

ARTICLE

THE ELECTRONICS BAN: PRIVACY AND SEARCH CONCERNS

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I. INTRODUCTION

As many who have traveled by plane know, whether flying internationally or domestically, the security measures taken at the airport can be quite the hassle. Currently, passengers cannot bring the following items in carry-on luggage on a plane: liquids in bottles that hold more than three fluid ounces, scissors, lighters, matches, aerosols, firearms, razor blades, knives, snow globes, gel inserts for shoes, mace, pepper spray, and other self-defense items.¹ While some of these items are easy to comprehend as dangerous weapons (i.e. firearms, knives,

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1. *What Can I Bring?*, TRANSPORTATION SECURITY ADMINISTRATION, <https://www.tsa.gov/travel/security-screening/whatcanibring> (last accessed July 24, 2017).

explosives), others may present unexpected difficulties, especially since some come as common items that passengers may forget are prohibited. Examples include scissors, which can include nail grooming scissors, razor blades, which can include shaving razors, and aerosols, which can include sunscreen sprays.

As for electronics, there have been certain protocols to follow when bringing laptops on a plane. At most airports, laptops have to be taken out of the carry-on luggage or laptop sleeve, which can prolong the security check process.² This protocol does not typically include other common electronics such as phones, portable gaming systems, or tablets. On March 21, 2017, the Department of Homeland Security banned “all personal electronic devices larger than a cell phone or smart phone [from placement in carry-on luggage for flights arriving] at 10 airports where flights are departing for the United States.”³ The ten airports were all in the Middle East. The new electronics restriction barred passengers on flights from these ten Middle Eastern countries from carrying any electronics larger than a cell phone in carry-on luggage.⁴ This included tablets, laptops, and cameras.⁵ This was not a United States-only ban, as Great Britain has also implemented an electronics ban.⁶ While only certain Middle Eastern countries and certain airlines were affected by this ban, commentators speculated that European countries could be included in this ban, meaning passengers on airplane trips from Europe to the United States would not be able to have electronics in carry-on luggage.

Only four months later, on July 21, 2017, Homeland Security removed the ban from all airports and airlines.⁷ While the lifting of the temporary ban suggests the issue is moot, the previous acceptance of the temporary ban could still serve as a stepping stone for a future temporary or permanent electronics ban.

2. See *Laptops*, TRANSPORTATION SECURITY ADMINISTRATION, <https://www.tsa.gov/travel/security-screening/whatcanibring/items/laptops> (last accessed July 24, 2017).

3. *Fact Sheet: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States*, DEPARTMENT OF HOMELAND SECURITY (March 21, 2017), <https://www.dhs.gov/news/2017/03/21/fact-sheet-aviation-security-enhancements-select-last-point-departure-airports-01>.

4. *Id.*

5. *Id.*

6. David Shepardson & Alana Wise, *U.S. unveils enhanced airline security plan to avoid laptop ban*, REUTERS (June 28, 2017), <http://www.reuters.com/article/us-usa-airlines-electronics-idUSKBN19J21S>.

7. *Fact Sheet: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States (Updated July 21, 2017)*, DEPARTMENT OF HOMELAND SECURITY (July 21, 2017), <https://www.dhs.gov/news/2017/03/21/fact-sheet-aviation-security-enhancements-select-last-point-departure-airports>.

The TSA has a reputation for disallowing items or forcing passengers to remove certain articles of clothing once the items are deemed threats. An example is the threat of shoe bombers such as Richard Reid.⁸ After 2001, when Reid failed his attempt to detonate a bomb in his shoe, the TSA began requiring passengers to remove their shoes during security unless they were TSA pre-checked.⁹ Another example is the limitation on liquids enacted in 2006 after a terrorist attempted to bring liquid bombs through security at a United Kingdom airport.¹⁰ Given that electronics have already been identified as a threat, another temporary or permanent electronics ban may be imminent.

