents from the U.S. Department of Homeland Security, Immigration and Customs Enforcement. These agents detained Arnold for several hours, carefully examined his computer equipment and found several images depicting what they believed to be child pornography. The officers seized the computer and storage devices.

Arnold was prosecuted for violating federal child pornography laws, and he moved to suppress the evidence gained as a result of the search of his laptop, memory stick, hard drive, and compact disks. The court stated that: "The question presented in whether the government can conduct a border search of the private and personal information stored on a traveler's computer hard drive or electronic storage devices without Fourth Amendment review."

The court recognized that this is an issue of first impression in the 9th Circuit and granted the defendant's suppression motion.

The Supreme Court has given customs officials at the border broad authority to engage in warrantless and even suspicionless searches. In *Carroll v. United States*, 267 U.S. 132 (1925), the court spoke of the government's need to stop individuals at the border to protect the national interest in determining that a person is lawfully entering and is not bringing in contraband. In *United States v. Ramsey*, 431 U.S. 606 (1977), the court declared that "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into the country, are reasonable simply by virtue of the fact that they occur at the border."

In many cases, the court has extended the power of the government to engage in searches at the border. Most recently, in *United States v. Flores-Montano*, 541 U.S. 149 (2004), the court held that customs officials may detain a car and disassemble its gas tank without any need for showing reasonable suspicion. The court stressed the government's interests in monitoring its borders and the diminished expectations of privacy of those entering the country. The court said that since the government can search the passenger compartment of a car, it should be able to also look inside the gas tank where there is even less of an expectation of privacy.

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But there are limits to what can be done at the border without reasonable suspicion. For example, a person cannot be detained at the border on suspicion of smuggling contraband in his or her alimentary canal unless there are reasonable grounds for doing so. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). Likewise, a person cannot be subjected to a strip search at the border unless there is reasonable suspicion. *United States v. Guadalupe-Garza*, 421 F.2d 876 (9th Cir. 1998). The 9th Circuit has explained that to conduct a strip search, officials at the border must have a "real suspicion" that the person is smuggling contraband and that real suspicion is "subjective suspicion supported by objective, articulable facts." *United States v. Aman*, 624 F.2d 911 (1980).

Undoubtedly, since the tragedy of Sept. 11, the government has an even greater need to police the borders. But that cannot mean that the government has the license to do anything it wants at the borders. The basic principle must continue to be that as the intrusiveness of the search increases, so does the need for suspicion. *United States v. Vance*, 62 F.3d 1152 (9th Cir. 1995).

Searching the memory of a person's computer is highly intrusive. A person's computer files can contain deeply personal information. As Pregerson's opinion noted: "People keep all types of personal information on computers, including diaries, personal letters, medical information, photos and financial records. Attorneys' computers may contain information about confidential sources or story leads. Inventors' and corporate executives' computers may contain trade secrets."

There is certainly the chance that a computer may contain plans for bombs or other illegal material, such as child pornography. The issue is how to balance the government's law enforcement interests against the privacy interests of the individual.

The district court was correct here in concluding that such a balancing requires that the government show reasonable suspicion before searching the content of a person's computer. The government has no special interest at the border in searching a person's computer different from computers that are already in the country. The government is allowed to engage in suspicionless border searches where there is an interest unique to the border, such as preventing people from entering illegally or in intercepting drugs or weapons being brought into the country. But these interests do not exist with regard to the memory of computers.

At the same time, the intrusion into privacy is enormous. The Fourth Amendment would not allow the government to go through a person's drawers and read letters and diaries, medical records, or financial records without reasonable suspicion. In part, of course, this is about the sanctity of the home. But in large part, too, it is about the dignity interest that we each have in our most private information. The memory on a person's computer and storage devices can contain the most personal and private of information. They truly might be an individual's inner-most thoughts or most deeply guarded secrets.

