

Digital Privacy at the US Border

EFF's Guide to Your Constitutional Rights



EFF One-Pager
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At the U.S. border, border agents often search and seize the information we store in our phones and other digital devices. Government has more power at the border than other places, but the border is not a Constitution-free zone.

Freedom from unreasonable searches and seizures (4th Amendment)

The ordinary rule: Government agents cannot search and seize our property without a warrant from a judge based on probable cause of crime.

The border is different: For a “routine” search (such as the disassembly of a gas tank), agents need no warrant or individualized suspicion. For a “non-routine” search (such as a strip search), lower courts have held that agents need reasonable suspicion, though the Supreme Court has not yet addressed this point.

What about device searches at the border? In *Riley v. California* (2014), the U.S. Supreme Court held that police need a probable cause warrant to search an arrestee's cell phone. Under *Riley*, border agents should also be required to obtain a probable cause warrant for all device searches, whether forensic or manual.

Under border search law, lower courts are divided on whether device searches are routine or non-routine. In *U.S. v. Cotterman* (2013), the 9th Circuit U.S. Court of Appeals held that “forensic” device searches aided by sophisticated software are non-routine searches that require reasonable suspicion, while “manual” device searches are routine and require no warrant or individualized suspicion of criminal activity. In *U.S. v. Kolsuz* (2018), the Fourth Circuit, citing *Riley*, held that suspicionless forensic border searches of digital devices violate the Fourth Amendment, leaving open the possibility of a

warrant requirement for both forensic and manual searches. In *Molina-Isidoro* (2018), the Fifth Circuit emphasized that a leading Fourth Amendment legal treatise recognizes that “*Riley* may prompt a reassessment” of the question.

Freedom of speech, association, and press (1st Amendment)

Device searches reveal anonymous speakers, private memberships in expressive associations, private decisions about what to read and watch, and confidential journalistic sources. To protect these First Amendment interests, border agents should be required to get a probable cause warrant before searching devices.

Freedom from self-incrimination (5th Amendment)

- Courts are grappling with when people have a right to refuse law enforcement demands that they unlock their devices with their passwords or fingerprints.
- Only a judge, and not a border agent, can decide whether the Fifth Amendment protects this information.

Freedom from discrimination (1st, 5th, and 14th Amendments)

- Border agents may not discriminate against travelers on the basis of race, ethnicity, religion, and similar characteristics.

Want more information?

- Read about all of EFF’s border search work:
<https://www.eff.org/issues/border-searches>
- Print EFF’s pocket guide to protecting digital privacy at the border:
<https://www.eff.org/document/eff-border-search-pocket-guide>
- Read EFF’s longer travel guide:
<https://www.eff.org/wp/digital-privacy-us-border-2017>
- Read about our civil case against the U.S. government challenging border device searches: <https://www.eff.org/cases/alasaad-v-duke>
- Read EFF’s general surveillance self-defense manual at ssd.eff.org.

The Electronic Frontier Foundation is the leading nonprofit defending digital privacy, free speech, and innovation. <https://eff.org>