Temporary electronics bans result in many inconveniences. For example, the temporary nature of the ban means it could be extended to any country, disrupting business and travel for those who thought they were outside the scope of the ban. Small electronics unaffected by the ban also may have inferior battery life or inferior suitability for working while traveling. As many know, the business traveler depends on a laptop for work and travel. Work flights are typically scheduled where the business traveler flies at night to sleep and then arrives at the destination in the morning to start the work day in another country. The flight back home is typically scheduled so the traveler can work during business hours on the plane, arrive home to sleep, and go into work the next day with their work already completed. A laptop ban prevents business travelers from completing work on the plane on the flight home. The laptop ban also has the potential to increase the number of thefts from checked luggage, as thieves now know laptops from Middle Eastern countries are in checked luggage.

This paper will discuss the constitutionality of the electronics ban and a possible remedy for the ban. Part II will look at the constitutional background of unlawful searches and seizures from the perspective of the Fourth Amendment. Part III will apply this law by highlighting arguments for and against the constitutionality of the electronics ban. Part IV lays out a possible resolution to protect privacy rights of passengers, while still taking national security into account, to potentially prevent an electronics ban from occurring in the future.

8. Brittany R. Stancombe, *Comment: Fed Up With Being Felt Up: The Complicated Relationship Between The Fourth Amendment and TSA's "Body Scanners" and "Pat-Downs"*, 42 CUMB. L. REV. 181, 198 (2012).

9. *Id.*

10. See Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. at 18,291 (TSA notice of proposed rulemaking regarding liquids and advanced imaging in screening).

II. CONSTITUTIONAL BACKGROUND ON SEARCHES AND SEIZURES

The Fourth Amendment to the United States Constitution states that “[t]he 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.”¹¹ Given the immediate relationship between flying bans and airport security measures, this article looks specifically at airport security measures, such as searches. The Fourth Amendment and related case law require airport security measures to be reasonable. Reasonableness is measured by balancing the extent of intrusion on an individual’s privacy and the weight of the government interest.¹² An electronics ban leads to potentially unlawful searches of checked luggage because agents are able to search checked luggage when the passenger is not present. While these types of searches are currently constitutional, they give agents an opportunity to overreach their authority and unfairly violate a person’s right to privacy.

Despite the constitutionality of airport searches, many circuit courts, including the Fifth Circuit, require airport searches to be no more intrusive than necessary.¹³ However, border agents are authorized to scan and download all files and search histories from electronics without any reasonable suspicion needed by virtue of the border search doctrine to the Fourth Amendment.¹⁴ While some courts deemed the reasonable suspicion requirement met in these cases, they emphasized their distaste for computer searches at the border becoming the norm.¹⁵ Such searches are invasive, as a person’s private files and original work may be on the searched laptop, and the government may keep their own copies of such files. Additionally, because electronics are only banned from carry-on luggage, government officials are able to search electronics within checked luggage. Laptop searches fall within the border search exception when electronics are brought into the United States. These searches may include seizure of the laptop for a number of days. However, the border search exception reflects

11. U.S. CONST. amend. IV.

12. *Samson v. California*, 547 U.S. 843 (2006).

13. *United States v. Skipwith*, 482 F.2d 1272, 1275-76 (5th Cir. 1973).

14. See *United States v. Arnold*, 523 F.3d 941, 946 (9th Cir. 2008) (“we are satisfied that reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border.”).

15. See *Abidor v. Napolitano*, 990 F. Supp. 2d 260, 282 (E.D.N.Y. 2013).

the Fourth Amendment exception for searches of individuals entering the United States and not the ban on electronics itself.¹⁶ Therefore, these searches would not be considered unlawful seizures due to the border search exception.

