



THE LEGALITY OF

STOP & ID

PROCEDURES

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THE RUTHERFORD INSTITUTE, a national nonprofit civil liberties organization, is deeply committed to protecting the constitutional freedoms of every American and the integral human rights of all people through its extensive legal and educational programs. The Institute provides its legal services at no charge to those whose constitutional and human rights have been threatened or violated. The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms.

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We are not supposed to be living in a “show me your papers” society.

Despite this, the U.S. government has recently introduced measures allowing police and other law enforcement officials to stop individuals (citizens and noncitizens alike), demand they identify themselves, and subject them to patdowns, warrantless searches, and interrogations. These actions fly in the face of longstanding constitutional safeguards forbidding such police state tactics.



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In 2017, for example, Customs and Border Protection (CBP) agents boarded a plane at New York’s JFK Airport and demanded that all persons on board show “documents” identifying themselves before they would be allowed to leave the plane.¹ While such a demand might be legal if made to a person trying to cross the border into the United States, it plainly violates the Fourth Amendment’s ban on unreasonable searches and seizures to stop and demand identification from persons who are already legally within the country.

Government agencies insist that such stop-and-ID procedures are necessary to combat illegal immigration, especially at border crossings. But

border crossings are unique circumstances in which the government may legally demand that travelers identify themselves and subject them to “routine” searches of their belongings. Nevertheless, the government has opened itself up to serious legal challenges by making the dubious claim that border agents also possess the authority to demand travelers divulge the passwords for their social media accounts and electronic devices in order to search for evidence of wrongdoing, regardless of whether agents have any suspicions whatsoever. By exploiting a loophole in the Fourth Amendment for border searches, government agents are now seeking access to virtually all digital records for the purpose of conducting criminal investigations and intelligence surveillance.

In conducting such searches, government agents not only gain access to private information stored on the devices but also to the wealth of personal information stored remotely “in the cloud” and accessible through the devices. Border agents are also targeting their demands at minorities (particularly Muslims) and journalists, filmmakers and activists who have been critical of the government in an attempt to chill First Amendment rights.² As a result, border searches of electronic devices increased five-fold between 2015 and 2016 and continue to rise.³

Such tactics quickly lead one down a slippery slope that ends with government agents empowered to subject anyone—citizen and noncitizen alike—to increasingly intrusive demands that they prove not only that they are legally in the country, but also that they are in compliance with every statute and regulation on the books.

This flies in the face of the provisions of the Fourth Amendment to the United States Constitution, which declares that all persons have the right to be free from unreasonable searches and seizures by government agents. At a minimum, the Fourth Amendment protects the American people from undue government interference with their movement and from baseless interrogation about their identities or activities.

Unless police have reasonable suspicion that a person is guilty of wrongdoing, they have no legal authority to stop the person and require identi-

fication. In other words, “we the people” have the right to come and go as we please without the fear of being questioned by police or forced to identify ourselves.⁴ Moreover, in the absence of a court-issued warrant, all persons within the United States have the right to not be searched by government agents or forced to reveal the contents of their wallets, their mobile devices or any other personal property.

Unfortunately, far-reaching surveillance by the government and its corporate allies has contributed to a climate in which the Fourth Amendment’s robust assurance of privacy and safeguards against government overreach have been severely eroded.

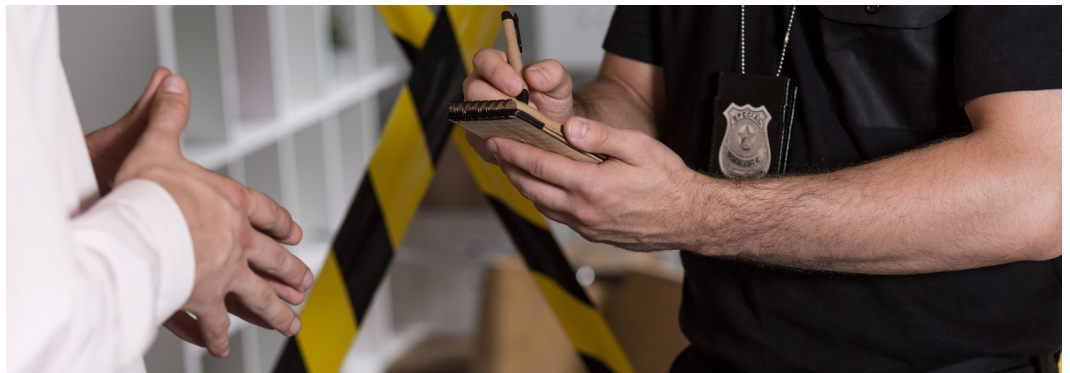
From the use of license plate readers that monitor our driving habits in real time⁵ to the National Security Agency’s massive collection of data about our telephone use,⁶ the government is continually seeking to know all it can about our private lives and is exploiting every opportunity to expand the reach of its surveillance. This shift towards a surveillance state where our actions are constantly watched and recorded becomes more ominous with every passing day.

