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For example, CBP officials routinely scan travelers' digital devices to identify evidence of drug smuggling, and may even use facial recognition technology. CBP has scanned devices to find child pornography and evidence of child sexual abuse. If CBP discovers weapons, explosives, or other dangerous items, border officers are trained to take immediate action if they find contraband. This is known as a safety alert, and includes the possibility of arrest and confiscation of evidence. But the procedures that CBP and other U.S. authorities have adopted to search phones and other devices at the border raise novel legal questions. The government says that it is able to search digital devices without the prior suspicion typically required for a search under the Fourth Amendment. Now, CBP policies have created a broad new category of border searches that are called basic searches. When an agent conducts a basic search at the border, officers may not require any suspicion before conducting a search of a person or his or her electronic devices. When a CBP officer conducts a search, what he or she is looking for can be anything at all. The only requirement is that CBP must first have suspicion that something may be wrong. This case is about the kind of suspicion CBP needs to support its basic searches of travelers and their electronic devices. When a traveler presents for inspection at a U.S. port of entry at the border, a CBP officer may begin conducting a basic search of his or her device. Travelers must provide their passcodes. If they refuse, an officer may detain the device for up to five days. During this five-day period, officers may search the contents of the device, and they may ask for the passcode. The CBP officer and the traveler can engage in a back and forth debate about whether the passcode is valid. If the officer is unsatisfied with the password, the officer may threaten to detain the device longer. But that threat is not legally binding. If the device is not turned off, the officer has no authority to turn off its power. The officer can search the device and look at the content. If the officer has probable cause to believe the device contains evidence of a crime, the officer can seize it. Then, the officer must apply for a search warrant.



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One of the exceptions concerns routine border searches of the persons of entrants who are not being questioned about any specific offense. But according to the 2018 directive, all CBP officers are now allowed to conduct a search of the electronic device of anyone entering the US, including the detention of the person. Travelers are not necessarily questioned, nor does the 2018 directive say that their phones are searched. The directive gives special discretion to CBP officers for cases where the officer has an articulable suspicion of terrorist activity. They may then seize the phone (or other device) for further search. The 2018 directive replaces the 2009 version of the US CBP Mobile Devices Directive, which required CBP officers to obtain a warrant supported by probable cause. The 2009 version held that, if a device is running on a mobile wireless network, border agents must first obtain the consent of the wireless service provider for a search. For prepaid devices, the agents can obtain consent for searches, but the 2009 version of the US CBP Mobile Devices Directive made clear that consent could not be assumed. If a device is not running on a mobile wireless network, but is connected to a Wi-Fi hotspot, border agents can also obtain consent from the owner of the hotspot to conduct a device search, but in no case can an agent simply demand that an individual provide the password. Once devices are seized for further search, a border agent must file a Request for Custody form with the US Immigration and Customs Enforcement, which is responsible for detaining travelers for further investigation. Information on where a device is being held is returned to the device owner.

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