However, there is precedent to disallow certain items from airplanes. The primary example is liquids. Before 2006, passengers could carry any size and any type of liquid on airplanes. After the capture of the liquid bombers in 2006, the British and American airports banned liquids over a certain amount, with the British even going as far as banning all carry-on luggage temporarily.¹⁷ Liquids are now restricted in the United States to bottles labeled 3.4 ounces or less, and even if the bottle is labeled more than three ounces but is only filled to less than 3.4 ounces, it must be packed in checked luggage, or it will be thrown out.¹⁸ Liquids that are less than three ounces must be placed in a clear bag and must be taken out of carry-on luggage to be scanned separately.¹⁹ This has become a hassle because it requires time to pack liquids in such a way, but it also complicates travel for those with medical conditions, parents traveling with babies, and new mothers traveling with breast milk for newborns.²⁰ Despite these challenges, no case law addressed this restriction on liquids. However, the liquids ban is important to note because, just like the electronics ban, the British described the liquids restrictions as “temporary.”²¹ The ban was to be a temporary fix until “suitable technology to screen liquids for explosives became readily available.”²² Just like the United States, no suitable technology has been implemented.²³

Another issue that is relevant is how checked luggage is

16. United States v. Cotterman, 709 F.3d 952, 960 (9th Cir. 2013)

17. Bruce Schneier, *Puzzling out TSA's laptop travel ban*, CNN (March 22, 2017), <http://www.cnn.com/2017/03/22/opinions/puzzling-out-tsa-laptop-ban>.

18. *Liquids Rule*, TRANSPORTATION SECURITY ADMINISTRATION, <https://www.tsa.gov/travel/security-screening/liquids-rule> (last visited July 24, 2017).

19. *Id.*

20. Daniel S. Harawa, *The Post-TSA Airport: A Constitution Free Zone?*, 41 PEPP. L. REV. 1, 3 (2013) (“New mother Elizabeth McGarry was forced to taste her own breast milk at JFK Airport to assure TSA agents that the bottles did not contain poisonous liquids. In Lansing, Michigan, TSA agents burst a bladder cancer patient’s urostomy bag during the course of a pat-down, such that the man had to board his flight covered in his own urine.”); see also *New mom says TSA officers dumped her breast milk at Denver airport*, AOL NEWS (June 22, 2017), <https://www.aol.com/article/news/2017/06/22/new-mom-says-tsa-officers-dumped-her-breast-milk-at-denver-airport/22583239/>.

21. Simon Calder, *It's The 10th Anniversary of the Liquids Ban on Flights – But Is It Still Necessary?*, INDEPENDENT (August, 9, 2016), <http://www.independent.co.uk/travel/news-and-advice/liquids-ban-on-flights-10th-anniversary-do-we-still-need-it-a7181216.html>.

22. *Id.*

23. *Id.*

treated compared to carry-on luggage. Courts have found that checked luggage is not protected to the same extent as carry-on luggage, stating,

based upon the court's analysis of the expectations of privacy which flow from the decision of persons who have carry-on luggage to keep that luggage nearby them and under their watchful eye, I find that it is reasonable to conclude that passengers have a lesser expectation of privacy in checked luggage than in carry-on luggage.²⁴

Though passengers have additional privacy interests in their carry-on luggage, checked luggage poses additional privacy concerns due to TSA's ability to search checked luggage without alerting the passenger.

III. APPLICATION OF LAWS TO THE ELECTRONICS BAN

TSA is authorized to ban laptops in carry-on luggage but permit them in checked luggage based on their statutory authority to implement screening procedures. However, scanning laptops to retrieve the user's files or search history can be a violation of the Fourth Amendment. Agents would need to show reasonable suspicion to search laptops according to some courts.²⁵ However, the government claims to have the authority to search all electronics regardless of suspicion or lack thereof.²⁶ For example, ICE agents also claim to have the authority to download and save a copy of all files on an electronic device, and they also can keep electronics for a number of days or months before returning the devices to the passenger.²⁷ This means that any original work the passenger saves on laptops or any sensitive information for work, including attorney-client privileged

24. *United States v. Winborn*, 8:02CR046, 2002 U.S. Dist. LEXIS 14380, at *15 (D. Neb. May 16, 2002) (discussing privacy expectations in luggage checked on buses).

