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White Collar Briefly



On May 9, 2018, the Fourth Circuit Court of Appeals issued an opinion in [United States v. Kolsuz](#), holding that the Fourth Amendment requires individualized suspicion for forensic searches of cell phones seized at the border.

In so holding, the Fourth Circuit provides important clarification about how the Fourth Amendment applies to border searches of electronic devices. But, both in the Fourth Circuit and in jurisdictions across the country, critical questions remain unanswered about the scope of the Fourth Amendment in this context. [caption id="attachment_3532" align="alignright" width="300"]



Source: ACLU.org[/caption] *The Decision* In *United States v.*

Kolsuz, federal customs agents found firearm parts in the checked luggage of an airport traveler and then detained him as he was attempting to board an international flight. Subsequently, and without a warrant, agents seized his cell phone and "subjected it to a month-long, off-site forensic analysis, yielding a nearly 900-page report cataloging the phone's data." Based in part on this information, the traveler was eventually convicted of, among other things, attempting to smuggle firearms out of the country. On appeal of his conviction, the traveler challenged the denial of his motion to suppress the forensic analysis of his cell phone as a violation of his Fourth Amendment rights. In addressing the issue, the Fourth Circuit acknowledged that government agents may perform "routine" searches at international borders, or their functional equivalents, without a warrant or individualized suspicion consistent with the Fourth Amendment. But, the Court recognized that even at the border certain "non-routine," "highly intrusive" searches require individualized suspicion. Ultimately, the court held that forensic searches of digital devices, like the one at issue in that case, qualify as such "non-routine" searches and are thus prohibited absent some level of individualized suspicion. The Court's holding was based, in part, upon its determination that forensic analysis of a digital device can "reveal an unparalleled breadth" of "private," "sensitive" information. It was also based on the Supreme Court's 2014 decision in *Riley v. California*, which recognized the strong privacy interests associated with electronic devices. There, the Supreme Court held that a warrant is required to search a cell phone seized incident to arrest because of the private, extensive information contained on such devices. Notably, however, the Fourth Circuit did not decide whether the requisite level of suspicion for such forensic searches is reasonable suspicion, or something more (like a warrant supported by probable cause). It also had no occasion to decide the requisite level of suspicion for officers to conduct "manual" searches, where agents review the content of electronic devices without the help of forensic technology. **Other Case Law, Open Questions** The Fourth Circuit is just one of several federal appellate courts to have recently grappled with the application of the Fourth Amendment to searches of electronic devices at the border. While the courts' opinions in these cases are not (yet) in direct conflict, they are certainly varied and have left open critical questions. For instance, in 2013, an en banc Ninth Circuit ruled in [United States v. Cotterman](#) that reasonable suspicion is required for forensic searches of computers at the border. Manual searches of electronic devices at the border, the court held, do not require such any level of suspicion. This issue was also presented to the Fifth Circuit in [United States v. Molina-Isidoro](#). But, in March of this year, the court declined to resolve what level of suspicion applies to searches of electronic devices at the border. There, the court noted that the manual search of the defendant's cell phone was supported by probable cause—a routine luggage x-ray led to the discovery of over 4-kilos of crystal meth in Molina's suitcase. Thus, the court held that the border agents had a good faith basis for believing the search did not run afoul of the Fourth Amendment. Also this March, the Eleventh Circuit held in [United States v. Vergara](#) that forensic searches of electronic devices at the border do not require a warrant or probable cause. But the court did not reach the question of whether reasonable suspicion is required for such searches because the defendant did not raise the issue. And, notably, the panel decision was made over a strong dissent, which argued that a forensic search of a cell phone at the border requires a warrant supported by probable cause. The First Circuit may also have a chance to address the issue soon. In May, the U.S. District Court for the District of Massachusetts declined to grant the government's motion to dismiss plaintiffs' Fourth Amendment claims related to warrantless and suspicion-less border searches of electronic

devices. The high-profile case, *Alasaad v. Duke*, is based on the claims of 10 plaintiffs comprised of U.S. citizens and one permanent resident, including a NASA engineer, a former U.S. Air Force engineer, and journalists, each of which had their electronic devices searched and/or confiscated by border agents. Plaintiffs are seeking declaratory relief and expungement of all data copied from their devices. In the end, it seems increasingly likely that the Supreme Court will need to resolve how the border search exception applies to government searches of computers and cellphones. But, in the meantime, the final resolution of this issue has become increasingly important. [According to](#) the U.S. Customs and Border Protection ("CBP"), U.S. customs agents conducted 60 percent more searches of travelers' electronic devices in 2017 than in 2016, searching 30,200 devices. However this issue is decided, it will have a significant impact on the millions of travelers—many of whom travel with confidential or highly sensitive business information—that pass through the United States' borders each year.

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