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COVID-19 Is No Excuse for Suspicionless Searches of Electronic Devices at the Border

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The coronavirus is not in your phone. Why should it be used to justify border searches?

For the last four years, the U.S. border has been a flashpoint for bitter public policy disputes over immigration, the character of the country's sovereignty, and the nature and extent of constitutionally guaranteed civil liberties. Many of these border-related disputes have receded from public consciousness as a result of 2020's trifecta of a presidential impeachment, a global health pandemic, and racial tension over policing. Yet as the country begins to emerge from COVID-19 lockdowns, America's international borders are likely to resurface as a key battleground for civil libertarians and law enforcement officials. The cause? The "border search exception," a little-known loophole to the Fourth Amendment's requirement that the government obtain a search warrant before searching or seizing your "persons, houses, papers, [or] effects."

Customs and Border Protection (CBP)—a massive agency with nearly 50,000 officers—is the principal federal law enforcement agency deputized to police the nation's borders, including international airports. In the wake of the COVID-19 pandemic, CBP's law enforcement mandate is likely toexpand to include protecting the country from sources of COVID-19-related infection from abroad. In pursuit of that goal, CBP will likely claim the right to indiscriminately search international travelers' electronic devices without a warrant supported by probable cause, or even without reasonablesuspicion that the traveler has been exposed to COVID-19 or has violated related public health measures.

Such a breathtaking claim of unbounded investigatory authority would hardly be unprecedented for CBP. To the contrary, it would be of a piece with CBP's policy of conducting suspicionless searches of electronic devices—CBP already conducts tens of thousands of such searches every year. And CBP would not be the only law enforcement agency to sift through digital data in an effort to trace the spread of COVID-19. State and local law enforcement authorities have been trawling through social media posts to arrest travelers for violations of social distancing orders.

Authorities in Hawaii, for example, relying in large part on Instagram photos, have arrested travelers for breaking the state's mandatory 14-day quarantine period. In the past, CBP has reportedly relied on social media communications to deny entry to, or even deport, international travelers. Moreover, with the emergence of contact-tracing apps, it is plausible that cellphones might contain valuable information about a traveler's exposure to COVID-19.

CBP grounds its policy of searching electronic devices without a warrant or even reasonable

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suspicion in the border search exception to the Fourth Amendment's warrant requirement. But while that exception substantially limits the power of the Fourth Amendment at the border, it does not destroy it. Searches and seizures are constitutionally permissible under the exception only if they fit within its narrow historical purposes—preventing the smuggling of contraband and assisting in the collection of customs duties. The Supreme Court has never extended the exception to the search and seizure of private papers. Before the advent of cellphones and other electronic devices, which contain vast troves of personal information, vanishingly few travelers would have been carrying all or most of their private papers with them across international borders.

Suspicionless searches of electronic devices at the border are likely unconstitutional, as several courts have recently held. Besides, there would be little reason for courts to approve the search of electronic devices in the name of public health; there are far better ways of preventing and tracking the spread of a disease—including testing travelers and limiting movement to and from hotspots—than indiscriminately rummaging through their phones, tablets, and laptops for evidence of violations of social distancing orders or communications reflecting concern over potential exposure.

The federal government should, of course, do what it can to protect public health. But suspicionless searches of electronic devices are an impractical and unconstitutional method of achieving that aim.

The Limited Purposes of the Border Search Exception

The Fourth Amendment requires government agents seeking to search or seize "persons, houses, papers, [or] effects" to get a warrant supported by probable cause. Despite the clear mandate of the Fourth Amendment, its warrant requirement is riddled with judicially created exceptions. For example, government agents are allowed to search suspects upon their arrest in order to make sure they don't reach for weapons or destroy evidence. A similarly well-known exception permits the government to seize evidence that is in "plain view," so long as the officer is lawfully present in the place where he sees the evidence. One of the lesser-known exceptions to the warrant requirement is the border search exception.

The exception can be traced to the Collection Act of 1789, which authorized customs officers to search ships that they reasonably suspected to be smuggling dutiable goods. The statute is considered one of the best guides to the meaning of the Fourth Amendment because it was enacted by the same Congress that proposed the Bill of Rights to the state legislatures. In its first decision addressing the exception, *Boyd v. United States*, the Supreme Court explained that the category of searches and seizures contemplated as reasonable by that Congress was narrow. The Court was especially concerned about private papers, drawing a bright line between what the government may search for and seize—"goods liable to duties and concealed to avoid the payment thereof"—and what it may not—"a man's private books and papers."