Nevertheless, there are limits to what the government can lawfully do and demand in its interactions with the public. The following Constitutional Q&A provides insight into the rights of the public when faced with attempts by the government to unlawfully stop them, demand their identification, and search their belongings, both within the domestic United States and at international border crossings.

WHEN ARE POLICE ALLOWED TO STOP ME WHEN I AM TRAVELING IN PUBLIC?

Police may approach and speak to people in public without suspecting any wrongdoing. In such instances, however, a person is not obligated to speak with the officer and is free to walk away.⁷ In order for police to stop and hold a person for questioning and investigation – a so-called *Terry* stop – the Fourth Amendment requires that the officer have reasonable suspicion that the person is engaged in illegal activity.⁸ Police may also effect an arrest which involves taking a person into custody. An arrest is allowed by the Fourth Amendment only if there is a warrant for the arrest of the person or the police have probable cause to believe the person committed a crime. A stop that is initially a *Terry* stop may result in discovery of evidence by the police and, potentially, probable cause for an arrest.

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WHAT IS THE DIFFERENCE BETWEEN “REASONABLE SUSPICION” AND “PROBABLE CAUSE”?

A police officer has “reasonable suspicion” if he has reliable information indicating that a particular person may be engaged in criminal behavior. An officer can rely upon his experiences in concluding he has reasonable suspicion, but shouldn’t rely upon hunches or prejudices.⁹ An officer has “probable cause” when he has more than mere suspicions about a person. That is, the officer must have reliable evidence making it very likely that the person committed or is committing a crime.¹⁰ There are no hard and fast rules on whether particular circumstances provide police with rea-

sonable suspicion or probable cause. Thus, police have discretion in determining whether to stop someone, discretion which may be influenced by the biases and prejudices of the officer. It is ultimately the responsibility of the courts to make impartial, unbiased decisions on whether a police officer had reasonable suspicion or probable cause.

MAY POLICE STOP ME WHILE I AM TRAVELING IN PUBLIC AND REQUIRE THAT I PRODUCE IDENTIFICATION DOCUMENTS?

No. Unless government agents have specific evidence that you may be involved in some criminal activity, they may not impede your freedom of movement for purposes of determining your identity. Citizens are free to roam and loiter in public places and are not required to provide police with their identity or give an account of their purpose for exercising their freedom.¹¹ Even when police do have sufficient cause to stop you and request your identity, they cannot require that you produce papers or documents proving your identity. You are only required to tell the officer your identity.¹²

WHEN ARE POLICE ALLOWED TO STOP ME AND REQUEST IDENTIFICATION?

As noted above, police may make a *Terry* stop of a person if they have reasonable suspicion that the person is engaged in illegal activity. The purpose of a *Terry* stop is to allow police to conduct an investigation of suspicious circumstances, and in connection with that investigation police are allowed to request that a person identify themselves. Some states have “stop and identify” laws that require persons to provide their identity and address if they are subject to a *Terry* stop.¹³ The Supreme Court has held that under a “stop and identify” law, persons can be convicted for obstructing an investigation for refusing to identify themselves during a *Terry* stop if the request to identify is reasonably related to the purpose of the stop.¹⁴ But even in places covered by “stop and identify” laws, it is not required that you provide documents showing your identity.¹⁵

In a state or locality that does not have a “stop and identify” law, there is no legal requirement that you identify yourself in the course of a *Terry* stop. A person stopped for investigation is not required to answer questions posed by the police and a refusal to answer cannot be the basis for an arrest.¹⁶ Also, a police officer does not have the authority to search you or your belongings during a *Terry* stop and you should protect your Fourth Amendment rights by not consenting to a search during such a stop. If the officer has a basis for believing the person stopped has a weapon, the officer may conduct a “pat down” or “frisk” of the person’s outer clothing.¹⁷

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Police do have the authority to request identification if they stop a vehicle after observing a traffic infraction. They may ask to see the driver’s license, the vehicle registration, and any proof of insurance.¹⁸ The Supreme Court also has held that law enforcement may require drivers produce identification at roadside checkpoints set up to stop passing vehicles and check for compliance with licensing requirements and for driver sobriety.¹⁹

DOES THE U.S. CONSTITUTION PROTECT MY RIGHT TO TRAVEL?