25. *Abidor*, 990 F. Supp. 2d at 282; *see also* *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir. 2013) (discussing "computer strip searches" in the context of forensically comprehensive searches).

26. Esha Bhandari, Nathan F. Wessler, and Noa Yachot, *Can Border Agents Search Your Electronic Devices? It's Complicated*, ACLU (March 14, 2017), <https://www.aclu.org/blog/free-future/can-border-agents-search-your-electronic-devices-its-complicated>; *see also* Linda Klein, *Preservation of Attorney-Client Privilege and Client Confidentiality for U.S. Lawyers and Their Clients During Border Searches of Electronic Devices*, (May 5, 2017), [https://www.americanbar.org/content/dam/aba/images/government_affairs_office/attyclien_tprivissue\(bordersearchesofattorneydevices,abalettertodhs,finalversion,may5,2017\).pdf](https://www.americanbar.org/content/dam/aba/images/government_affairs_office/attyclien_tprivissue(bordersearchesofattorneydevices,abalettertodhs,finalversion,may5,2017).pdf) ("ICE Special Agents acting under border search authority may search, detain, seize, retain, and share electronic devices, or information contained therein, with or without individualized suspicion, consistent with the guidelines and applicable laws set forth herein.")

27. Bhandari, Wessler, and Yachot, *supra* note 28.

information, are not protected.²⁸ The American Bar Association sent a letter to the Secretary of Homeland Security John F. Kelly explaining the concerns of attorneys about such laptop searches with confidential client information on them.²⁹ The American Bar Association was concerned that the CBP and ICE personnel were searching electronics, with or without reasonable suspicion, which risks a breach of attorney-client privilege.³⁰ Federal agencies are likely to have formal ways to prevent from such confidential or privileged information from being subject to search, but this does not guarantee that this is satisfactory or will even be honored by CBP, ICE, DHS, or the TSA. In one incident, a NASA engineer, out of fear of detention or seizure of his work phone, was forced to unlock his work phone that contained highly privileged and sensitive information.³¹ The problem with electronic searches, besides the obvious privacy intrusion, is that if laptops are banned from carry-on luggage, passengers will not be able to watch or carry laptops to protect such information on these electronic devices, as passengers typically keep personal items close to them in their carry-on luggage.³² There are also issues of theft by non-governmental agents, as people will suspect an increase of electronics in checked luggage, as well as damage to electronics.

Placing electronics, especially ones with confidential information, in checked luggage poses policy issues. The problem that arises with the court's interpretation that checked luggage is not as protected as carry-on luggage is that with a potential laptop ban, checked luggage will now contain, against the passenger's wishes, an item that the passenger would prefer to have in carry-on luggage for privacy reasons.³³ Since the courts gave the TSA the power to look through checked luggage, laptops or other electronics can be scanned, and files from those electronics can be downloaded and saved without the passenger's knowledge. Great Britain has done the same, and British officials have searched bags before they are placed on the baggage carousel, never tell the owners if nothing is found in the search, and even read confidential legal and medical records.³⁴

28. *Id.*

29. Klein, *supra* note 28.

30. *Id.*

31. Emanuella Grinberg and Jay Croft, *American NASA Scientist Says His Phone Was Seized At Airport*, CNN (February 15, 2017), <http://www.cnn.com/2017/02/13/us/citizen-nasa-engineer-detained-at-border-trnd/index.html>.

32. *Bond v. United States*, 529 U.S. 334, 336 (2000).

33. *Winborn*, 2002 U.S. Dist. LEXIS 14380 at *15.

34. John Vine, *An inspection of the use of Border Force customs examination powers to search baggage in the absence of passengers*, INDEPENDENT CHIEF INSPECTOR OF BORDERS AND

These covert searches are invasive and lead to the passengers not even knowing if the data on their electronics were copied.