In later cases, the Court approved of warrantless searches of various containers that might hide contraband or dutiable goods, including a car carrying liquor during Prohibition (*Carroll v. United States*) and even a human alimentary canal hiding dozens of cocaine-filled balloons on a flight from Colombia (*United States v. Montoya de Hernandez*). Searches of "persons" or "effects" that might be used for smuggling is one thing. But the Court has never held that the border search exception allows government agents to search and seize the "papers" of international travelers. To the contrary, in a case concerning the opening of mail from Thailand suspected to contain heroin (*United States v. Ramsey*), the Court emphasized that the border search exception authorized government agents to determine whether containers are hiding contraband, but not to read private correspondence. Put simply, one doesn't have to read a letter to know that it isn't a drug.

The Border Search Exception's Application to Electronic Devices

In its landmark 2014 decision *Riley v. California,* the Supreme Court held that "officers must generally secure a warrant before conducting" "searches of data on cell phones." In that case, the state of California argued that officers should be permitted to search electronic devices without a warrant whenever they arrest someone. The Court disagreed.

Although it makes sense to search a suspect for weapons that might harm an officer or evidence the suspect might destroy, the same can't be said for searching a suspect's cellphone. The Court concluded that whatever interests the government might have in searching a cellphone would be far outweighed by the violation of a suspect's substantial privacy interests caused by such a search. Cellphones, the Court explained, have "immense storage capacity" and can be used to reconstruct "the sum of an individual's private life." The Court continued, "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." And the Court's "answer to the question of what police must do before searching [a] cell phone seized incident to an arrest [was] accordingly simple—get a warrant."

But *Riley* concerned searches conducted in the interior of the country, not at the border. Post-*Riley*, several federal appellate courts have considered whether the result should be any different for searches conducted at the border, where governmental powers are at their zenith and an individual's privacy expectations are at their lowest ebb. The Supreme Court has never addressed that question, and circuit courts are split on it. The 9th Circuit Court of Appeals, whose jurisdiction covers western states including California, and the 4th Circuit, whose jurisdiction covers mid-Atlantic states including Virginia, have held that border agents may perform "manual" searches without even reasonable suspicion, but that reasonable suspicion is required for a "forensic" examination of a cellphone's data—an electronic "strip search," as one court called it. The 11th Circuit, by contrast, whose jurisdiction covers southeastern states including Florida, has held that "no suspicion is necessary to search electronic devices at the border."

The upshot is that if you fly into Miami from abroad, CBP has the right to search your phone, whether that's thumbing through it or copying and storing its contents. And even in the jurisdictions where courts have protected travelers the most, CBP has the right to access your phone; and in order to copy all of its contents, it needs only reasonable suspicion that you are attempting to smuggle in contraband or avoid customs duties. No court has held that searching electronic devices at the border requires a warrant, though some circuit judges have advocated for such a rule in dissenting and concurring opinions.

All this may prompt the Supreme Court to take up a case involving the search of an electronic device at the border. The government would drum up a number of justifications for such a search, but in the present climate, one convenient excuse may be border agents' efforts to control the spread of COVID-19, in the interest of public health and national security. The Court would do well to reject this or any similar argument for a few reasons.

First, the government has a limited interest in conducting such searches, because electronic devices are unlikely to uncover contraband, dutiable items, or evidence relating to the spread of disease. And although anyone in the world might contract COVID-19, searching electronic devices for evidence of the disease seems fruitless. Border agents might discover evidence of unwise behavior, but, notwithstanding the development of contact-tracing apps, probably not any reliable indication of whether the traveler has the disease.

Second, whatever the stated reason for suspicionless searches, there is a risk that the government would abuse its authority by using searches for general law enforcement purposes. As the 9th Circuit emphasized in one case, courts must ensure that suspicionless searches, including border searches, are "not subverted into a general search for evidence of crime"; courts must guard against the "vast potential for abuse" that accompanies "the power to intrude into the privacy of ordinary citizens" without a "warrant or particularized suspicion." Inspections undertaken in the name of public health might become just another policing tactic.

Third, as the Supreme Court concluded in Riley, electronic devices really are different. They contain far more information than the government could acquire by searching a person or, often, even a house. The price of international air travel should not be an electronic strip-search.

Travelers have become accustomed to a variety of petty indignities, which have only multiplied during the COVID-19 pandemic. The pandemic itself will eventually subside, and

when it does, it is important that our civil liberties remain intact. It is one thing to search travelers and their property, even if ineffectively, for contraband; it is quite another to lay bare their private papers, for any reason and at any time.

The authors represent the R Street Institute and the Cato Institute as amici curiae in an appeal pending in the Fifth Circuit concerning the constitutionality of warrantless border searches of electronic devices, Anibowei v. Morgan.

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