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Additional Powers of Search and Seizure at and Near the Border

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution
Amendment IV

That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.

United States Supreme
Court, 1977, U.S. v. Ramsey

Introduction. In normal practice, the Fourth Amendment of the U.S. Constitution requires individualized suspicion together with procurement of a warrant prior to a government search and/or seizure. Federal courts have recognized some exceptions, however, with the most common one pertaining at the nation's borders, where most stops and searches are exempt from the usual requirements. That exception is justified by the understanding that a sovereign nation has the power to control who and what comes within its borders. This article describes practices related to searches and seizures at and near the border. A lengthy discussion of U.S. practices is followed by a brief discussion of Canadian practices.

Defining the Border. Border searches may occur at the land entry from the adjacent countries of Canada or Mexico, at the place a ship docks in the U.S. after having been to a foreign port, and at the airport where international flights first land. Border searches may also be conducted at the "functional equivalent" of the border, which is generally the first practical detention point after a border crossing or point of entry.¹ Searches at the "functional" border are considered no different from those conducted at the physical border and are justified because of the infeasibility of stopping and searching a subject at the physical border. Examples of functional equivalents include international airports within the U.S. and ports within U.S. territorial waters.

Routine and Non-routine Searches. In general, officials at the border may search any person entering or leaving the country, together with that person's belongings.

Any person or thing coming into the United States is subject to search by that fact alone, whether or not there be any suspicion of illegality directed to the particular person or thing to be searched.²

[T]he examination of a person by ordinary pat-down or frisk, the requirement that outer garments such as coat or jacket, hat or shoes be removed, that pockets, wallet or purse be emptied, are part of the routine examination of a person's effects which require no justification other than the person's decision to cross our national boundary.³

A "routine" search of a person and his belongings may be conducted without probable cause, reasonable suspicion, or a war-

rant. Such a search must be of a nature as to pose no serious invasion of privacy. As cited above, removal of outer garments and emptying of a wallet are examples of personal searches that are not considered unduly invasive. A “non-routine” search involves a more serious invasion of privacy, and included within this category are strip searches, body-cavity searches, and x-ray searches. Although such searches may still be conducted without a warrant, they must be justified by an appropriate degree of reasonable suspicion. For instance, a strip search is justifiable based upon a “subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body...”⁴ To justify a body-cavity search, however, the “objective, articulable facts” would need to point to concealment *within* the body. It is commonplace for a routine search to uncover evidence that generates the reasonable suspicion necessary to justify a non-routine search.

Federal courts have upheld the concept that the examination of *inanimate objects* constitutes a relatively minor invasion of privacy and poses little offense to the average traveler. Virtually all examinations of inanimate objects are therefore considered to be routine (i.e., requiring neither a warrant nor reasonable suspicion), including practices such as: inspection of luggage, inspection of outbound materials,⁵ search of a vehicle (even if the search is extensive and time-consuming), and x-ray examination of luggage and vehicles.⁶ Even a search that involves disassembly of a vehicle (e.g., removal of the gas tank) is considered routine.⁷ Only when a search involves some degree of destructiveness does there emerge a question as to whether it must be supported by reasonable suspicion. In one recent case, a court found that drilling a small hole in the bed of a pickup truck was not so destructive as to require reasonable suspicion, reasoning that the hole posed no real threat to the safety and function of the truck.⁸

In all of the above circumstances the courts have held that the practices are consistent with the Fourth Amendment in that border-related searches are a *reasonable* necessity given the imperative for a sovereign nation to protect its citizens from threats emanating from beyond the borders. Case law has sought to find the proper balance between this border-security imperative and the preservation of personal dignity and privacy.

Electronic Storage Devices. There is current controversy regarding the government’s right to search electronic storage devices (ESDs) at the border. In an era of portable computing, it is common for individuals to store data on laptop computers, cell phones, disk drives, and other ESDs and travel with them across the border. The data may be of a personal nature (such as diaries, medical information, financial records, and photos) or of a proprietary business nature (such as attorneys’ confidential client information, reporters’ undisclosed sources, or inventors’ trade secrets). Courts have recently been confronted with several issues: (1) whether the border search exception applies to ESDs; (2) if so, whether a search of ESDs is classified as routine or non-routine; (3) if classified as non-routine, the degree of suspicion needed to justify the search. While the Supreme Court has not yet addressed this issue, lower courts have concluded that searches of ESDs fall under the border search exception. However, the courts have not clearly established the degree of suspicion needed to conduct a search. Early cases upholding the search of laptops at the border were supported by reasonable suspicion.⁹ More recently, one court held that reasonable suspicion was not necessary. Stating that “searches of closed containers and their contents can be conducted at the border without particularized suspicion under the Fourth Amendment,” the court did not recognize ESDs as distinguishable from other containers.¹⁰ Whether other federal courts adopt similar perspectives remains to be seen.