The Supreme Court has made clear that one aspect of personal liberty protected by the Fifth and Fourteenth Amendments is your freedom to

move from one place to another according to your inclinations.²⁰ A person's right to move to and to remain in a public place of his or her choice is a part of our heritage and is a natural right that predates even the Constitution.²¹ The constitutional right to travel includes the right to travel to and from foreign countries. This allows citizens to pursue their livelihoods and to remain well-informed on public issues.²² This freedom of movement is also protected by the Fourth Amendment's prohibition on unreasonable searches and seizures.²³

DO THE PROTECTIONS OF THE FOURTH AMENDMENT APPLY AT THE INTERNATIONAL BORDERS OF THE UNITED STATES?

The Fourth Amendment does protect citizens and non-citizens who are crossing into the United States at an international border or at places that are the functional equivalent of a border. However, the right of privacy guaranteed by the Constitution is more limited in this situation. Because of the national interest in excluding persons not authorized to enter the country and objects considered dangerous, there is a long-standing rule that government agents may stop and examine persons and property crossing into the United States. Unlike other situations, a government agent does not need reasonable suspicion to detain and question a person at the border. Even though the Fourth Amendment generally requires a warrant to seize and search your property, government agents do not need a warrant to search belongings that you have with you while crossing into the United States.²⁴

WHAT CONSTITUTES AN INTERNATIONAL BORDER CROSSING?

Persons are subject to border searches when crossing the country's land borders with Mexico and Canada. Additionally, you are subject to a border search when entering the United States at a place that is the "functional equivalent" of a border. This would include any airport when you are arriving on an international flight²⁵ and the landing place of any pri-

vate plane that crossed over the international border during its flight.²⁶ It also includes a place where a ship docks after being in a foreign port.²⁷ A point of departure in a foreign country also may be considered the functional equivalent of a border if the United States has an agreement with that foreign country to establish a preclearance customs station at that point of departure.²⁸



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The United States Border Patrol also maintains thirty-three checkpoints on major highways miles away from the United States' land borders at which drivers may be required to stop for questioning or inspection by government agents.²⁹ These "fixed checkpoints" are of two types:

- Those that are considered the "functional equivalent" of a border and at which vehicles, property and persons are subject to the kinds of inspections that occur at borders. This kind of checkpoint is legal only if the government can prove that the traffic passing through the checkpoint is almost entirely from the foreign side of the border.³⁰
- Other fixed checkpoints on major highways where a significant amount of the traffic is domestic. Vehicles, property and persons passing through these checkpoints are not subject to a full search at the will of the government agent. Government agents may only conduct brief questioning as discussed below.³¹

ARE BORDER PATROL AGENTS ALLOWED TO STOP MY VEHICLE AT PLACES OTHER THAN A FIXED CHECKPOINT?