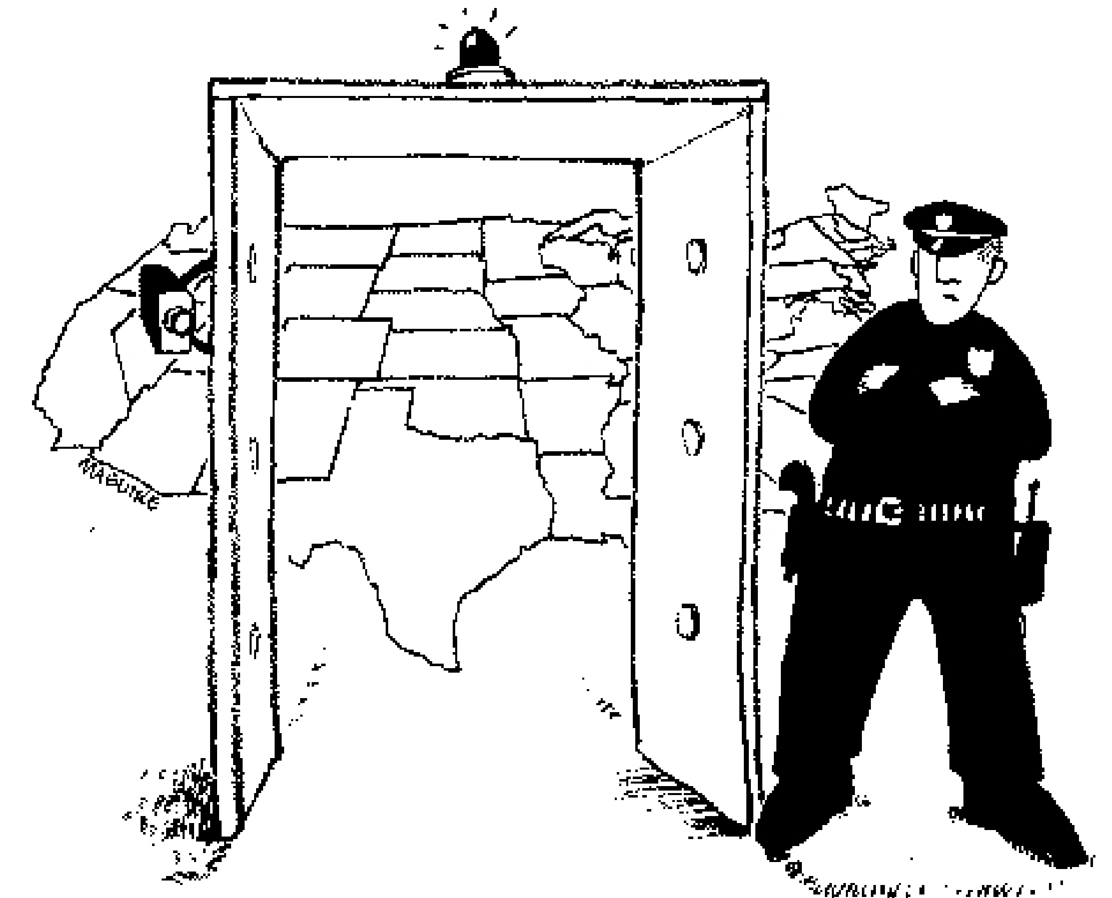
The police surely could gain information about terrorism or child pornography or other illegal activity if they did not have to comply with the Fourth Amendment. But that is not enough to justify suspending the Constitution's requirements for probable cause and warrants, or at least reasonable suspicion.

Pregerson's opinion in *United States v. Arnold* explained that there was no reasonable suspicion justifying the search of the defendant's computer and memory devices. The issue left open by his opinion is whether reasonable suspicion is sufficient to allow such a search, or whether the greater standard of probable cause must be met. I would argue for the latter based on the tremendous privacy interests implicated when law enforcement officials search a person's computer. This is not to say that there can never be such a search. Rather, it is to emphasize the importance of the Fourth Amendment and the need for law enforcement to meet the constitutional requirement for probable cause when there is such an intrusive search.

The Fourth Amendment obviously was written at a time when electronic communication was not even imagined. Over the course of the 20th century, the Supreme Court found that there is protection for telephone communications because the Fourth Amendment provides protection when there is a reasonable expectation of privacy. Likewise, the Fourth Amendment must apply to the newest forms of electronic devices and communications.

Pregerson got it just right: police search of a computer and its memory devices must be accompanied by at least reasonable suspicion.

Erwin Chemerinsky is Alston & Bird Professor of Law and Political Science at Duke University.



Court Must Make EPA Do Its Job on Global Warming

By Timothy J. Dowling

If the rule of law and judicial restraint mean anything, they mean victory for California, Massachusetts and the other petitioners in *Massachusetts v. EPA*, 05-1120, the global warming case that will be argued today before the U.S. Supreme Court.

You wouldn't realize this if you listened to the auto industry. In its briefs and media statements, its suggests that California and its allies are asking the court to strike an activist pose — in effect, to anoint itself Global Warming Czar — by entering into a complex policy debate better left to the political branches of government. Don't believe it. In fact, just the opposite is true. The 12 states, three cities and environmental groups that brought the case want nothing more than a straight-up reading of federal law and appropriate deference to policy decisions Congress has made regarding public health and welfare. It's industry that is trying to cloud the legal issues with economic jargon and irrelevant policy spin, as well as a radical theory of standing that flouts established precedent.

The case is a challenge to a 2003 decision by the Environmental Protection Agency declining to regulate greenhouse gas emissions from new cars and trucks under Section 202 of the federal Clean Air Act. Section 202 states that EPA's administrator "shall" regulate any air pollutants from new motor vehicles "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Overturning the legal conclusions of two prior agency general counsels, EPA decided that greenhouse gases are not air pollutants under the act and that it therefore lacks legal authority to regulate them.