One possible reason that more comprehensive searches are permitted is the public's willingness to accept such searches in the name of national security. Though new policies can be rationalized with variations of "if you aren't bad, you have nothing to hide" and "we don't want another 9/11, so the inconvenience or loss of privacy is worth it;" such rationalizations allow the government to intrude on a person's privacy for no apparent reason except that the person is flying on an airplane.³⁵ In addition, the TSA security guidelines are not available to the lay public, so the public does not know what TSA agents can and cannot do based on their policies.³⁶

IV. POSSIBLE RESOLUTION

The best resolution is to restrict the TSA's power and require the TSA to make public all their policies, suggestions, and passengers' rights information.³⁷ As of now, the TSA has the power to search all carry-on and checked luggage without consent, subject passengers to invasive searches, and scan, download, and save files from personal electronic devices despite the confidentiality of such files. Disallowing laptops from carry-on luggage places electronic items and the files on such items at a much higher risk of being compromised, and the TSA's easy access to such files is too intrusive, threatens trade secrets or privileged communications, and more. If the TSA is limited by express consent, reasonable suspicion, or some other medium, this will allow the TSA to still check for threats without compromising passengers' privacy. In addition, requiring the TSA to post their policies in brochures, websites, or other mediums allows passengers to know what policies the TSA must follow so passengers can object to searches or downloads that are not permitted under the TSA's policies. This also decreases the TSA's possibility of being sued for invasive searches deemed unconstitutional by the Fourth Amendment, which saves valuable government resources that would be expended in fighting such suits. Making the TSA's policies public will also help educate passengers on their expectations for security, potentially leading to a decrease in congestion at security

IMMIGRATION (2013), <https://www.gov.uk/government/publications/inspection-report-on-baggage-searching-in-the-absence-of-passengers-april-2014>.

35. R. Gregory Israelsen, *Applying the Fourth Amendment's National-Security Exception to Airport Security and the TSA*, 78 J. AIL L. & COM. 501, 525 (2013).

36. Harawa, *supra* note 25, at 16.

37. *Id.*

checkpoints.

Another possible solution comes from the prompt implementation of new technology to screen for threats. Returning to the liquids ban example, some countries, including Japan, have implemented scanning mechanisms that allow liquids to be carried through security. Japan uses a device called the Bottled Liquid Checker, or BLC, which is used to screen liquids; the liquids are placed into a cradle in the BLC, scanned, and then cleared for passengers to take on the plane.³⁸ Within fifteen seconds, these machines read the molecular makeup of the liquid and determine if the liquid are safe.³⁹ This technology has been used in Japan for nearly a decade, yet the TSA does not have any new implementations for liquids.⁴⁰ Should the United States adopt such technologies, it could remove some of the more onerous airport searches – and the same may be true for electronics as well.

Implementing or developing screening technology for electronics can decrease the problems banning laptops would bring. Some machines have been developed or are in the process of being developed to allow passengers to keep their laptops and liquids in their carry-on luggage during the scanning process. However, adoption will require time and money, as it will take time for the TSA to approve such machines and for Congress to appropriate the funds for the purchase of these machines.⁴¹

Recently, Homeland Security has created enhanced security measures to scan electronics.⁴² Airlines were required to add explosive-detection equipment, implement tougher security checks, and interview passengers as part of the screening process.⁴³ This will increase the amount of time spent in security, but if airlines and airports in and outside the United States do not comply with these security measures, then those airlines or airports will not be

38. See Courteney L. Taylor, *Touched By An Agent: Why The United States Should Look To The Rest Of The World For A New Airport Security Scheme And Stop Using Full-Body Scanners*, 35 HOUS. J. INT'L L. 503, 512. Note that some authors use the term "Bottled Liquid Scanners," or BLS. See also Andrew Bender, *Want To Carry Drinks Through Airport Security? This Machine Could Let You*, FORBES (August 22, 2012), <https://www.forbes.com/sites/andrewbender/2012/08/22/want-to-carry-drinks-through-airport-security-this-machine-could-let-you/#390cdeccc56f>.