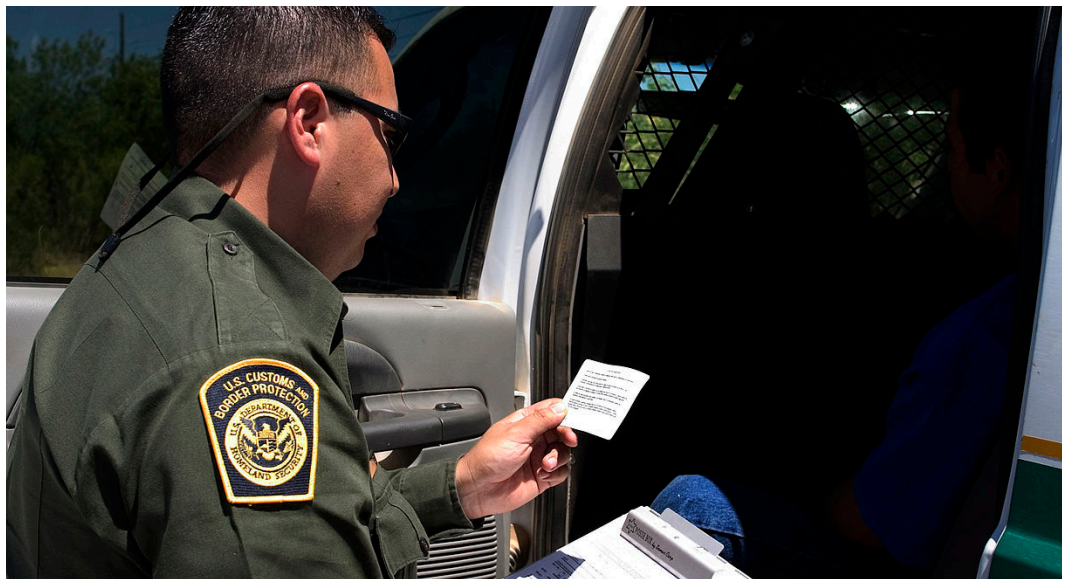
The United States Supreme Court has ruled that “roving patrols” of border agents are not forbidden by the Fourth Amendment, and these patrols may stop vehicles near the border when the agents reasonably suspect that a vehicle may contain persons who are illegally in the country.³² There is no hard and fast rule on how close to the border the stop must be made, but roving patrol stops are generally legal only if within about seventy-five miles of the border.³³ This kind of stop must be brief and consist of asking the vehicle occupants about their citizenship and immigration status. Any extended detention must be based on the occupants’ consent or probable cause. Additionally, a roving patrol may not stop a vehicle solely because the occupants appear to be of Mexican ancestry.³⁴

WHAT KIND OF INVESTIGATION CAN GOVERNMENT AGENTS CONDUCT WHEN I AM AT A BORDER OR ITS EQUIVALENT?

When you enter into the United States at a border, border agents can require you to present documents revealing and proving your identity, such as a passport, a passport card or other official document. A driver’s license and birth certificate are no longer sufficient for a citizen to return to the United States from Mexico and Canada.³⁵

Border agents also may conduct a “routine search” of your person, belongings, or vehicle when entering the United States.³⁶ This includes a search of your outer clothing, the contents of a pocketbook or bag, luggage, and the interior and trunk of a vehicle.³⁷ Just because an agent is authorized to conduct these kinds of searches does not mean that you will be subjected to any of them. Border agents employ initial screening by speaking with you and examining your documents before requiring additional examination.³⁸

At highway fixed checkpoints that are not the functional equivalent of a border, agents are not allowed to demand identification documents or search people and their belongings. Although cars may be required to stop at these checkpoints, government agents may only briefly question the vehicle occupants about their immigration status and ask them to explain any suspicious circumstances. Only if the questioning gives rise to reasonable suspicion of illegal activity may the vehicle and its occupants be kept for additional screening and inspection. A full search is allowed only if the screening gives agents probable cause to conduct a search.³⁹



CAN BORDER AGENTS CONDUCT ANY SEARCH THEY WANT WHEN AT BORDERS?

Only routine searches are allowed as a matter of course at borders. Because the Fourth Amendment forbids “unreasonable” searches, there are certain searches that are considered so intrusive of personal privacy that border agents are required to have evidence giving rise to reasonable suspicion that the person is carrying something illegal before they may conduct the search. Thus, strip searches, in which a person is required to shed clothing, are not legal at the border unless the border agent is aware of specific facts that reasonably lead the agent to believe this specific person is concealing something beneath his or her clothing.⁴⁰

Although what constitutes a “strip search” is not definitively settled, we believe that anytime you are required to bare your body in order to be inspected by a government agent, you have been subjected to a strip search that may have violated your rights.

Body cavity searches are even more severe intrusions upon personal privacy and dignity, and for a border agent to force a person to endure this kind of search the agent must have a clear indication that the person is carrying something illegal in a body cavity.⁴¹ Our position is that any body cavity search is unreasonable under the Fourth Amendment unless a warrant for the search has been issued.

ARE BORDER AGENTS ALLOWED TO EXAMINE MY COMPUTER, SMART PHONE OR OTHER ELECTRONIC DEVICE?