EPA's reading contravenes the act's plain language. The statutory definition of air pollutant is broad, embracing "any air pollution agent or combination of such agents," including "any substance or matter which is emitted into or otherwise enters the ambient air." Section 103 of the act identifies carbon dioxide, the principal greenhouse gas emitted from cars, as an air pollutant. And the term "welfare," one of the triggers for regulation under Section 202, is defined to include effects on climate and weather.

Because EPA's position cannot be reconciled with the applicable statutory text, it argues that statutory "context" limits the act's application. For example, EPA observes that other provisions require research and monitoring of greenhouse gases without authorizing regulatory controls. But it makes perfect sense for Congress to mandate additional research while requiring EPA to act on that research if it shows that greenhouse gases endanger public health and welfare.

None of the context invoked by EPA detracts from the plain requirements of Section 202. Indeed, if greenhouse gases were not air pollutants, one wonders why Congress would include the research requirements for greenhouse gases in the Clean Air Act, whose express purpose is to prevent air pollution.

As an alternative basis for refusing to regulate, EPA argues that, even if it has legal authority to do so, it would not regulate because of various policy reasons unrelated to public health and welfare. Relying heavily on the phrase "in his judgment" in Section 202, EPA contends that it has well-nigh unreviewable discretion to refuse to regulate, for virtually any reason, including reasons having nothing to do with the health and welfare standard in Section 202.

The phrase cannot possibly support this reading. This language means simply that the administrator is responsible for determining whether scientific evidence on health and welfare is sufficient to trigger the imposition of emission controls. On EPA's reading, the agency could refuse to regulate even in the face of overwhelming evidence of harm to public health. EPA's interpretation improperly transforms a statutory requirement ("shall regulate") into unbridled discretion to refuse to regulate.

The plaintiffs want a straight-up reading of federal law and appropriate deference to congressional decisions.

Perhaps sensing the weakness of their statutory arguments, EPA and industry contend that the petitioners lack legal standing even to bring the case because they have failed to show injury that could be remedied by winning. The argument is as baseless as it is radical.

The petitioners have submitted undisputed affidavits from scientific experts showing that, because of global warming, they have suffered and will continue to suffer serious injuries. They are losing their coastal lands to rising sea levels. Increased temperatures have worsened smog, causing health problems for asthmatics, the elderly and many others. The petitioners have lost and will continue to lose the use and enjoyment of natural resources. In addition to this ample record evidence, our nation also is suffering from increased wildfires, droughts, deadly heat waves, floods and other calamities scientists attribute to global warming. Contrary to the industry's arguments, the petitioners' injuries are not rooted in a speculative worst-case scenario but rather are concrete present-day harms with ongoing health and economic consequences.

The manufacturers also argue that these injuries are too generalized to support standing. It's a theory only industry could love, for it basically says that, if global warming harmed only a few people, they all could sue, but because it harms many people, no one can sue.

Under established precedent, the critical inquiry is not whether the injury is widespread but whether it is concrete. In *FEC v. Akins*, 524 U.S. 11 (1998), the court allowed a group of voters to challenge a decision by the Federal Election Commission because the decision deprived them of information relating to campaign contributions. This injury, though widely shared, was concrete enough to distinguish the case from prior rulings that denied standing where the plaintiff alleged only an abstract or indeterminate interest. So too here.

Industry also argues that the petitioners lack standing because a win won't bring them adequate redress. Emissions from U.S. cars and trucks, the argument goes, account for only a relatively small portion of global greenhouse gas emissions. But motor vehicles spew 23 percent of all U.S. greenhouse gas emissions, hundreds of millions of metric tons annually. Because carbon dioxide lingers in the atmosphere for many decades, reduction of any significant portion of these emissions yields significant benefits over time. A ruling that these emissions are air pollutants also could allow California and other states to move ahead with their own clean car programs as authorized by Section 209 of the act.

More to the point, standing jurisprudence has never denied injured parties all relief simply because they will obtain, at best, only partial redress. Global warming has no silver bullet solution. Incremental measures are the only way to tackle what an overwhelming scientific consensus describes as the pre-eminent environmental threat of our time.

The petitioners' request here is modest. They are not asking the Supreme Court to order EPA to regulate greenhouse gases but simply to apply existing legal requirements to decide whether they compel new controls in accordance with the congressional policy choices reflected in Section 202.

Massachusetts v. EPA would make a perfect case study for Judicial Restraint 101. If the justices simply follow the law, the petitioners will prevail.

Timothy J. Dowling is chief counsel of Washington, D.C.-based Community Rights Counsel, which filed an amicus brief in *Mass. v. EPA* on behalf of a nationwide coalition of local officials, including the city and county of San Francisco.

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