



## At US Border, Dramatic Spike in Searches of Phones, Electronic Devices

Masood Farivar

October 28, 2017

Washington—U.S. border agents are searching nearly four times as many international travelers' smartphones and other electronic devices as they did two years ago, expanding the use of a little-known search-and-seizure authority that has sparked fresh legal challenges from digital rights advocates and defendants in several criminal cases.

The content searches of electronic devices, conducted without a warrant or any individualized suspicion, spiked during the final year of the Obama administration but have continued to surge this year as the Trump administration has adopted extreme vetting of travelers entering the country.

In the first six months of fiscal 2017, which ended Sept. 30, U.S. Customs and Border Protection (CBP) agents searched the electronic devices of 14,993 arriving international travelers, according to the most recent CBP data.

CBP has not released data for all of 2017, but unofficial estimates put the number of searched devices at 30,000. That compares with 19,000 in 2016 and 8,500 in 2015.

### 'Border search exception'

The searches are conducted under the so called "border search exception" to the U.S. Constitution's Fourth Amendment. The amendment protects Americans' rights against unreasonable searches and seizures without a warrant. But the U.S. border is a legal gray zone, where customs agents have long enjoyed legal authority to stop and search "any vehicle, beast or person" without a warrant.

Since the 2000s, the Department of Homeland Security has interpreted the border exception authority to include examinations of a host of electronic devices: cellphones, tablets, laptops, cameras and digital media players.

A 2009 CBP directive authorizes agents to examine electronic devices and to "review and analyze" their information "with or without suspicion."

All travelers, whether U.S. citizens or foreign nationals, are subject to these searches. The CBP directive says privileged and other sensitive material, including legal communications, are not "necessarily exempt from a border search."

Refusal to unlock and hand over a device may result in its “detention.”

Agents look at text messages, emails, photo albums and other personal data for evidence of terrorism links or criminal activity, such as child pornography.

CBP agents are allowed to seize devices and copy their content for on-site or off-site forensic tests, which can take weeks and sometimes months and yield personal data, sometimes in large quantities. In one case, a forensic test performed on a cellphone generated enough information to “fill 896 printed pages.”

Former Acting CBP Commissioner Jay Ahern, who signed the directive, called it “the broadest search authority anywhere in the world without a warrant.” He spoke at a Cato Institute criminal justice conference in Washington last week.

U.S. Immigration and Customs Enforcement (ICE) agents operate under similar guidelines.

## **Numbers**

CBP and ICE officials defend the practice, noting that the searches affect less than 1 in 10,000 international travelers and an even smaller number of U.S. citizens.

Last year, CBP processed more than 390 million international travelers at the country’s 238 ports of entry.

“It’s something we use in a very measured fashion when there is an indicator of concern,” Acting CBP Commissioner Kevin McAleenan, who is President Donald Trump’s nominee to lead the agency, told a Senate panel Wednesday.

Search triggers range from a previous violation of a customs law to having a name that matches a person of interest in a U.S. national security database, according to the CBP form that agents hand to travelers whose devices are detained. Travelers may also be stopped at random.

McAleenan said the searches of electronic devices have yielded “very serious and significant information,” including “everything from national security concerns to child pornography to evidence of crimes to determinations of people’s admissibility status.”

## **Court challenges**

But as border agents look at a larger number of people’s electronic devices for evidence of terrorism or other national security matters, privacy rights groups say the once-narrow border search authority is being too broadly interpreted for the digital age. The advocates are now challenging the government’s authority in court.

Last month, the American Civil Liberties Union (ACLU) and the Electronic Freedom Foundation (EFF) sued the acting heads of the Department of Homeland Security, CBP and ICE

on behalf of 11 travelers whose devices were searched and, in some instances, seized over the past year.

The complaint alleges that the “warrantless and suspicionless searches” violated the U.S. Constitution’s First Amendment on free expression and assembly and the Fourth Amendment on privacy.

The 11 plaintiffs include 10 U.S. citizens and one U.S. permanent resident. Among them are three journalists, a filmmaker, an artist, a NASA engineer and a former Air Force captain. Six are Muslims, one is a Haitian national and four are white Americans.

### **Examples of search and seizure**

Their combined experiences shed light on an otherwise opaque system and show just how far border agents would go to scrutinize electronic devices.

In July, Nadia Alasaad was stopped at the Canadian border and forced to unlock her phone and hand it over to a customs agent even after she protested that she had photos of herself without a headscarf that she did not want any male agents to view.

Akram Shibly, a New York-based filmmaker, said his phone was searched in December 2016 and January 2017 as he crossed the U.S.-Canadian border.

During the first stop, he alleges, agents ordered him to fill out a form disclosing his mobile phone password and social media identifiers. The agents used the information to view his “cloud-based apps and content.” (CBP says agents are not allowed to view data that only resides in the cloud). During the second border encounter, Shibly claims, CBP agents used force to seize his phone after he refused to hand it over.

Jeremy Dupin, the Haitian journalist who is a U.S. permanent resident, was stopped twice in December 2016, once during a layover at the Miami International Airport, and a second time as he and his daughter tried to enter the U.S. from Canada.

According to the complaint, his phone contained “reporting notes and images, source contact and identifying information, and communications with editors.”

The complaint calls the examinations “an unprecedented invasion of personal privacy” and “a threat to freedom of speech and association.” It also cites a 2014 Supreme Court decision that declared warrantless searches of cellphones of arrested suspects unconstitutional.

### **Supreme Court**

In *Riley v. California*, the Supreme Court rejected the government’s claim that searching a suspect’s cellphone was indistinguishable from searching his or her other belongings. “We think that rationale holds just as true for the border context, where the privacy interests are so great that the Fourth Amendment requires a warrant,” ACLU lawyer Esha Bhandari said.

Unlike legal challenges raised against the government's border search authority in criminal cases, none of the 11 plaintiffs named in the ACLU/EFF lawsuit is accused of any wrongdoing, noted EFF lawyer Aaron Mackey.

"This is one case where we're trying to change the law, where we're trying to get the courts to recognize that the practice that the CBP has been operating under and the previous decisions (in border exception cases) ... were incorrect," Mackey said.

Spokespeople for DHS, CBP and ICE declined to comment on the lawsuit.

Laura Donohue, director of Georgetown's center on national security and the law, said electronic device searches run afoul of other constitutional guarantees as well, including the Fifth Amendment right against self-incrimination.

While courts have consistently upheld the government's border exception authority, Donohue said, "The laws that we have focus on luggage and not digitalization."