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Unfortunately, several courts have ruled that electronic devices carried by persons who cross into the United States at a border are like travelers’ other belongings and may be examined by border agents as routine border searches.⁴² Under these rulings, a search of a laptop, cell phone, or other electronic device is not limited to an examination of its physical features, as would be the case with other belongings, but includes a search of the files and information on the electronic device. Seizing upon these court rulings, in 2009 the U.S. Customs and Border Protection agency issued a directive to its agents informing them that they have the authority to demand that persons entering the country hand over their electronic devices and provide any passwords so agents can review and analyze the information, whether or not there is any suspicion of illegal conduct. Border searches of electronic devices have exploded in recent years, increasing from 5,000 in 2015 to 25,000 in 2016.⁴³

Not content with examining personal devices, border agents are also demanding that persons, particularly Muslim-Americans, provide their social media information and their passwords to open mobile phones, in order to examine the wealth of information and contacts available on social media sites.⁴⁴

In some cases, travelers have had their electronic devices subjected to forensic examinations, which involve the use of sophisticated software to extract and analyze deleted and hidden information. Forensic examinations are time consuming (sometimes requiring days to complete) and reveal much more information about the traveler than could be revealed by a manual inspection of the device.⁴⁵ Because forensic examinations are substantial intrusions upon personal privacy and dignity, courts have ruled that these are not routine border searches and government agents must have reasonable suspicion of illegal activity before they conduct a forensic examination of an electronic device.⁴⁶



ARE BORDER SEARCHES OF ELECTRONIC DEVICES LEGAL?

Despite court rulings allowing government agents to conduct border searches of personal electronic devices, we believe that the Fourth Amendment does not authorize these searches and that border agents must obtain a warrant in order to search the content contained on personal electronic devices for the following reasons:

- In 2014, the United States Supreme Court recognized that cellphones are a special kind of personal property entitled to greater Fourth Amendment protection. Although police generally may search items in the control of an arrestee at the time of the arrest, the Supreme Court held that this rule does not apply to cellphones because of the amount of personal information they contain:

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life[.]” . . . The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.⁴⁷

The Supreme Court’s recognition that searches of personal electronic devices present significant intrusions into personal privacy demonstrates that such devices should not be treated like other property a person seeks to transport across the border.

- The information on electronic devices does not raise the concerns that justify warrantless and suspicionless border searches. The Fourth Amendment exception at the border is based on the government’s interest in excluding persons not authorized to enter the country and objects (such as narcotics or infected agriculture) that are dangerous. Electronic devices and the data they contain do not give rise to either of these risks and so the border exception should not apply to those devices.
- Because of the widespread use of cloud storage, allowing border agents unfettered access to electronic devices gives them the power to search a vast amount of personal information stored on the cloud that is unrelated to the purpose of a border search. As one court pointed out:

In the “cloud,” a user’s data, including the same kind of highly sensitive data one would have in “papers” at home, is held on remote servers rather than on the device itself. The digital device is a conduit to retrieving information from the cloud, akin to the key to a safe deposit box. Notably, although the virtual “safe deposit box” does not itself cross the border, it may appear as a seamless part of the digital device when presented at the border.⁴⁸

Giving government agents this kind of access to personal information is patently unreasonable for purposes of the Fourth Amendment.

- Information accessed in electronic devices during a border search is copied, stored and shared with other law enforcement and national security agencies.⁴⁹ Although these agencies would need a warrant to obtain information accessible through electronic devices, the border search exception can be exploited to avoid the requirements of the Fourth Amendment.
- Border searches of electronic devices violate other protections of the Constitution. A search which reveals a journalist's confidential sources or the identities of members of a political group violates the First Amendment's guarantee to freedom of the press and freedom of association.⁵⁰ If border agents force you to reveal your password, thereby forcing you to reveal your private statements and correspondence on the electronic device, they violate your Fifth Amendment right against self-incrimination.⁵¹ And when border agents target persons because of their religion or because they have criticized the government,⁵² they engage in discrimination in violation of the Constitution.

WHAT SHOULD I DO IF I BELIEVE MY RIGHTS WERE VIOLATED BY POLICE OR BORDER AGENTS?

If you believe your rights are being violated when police stop you or when you are at a border, you should try to document what happens and seek legal assistance afterward. You should not do anything to threaten officials or forcefully resist because this could lead to serious criminal charges against you. Instead, remain calm and courteous, but challenge their actions later in court.

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