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Does a Constitution-free zone really exist in America?

By Scott Bomboy | National Constitution Center – 54 mins ago

Is there really a government law that disallows the [Fourth Amendment](#) for 200 million Americans? Some people say it's true, but the reasoning behind a 100-mile "Constitution-free" zone argument is confusing at best.

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The ACLU's Constitution Free Zone

[ACLU's Constitution-Free Zone](#)

The American Civil Liberties Union has been saying since 2010 that a regulation allowing customs and immigration agents to search electronic devices at America's borders without cause is wrong. Two years prior to that, the ACLU also warned of a 100-mile-wide U.S. border called the "Constitution-free zone" where such searches could occur.

Last Friday, [the Department of Homeland Security issued a two-page review](#) of its policy on searching laptops, cell phones, and other devices at border checks, to clarify the policy that the ACLU had questioned in 2010.

The DHS said that customs and immigration agents can "exercise long-standing constitutional and statutory authority permitting suspicionless and warrantless searches of merchandise at the border and its functional equivalent."

The story was [picked up by Wired magazine](#) and some tech and political blogs as another example of the 100-mile "Constitution-free" zone and a violation of [Fourth Amendment](#) rights.

The ACLU also asked [for the details behind the decision to be released](#).

To be sure, the ACLU has played a valuable role in the debate since 2008 and has [obtained many government files about electronic-device searches](#) after filing Freedom of Information Act requests.

But the confusion seems to be centered on the idea of a 100-mile extended border for the United States, and how nearly 200 million Americans could have their laptops, cell phones, and iPads searched at any moment.

In a lawsuit filed in 2010, the ACLU argued that “we are not saying that the government can never search or seize electronic devices at the border, but only that border agents should have some suspicion that the search will turn up evidence of wrongdoing before looking through all the private information that people have stored in their devices.”

The 100-mile-wide border zone is from that earlier missive from the ACLU in 2008, which claimed the electronics-search zone applied to any person who lived within 100 miles of a land or sea border—which happens to be two-thirds of the American population. At the time, the ACLU labeled the area as [the “Constitution-free zone.”](#)

Since then, bloggers and writers have continued to make the connection between this 100-mile wide border and the lack of constitutional rights for searches of laptops and cell phones.

Legally, the 100-mile-wide region is called the “extended border” of the U.S., as [defined by Title 8 of the Federal Code of Regulations](#). There is also something called the “functional equivalent” border, which is the area around international airports in the interior region of the U.S.

The DHS ruling from last Friday said its “warrantless searches” applied to the U.S. “border and its functional equivalent,” with no mention of the extended 100-mile border.

Two [analysis papers from the Congressional Research Service](#) from 2009 offer some legal insight into what tactics agents can follow within the 100-mile-wide extended border, and why the distinction between the extended border and the other two borders is important.

Searches within the 100-mile extended border zone, and outside of the immediate border-stop location, must meet three criteria: a person must have recently crossed a border; an agent should know that the object of a search hasn’t changed; and that [“reasonable suspicion”](#) of a criminal activity must exist, says the CRS. (The service had done the legal analyses to prepare Congress members for legislation.)

“Although a search at the border’s functional equivalent and an extended border search require similar elements, the extended border search entails a potentially greater intrusion on a legitimate expectation of privacy. Thus, an extended border search always requires a showing of ‘reasonable suspicion’ of criminal activity, while a search at the functional equivalent of the border may not require any degree of suspicion whatsoever,” the CRS says.

The fact that agents need to show “reasonable suspicion” outside direct border stops and airports [puts their actions closer to the scope of the Fourth Amendment](#), says the CRS.

“The Fourth Amendment mandates that a search or seizure conducted by a government agent must be ‘reasonable.’ As a general rule, courts have construed Fourth Amendment *reasonableness* as requiring probable cause and a judicially granted warrant. Nonetheless, the Supreme Court has recognized several exceptions to these requirements, one of which is the border search exception.”

The argument about a Constitution-free zone may better apply to direct border stops and airports, where agents don’t need to explain why they are searching a computer or cell phone. So, there could still be a “Constitution-free zone,” based on the outcome of legal appeals. It would just be much smaller than that 100-mile band around the U.S..

The CRS says the Supreme Court has yet to consider a case involving the degree of suspicion needed to search laptops at the border without a warrant or reasonable suspicion.

And in an evolving world where people keep much of their private lives stored on computers and cell phones, the issue should only grow in importance in coming years.

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