

US court rules routine border search and seizure of electronic devices unconstitutional

By Kevin Reed
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A US court ruled on Tuesday that searches and seizure of electronic devices of international travelers without suspicion by the Department of Homeland Security (DHS) at US airports and other ports of entry are unconstitutional and in violation of the Fourth Amendment.

In the ruling, Judge Denise Casper of the US District Court of Massachusetts halted the routine practice by Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) of searching without “reasonable suspicion” the personal computers, tablets and smartphones of travelers.

The decision was in response to a 2017 lawsuit filed by the American Civil Liberties Union (ACLU) and the Electronic Frontier Foundation (EFF) on behalf of 11 international travelers whose electronic devices were searched, and in some cases seized, by US authorities upon entry into the US. Ten of the plaintiffs are US citizens and one is a lawful permanent resident.

The 48-page ruling states, “the Court declares that the CBP and ICE policies for ‘basic’ and ‘advanced’ searches, as presently defined, violate the Fourth Amendment to the extent that the policies do not require reasonable suspicion that the devices contain contraband for both such classes of non-cursory searches and/or seizure of electronic devices.”

As of January 2018, the Department of Homeland Security defines a basic search as a manual review of the contents of a device by a security officer and an advanced search as “any search in which an officer connects external equipment, through a wired or wireless connection, to an electronic device, not merely to gain access to the device, but to review, copy and/or analyze its contents.”

It should be pointed out that Judge Casper, by adopting the standard of “reasonable suspicion,”

stopped short of ruling in favor of the plaintiff’s challenge to “warrantless” searches of electronic devices at the border. Under the standard of “probable cause,” law enforcement authorities are required to obtain a court ordered warrant for the search and seizure of evidence that a crime has been committed.

Although the Fourth Amendment specifically states that “no warrants shall issue, but upon probable cause” for searches and seizures and “particularly describing the place to be searched, and the persons and things to be seized,” the District Court based its determination on exceptions to these requirements. In this case, the precedent of the border exception, “grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country.”

The ruling details several episodes of the abusive behavior by US border agents toward the traveling public at US ports of entry. In one such case, the ruling states, “Nadia Alasaad has twice had her iPhones searched at the border over her religious objections to having CBP officers, especially male officers, view photos of her and her daughters without their headscarves as required in public by their religious beliefs.”

The description goes on, “During the second search, which was of her daughter’s phone, Alasaad alleges, and Defendants have not disputed, that a CBP officer mentioned a photograph that had been on Alasaad’s phone during her earlier search but was not present in the second search.”

In another incident, the judgment says, “As to one such Plaintiff, Wright, a computer programmer, CBP also extracted and retained data, including attempting to image his laptop with MacQuisition software and extracting data from the SIM cards in his phone and

camera, from his electronic devices, and retained it for a period of fifty-six days, even if the parties agree that this data has now been returned to him.”

Another case, although not part of the lawsuit, was widely reported last summer when a 17-year-old incoming Harvard freshman from Palestine, Ismail B. Ajjawi, was stopped at Boston’s Logan International Airport and, after his phone and computer were searched, was deported. DHS officials cancelled Ajjawi’s visa and denied him entry into the US due to anti-US government posts found on his social media account that were made by his friends and not by him.

The ruling also establishes “substantial risk of future harm” from the routine searches because, once a traveler’s device has been examined, the record of this is maintained by DHS in their various security databases such as the Automated Targeting System (ATS) and the Investigative Case Management (ICM). In the case of ATS, a copy of any data obtained in any “prior border encounters” that included an advanced search is available to homeland security agents.

According to the CPB itself, the agency conducted more than 33,000 searches of electronic devices at US ports of entry in 2018. This is approximately four times the number of searches compared to just three years ago.

In the original lawsuit, the plaintiffs wrote, “Border searches of electronic devices intrude deeply on the private lives of all travelers and raise unique concerns for the journalists, lawyers, doctors, and others who carry particularly sensitive information about their news sources, clients, and patients,” adding that the warrantless searches “turn the border into a digital dragnet.”

In response to the ruling, EFF Senior Staff Attorney Sophia Copp said, “This is a great day for travelers who now can cross the international border without fear that the government will, in the absence of any suspicion, ransack the extraordinarily sensitive information we all carry in our electronic devices.”

While Judge Casper’s decision stipulates that border officers must now demonstrate “individualized suspicion” of illegal contraband before they can search a traveler’s device, the specifics of how this procedure will be implemented are not spelled out. That such enormous loop-holes are left in a ruling that purports to protect the international traveling public against “unreasonable searches and seizures” demonstrates that

no confidence can be placed in the courts to defend democratic rights.

The blatant violation of the Fourth Amendment by federal, state and local law enforcement, including homeland security officials, is taking place across the country and at the US borders each day in multiple forms. These practices have been on the rise since the terrorist attacks of September 11, 2001, which has been used by the political establishment, judicial system and law enforcement to dispense with constitutional and democratic norms for nearly two decades.

The launching of illegal wars of aggression abroad and attacks on democratic rights at home are two prongs of the response by the ruling elite to the decline of American capitalism as an economic and political power in world affairs. The target of all of these measures is ultimately the working class, the only social force capable of fighting for and defending democratic rights and stopping the descent into an authoritarian and military dictatorship.

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