

Border Searches of Travelers' Electronic Devices Remain an Evolving Area of U.S. Law

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Last year, we provided an update on the Trump administration's controversial ramp up of border searches and inspections of electronic devices of travelers applying for admission to the U.S. A variety of travelers have since challenged U.S. Department of Homeland Security ("DHS"), alleging fourth amendment violations. In fact, U.S. Customs and Border Protection (CBP) issued another directive earlier this year that further clarified their authority to search electronic devices. It was titled "Border Search of Electronic Devices" and it stated in part that border searches of electronic devices are limited to "only the information that is resident upon the device," and a CBP officer is prohibited from intentionally using the device to access information that is solely stored remotely or on a cloud. Our 2018 Policy update provided additional details about this directive.

United States v. Vergara

Last week, an interesting case about electronic device searches at the border caught our attention. In *United States v. Vergara*, the U.S. Court of Appeals for the Eleventh Circuit ruled that the search of electronic devices at the U.S. border, including forensic searches, required "neither a warrant nor probable cause" to believe a crime had been committed. The court characterized its decision as the first opinion to examine the question after the Supreme Court's ruling in *Riley v. California*, which recognized elevated privacy interests implicated by the search of a cell phone.

In *Vergara*, a U.S. citizen was returning to the U.S. on a cruise ship from Mexico. He had been flagged for additional screening due to a prior conviction for possession of child pornography. At the border, a CBP Agent searched the contents of several phones in his possession and discovered a short video of topless female minors. DHS was alerted, and it conducted a forensic search of all his phones, which found more than 100 images and videos of minors engaged in sexual conduct. Vergara was charged with possession and transportation of child pornography.

Vergara argued that the search of his phones was unconstitutional and that the resulting incriminating evidence from the forensic search should not be admitted at trial. The trial court disagreed, and Vergara was found guilty.

On appeal, the majority of the three-judge panel ruled that searches at the border, including of electronics, "never" require a warrant or probable cause to believe a crime was committed. It explained that "highly intrusive" border searches, like strip searches, require "reasonable suspicion" of a crime (a lesser showing than "probable cause"), and that all other searches can be made without any suspicion of a crime at all. Consequently, because Vergara had not argued that there was no "reasonable suspicion" at the border, the search of his electronics was necessarily legal.

One judge, however, dissented from this ruling. Judge Jill Pryor wrote that, in her view, the law requires that a forensic search of a cell phone at the border requires a warrant supported by probable cause. Judge Pryor explained that "cell phones are fundamentally different from any other object traditionally subject to government search at the border" because they store huge amounts of highly personal data.

What's Next?

The scope of the government's authority to search electronics at the border remains an evolving area of law. For example, the ACLU of Massachusetts, the national ACLU, and the Electronic Frontier Foundation recently filed a lawsuit in federal court in Massachusetts on behalf of 11 travelers whose personal electronics were searched at the border without a warrant, seeking a ruling that such searches cannot be made except pursuant to a warrant based upon probable cause. That suit remains pending. Until the question is finally resolved, travelers can assume that border agents will continue to assert broad powers to search personal electronics as travelers apply for admission to the US. Therefore, you should be aware and extremely careful about the information or data stored in your electronic device.

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