39. Taylor, *supra* note 38.

40. *Id.*

41. Alan Levin, *New Airport Scanners Could End Bans on Laptops and Liquids*, BLOOMBERG POLITICS (May 26, 2017), <https://www.bloomberg.com/news/articles/2017-05-26/new-airport-scanners-could-end-bans-on-laptops-and-liquids>.

42. Shepardson & Wise, *supra* note 6.

43. Micah Maidenberg, *Laptop Ban on Planes is Lifted, U.S. Officials Confirm*, NEW YORK TIMES (July 20, 2017), <https://www.nytimes.com/2017/07/20/business/laptop-ban-air-travel.html>.

able to allow their passengers to bring laptops into the cabin.⁴⁴ These enhanced security measures were created to benefit business class passengers because they pay more for their tickets and contribute greatly to airlines' revenues, rather than out of a general privacy concern.⁴⁵ The question of improved scanning technology remains relevant, because if these security measures do not fix the problem, then the electronics ban may be implemented again and expanded worldwide.⁴⁶

Another resolution relates to how checked luggage is treated compared to carry-on luggage. If a laptop ban were to take effect, courts should, at the very least, place the same expectation of privacy for both carry-on and checked luggage because passengers will not have the choice to carry electronics with them in carry-on luggage. For example, perhaps there should be a notice requirement for checked baggage searches. This would avoid the increased distrust of the American public toward the TSA if they know that the TSA must respect the privacy of items in checked luggage. While security measures have increased since 2002, passengers still expect privacy with respect to their personal items, especially ones that contain work product or confidential information. If passengers suspect the TSA is scanning their electronics while passengers do not have access to such electronics, this will create a divide between the government and its citizens, which benefits neither group.

V. CONCLUSION

The Bill of Rights protects a citizen's privacy interests from government intrusion, but we have largely given away those rights in the world of airline security in the interest of national security.⁴⁷ While the Fourth Amendment was designed to protect such privacies, in reality, we cannot assume we have privacy anymore while traveling. The reality is that our electronics and our persons are not private and are easily accessible as we go through airport security. Therefore, it should not be surprising that the privacy of our electronics will be compromised if we cannot access them from the time we check our bags to the time we pick them up from baggage claim. While some have received a note stating their bags were searched, others may not receive the same courtesy note.

Of course, airport security agents must be able to use

44. *Id.*

45. *Id.*

46. *Id.*

47. Harawa, *supra* note 25, at 5.

reasonable security measures, and there is no sound argument for eliminating all airport security measures. Instead, this paper seeks to highlight how certain measures compromise the right to privacy via invasive airport searches and seizures that are barely constitutional. Certain security measures are fine, but many other measures have a high potential to violate a person's privacy, whether personal or electronic. Limiting the TSA's actions with respect to electronics can help improve individual privacy as protected under the Fourth Amendment. This will likely require overturning court cases or federal law. Courts and Congress have allowed invasions of privacy in the name of national security, but there are methods that can decrease such privacy invasions while still efficiently and thoroughly scanning for threats. As Senator Rand Paul said,

While aviation security is undoubtedly important, we must be diligent in protecting the rights of all Americans, such as their freedom from being subjected to humiliating and intrusive searches by TSA agents, especially when there is no obvious cause. . . . It is important that the rules and boundaries of our airport screening process be transparent and easily available to travelers so that proper restraints are in place on screeners. Travelers should be empowered with the knowledge necessary to protect themselves from a violation of their rights and dignity.⁴⁸

Like Japan and other countries, the United States can also find ways to scan for threats without being invasive. This is crucial since “[a]ny Fourth Amendment violation is a problem; when multiplied by millions, unacceptable.”⁴⁹

48. *Id.* at 53.

49. Israelsen, *supra* note 35, at 519.