Extended Border Searches. The border search exception has been interpreted as allowing warrantless searches further inland than the physical border (or its functional equivalent). These “extended border searches” are valid in the following circumstances: (1) government officials have reasonable certainty or a “high degree of probability” that a border was crossed; (2) they also have

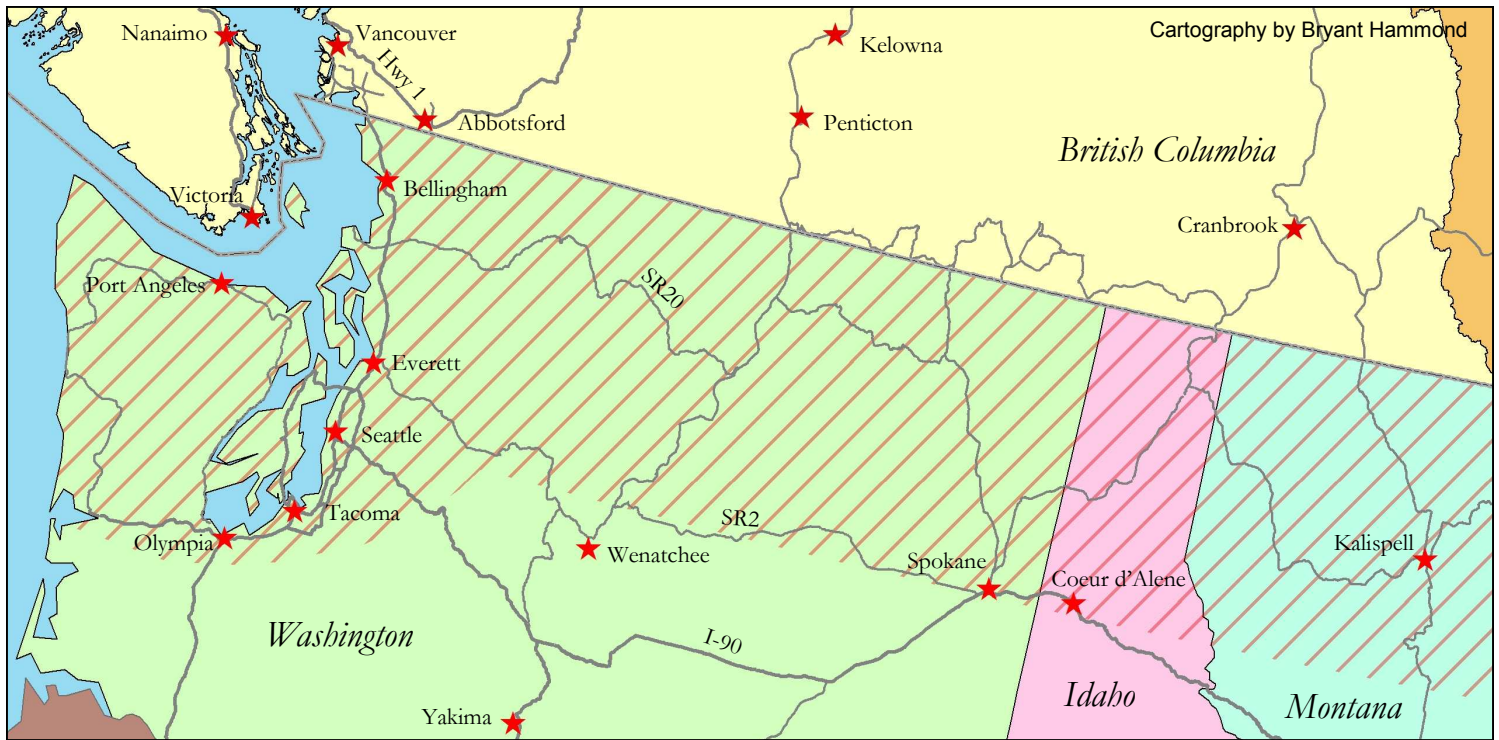


Figure 1. Lands Lying within 100 Miles of the Border

reasonable certainty that no change in the object of the search occurred between the time of the border crossing and the search; and (3) they have “reasonable suspicion” that criminal activity was occurring.¹¹ In this context, “reasonable certainty” is defined as requiring more than probable cause, but less than proof beyond a reasonable doubt. These three conditions establish no inherent limit upon the distance from the border at which such a search might occur—suitable surveillance seemingly could justify an extended border search at a location very distant from the border.

Immigration Enforcement Nationwide. The foregoing discussion has centered upon the interdiction of illegal goods and objects. A separate array of powers is granted to officers charged with enforcement of immigration laws. Certain powers are applicable nationwide—i.e., an officer may enter “into any area of a business or other activity to which the general public has access or onto open fields that are not farms or other outdoor agricultural operations without a warrant, consent, or any particularized suspicion in order to question any person whom the officer believes to be an alien concerning his or her right to be or remain in the United States.”¹² During initial questioning, this power is considered equivalent to the right of *any* person “to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.”¹³ If an officer develops “a reasonable suspicion based upon articulable facts” that a person being questioned is an illegal alien, the officer may briefly detain the person for further questioning.¹⁴ An officer may arrest without warrant a person he believes to be an illegal alien.¹⁵

Immigration Enforcement Near the Border. Additional powers apply within 100 miles of the border.¹⁶ Within that zone, an officer may without warrant “board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle...”¹⁷ Officials may also without warrant establish stationary road checkpoints near the border. At such checkpoints, officers may stop vehicles for brief questioning of the driver and passengers. No individualized suspicion is necessary in support of the decision to stop a given car, and, in fact, the apparent ancestry of vehicle occupants is an allowable basis upon which to select a car.¹⁸ However, an actual search of the vehicle or occupants must be supported by probable cause.¹⁹

In the zone within 25 miles of the border, an additional power is granted—officers patrolling the border may “have access to private lands, but not dwellings,” for the purpose of preventing the illegal entry of aliens into the U.S.²⁰ During the conduct of roving patrols, a stop of a vehicle is authorized if the officer is “aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion” that a vehicle contains illegal aliens.²¹ This standard is less stringent than the standard of probable cause that is otherwise necessary for stops of vehicles by law enforcement officials within the U.S. Interestingly, the apparent ancestry of vehicle occupants is *not* (by itself) a valid basis for the stop of a vehicle by a *roving* officer.

Figure 1 depicts the portion of Washington that lies within 100 miles of the Canadian border, encompassing the great majority of the state’s population. Within that area, the U.S. Border Patrol has recently operated temporary interior checkpoints on the Olympic Peninsula and has also boarded state ferries for the purpose of apprehending illegal aliens. While such activities are commonplace near the Mexico – U.S. border, public controversy arose in Washington.

Some Distinctions in Canadian Practices. In the Canadian Charter of Rights and Freedoms, section 8 establishes that “Everyone has the right to be secure against unreasonable search and seizure.” The applicability of that right at the border has been subject to judicial interpretation, and Canadian courts have upheld principles that are fairly consistent with American ones.

*The crux of the Crown's argument is that the reasonableness of border searches within the meaning of s. 8 ought to be treated differently from searches occurring in other circumstances. The Crown relied heavily on the rationales articulated in American cases for carving out customs procedures as a general exception to standard search and seizure protections. The dominant theme uniting these cases is that border searches lacking prior authorization and based on a standard lower than probable cause are justified by the national interests of sovereign states in preventing the entry of undesirable persons and prohibited goods... In my view, the state interests enunciated throughout the American jurisprudence that are deemed to make border searches reasonable, are no different in principle from the state interests which are at stake in a Canadian customs search for illegal narcotics...*²²

With respect to goods in the possession of a person in a customs-controlled area, an officer may perform a non-intrusive inspection with no individualized suspicion. To support an intrusive inspection of goods, the officer must have reasonable suspicion that the goods are in contravention of law, and to support the search of a person, the officer must have reasonable suspicion that something in contravention of law is secreted on or about the person.²³ Distinct from American practice, a person detained for personal search must be informed of their right to counsel (and other Charter rights), may demand to have the grounds for search reviewed by a senior officer, and can only be searched by a person of the same gender.²⁴ As in America, though, all of the above-described searches can be conducted without a warrant, and the searches need not be supported by probable cause.

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Endnotes.

1. Almeida-Sanchez v. U.S., 1973, U.S. Supreme Court
2. U.S. v. Odland, 1974, U.S. 7th Circuit
3. U.S. v. Sandler, 1981, U.S. 5th Circuit
4. U.S. v. Guadalupe-Garza, 1970, U.S. 9th Circuit
5. U.S. v. Kolawole Odutayo, 2005, U.S. 5th Circuit
6. U.S. v. Okafor, 2002, U.S. 9th Circuit
7. U.S. v. Flores-Montano, 2004, U.S. Supreme Court
8. U.S. v. Chaudhry, 2005, 9th Circuit
9. U.S. v. Ickes, 2005, U.S. 4th Circuit
10. U.S. v. Arnold, 2008, U.S. 9th Circuit
11. U.S. v. Delgado, 1987, U.S. 5th Circuit
12. 8 CFR 287.8(f)(4)
13. 8 CFR 287.8(b)(1)
14. 8 CFR 287.8(b)(2)
15. 8 USC 1357(a)(2)
16. 8 CFR 287.1(a)(2)
17. 8 USC 1357(a)(3)
18. U.S. v. Martinez-Fuerte, 1976, U.S. Supreme Court
19. U.S. v. Ortiz, 1975, U.S. Supreme Court
20. 8 USC 1357(a)(3)
21. U.S. v. Brignoni-Ponce, 1975, U.S. Supreme Court
22. R. v. Simmons, 1988, Supreme Court of Canada
23. Customs Act, sections 99.2 and 99.3
24. Customs Act, section 98