

## The Fourth Amendment and the Border

**Roman Mars:** January 16th, 1920, was your last chance to buy a legal drink in the United States. Bars and restaurants held wakes and passed out miniature coffins. On January 17th at 12:01 a.m., the 18th Amendment went into effect, and the Federal Volstead Act would give law enforcement officials the power to enforce prohibition.

**Elizabeth Joh:** The New York Times reported then that Americans "cheered the final moment of a moist United States." This was the beginning of prohibition. We were officially a dry country.

**Roman Mars:** But we weren't really.

**Elizabeth Joh:** Prohibition made liquor sales and distribution illegal. But it didn't stop people's thirst. And in fact, you can think of the 18th Amendment to the Constitution, which said that the manufacture, sale, or transportation of intoxicating liquors in the country was prohibited as a change to our constitution that created an entire criminal underworld. That underworld depended on the smuggling of liquor across the border. President Hoover commissioned a lengthy report to address what to do about the enforcement of prohibition laws. The final report, published in 1931, was officially known as the National Commission on Law Observance and Enforcement. But it's also known as the Wickersham Report after its chairman, George Wickersham. He'd been the attorney general under President Taft. The report made it clear that there were serious problems with enforcing prohibition. Liquor was being smuggled from across the border, from everywhere.

**Roman Mars:** The report observed, "Transportation is by land, by water, and by air. Smuggling of liquor by land is by rail or motor--most from Canada, and some small extent by pack animals on the southwestern border."

**Elizabeth Joh:** Those pack animals were used by Tequileros--Mexican bootleggers working with their Anglo counterparts. According to one account, Texas Rangers in the lower Rio Grande Valley were repeatedly frustrated by a burro they dubbed the "Lone Rum-Running Jackass of Star County." Why? Because the burro had a knack for finding its way home alone to Texas after having been loaded with liquor across the border in Mexico. In 1921, federal prohibition agents stopped a car being driven by the bootlegging Carroll Boys of Grand Rapids, Michigan. The agents had been watching the Carroll Boys and were sure they were running liquor between Detroit and Grand Rapids. Where was it coming from? Probably from Canada. The agents ripped open the upholstery in the car seat and discovered 68 bottles of whiskey and gin, seized the liquor, and arrested them. The Carroll Boys complained that their car had been searched without a warrant. That's prior judicial authorization. In the 1925 case of Carroll versus the United States, the United States Supreme Court, in an opinion written by Taft, who was now the Chief Justice of the Supreme Court, rejected this argument and sided with the government. "It was enough," said the Court, "that Prohibition agents had probable cause," that's a term from the Fourth Amendment, "that there was contraband in the car." So, while the government didn't need a warrant to stop and search the car, they did need probable cause. Otherwise, that would let agents search any car they wanted for any reason or no reason at all. And here is where the Court makes an interesting observation. Now prohibition agents needed probable cause to search the car in Grand Rapids, but "travelers crossing an international boundary could have their cars searched," said the Court, "without probable cause" because of, quote, "national self-protection." In other words, there are different rules for the government when they're acting at the border. Since 1925, the idea that your Fourth

Amendment rights are different at the border has been well-established. You know who else really cares about the border? President Trump. His administration is interested not just in the wall but also border searches--searches not just of cars but of laptops and cell phones. What does the Constitution say about the border, the Fourth Amendment, and your digital devices?

**Roman Mars:** This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the tweets and peculiar poetry of our 45th President of the United States and apply them to the U.S. Constitution so we can learn our founding document like we never have before. Our music is from Doomtree Records. Our professor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. Let's start with the Constitution. The Fourth Amendment says that, quote, "the right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches shall not be violated, and no warrant 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."

**Elizabeth Joh:** The Fourth Amendment limits the kinds of searches and seizures the government, both at the state and federal level, can conduct. So, what's reasonable under the Fourth Amendment really depends on the context. Remember, the Supreme Court said in the 1925 case that the car the Carroll Boys were driving could be searched without a warrant. But the prohibition agents did need some degree of legal suspicion--that was the probable cause--that the car would have liquor in it. They did have probable cause, so the search didn't violate the Fourth Amendment. But even in that case, the Supreme Court said that the border was different. The government's power at the border wasn't an issue in the case, but it became one in a case the Supreme Court decided in 2004. That began when Manuel Flores-Montano drove through the port of entry in Southern California. A customs agent asked him to pull over. And the agents took apart the gas tank of his Ford Taurus and found 81 lbs. of marijuana. The customs agent had no warrant, but there was something different here. The government argued that it had no suspicion at all, and it didn't matter. No suspicion that Montano had been involved in any criminal activity. So, one thing to make clear here--a police officer asking you to pull over so the government can take apart your gas tank for no legal reason whatsoever would violate the Fourth Amendment if it happened within the country.

**Roman Mars:** What "within the country" means is fuzzier than you might think, but we'll get to that later.

**Elizabeth Joh:** But the Supreme Court said in the Montano case that the border is different. The government's interest in keeping unwanted people and things from coming inside the country is very high. And the Court said that this authority went all the way back to the beginning of the country itself. The result for Flores-Montano? It didn't matter if the dismantling of his gas tank was done without a warrant or even any legal suspicion at all. That wasn't a Fourth Amendment problem. The government could rely on what's called the "border search exception" to the Fourth Amendment.

**Roman Mars:** It seems that--at least from watching movies, and maybe I'm wrong--establishing probable cause isn't all that hard to do. So why in this case did the U.S. argue in the Montano case that it had no probable cause when they probably could have just come up with something that was good enough? Were they really trying to try this case to test what they could do at a border?

**Elizabeth Joh:** Okay. So, let's get into the weeds a little bit. There are two levels of Fourth Amendment suspicion. One's called "probable cause." That's in the Constitution itself. One's called "reasonable suspicion." That's a justification that the Court recognized in 1968. So, what that means is there's a higher-level probable cause and a lower-level reasonable suspicion. And why would the government ask the Court, say, that it's okay to have no suspicion at all at the border? They may have had some suspicion. And in reality, they probably did think something about him. But the reason why you would want to argue this as a legal reason is that it permits the government to do whatever it wants, even if it only has, let's say, a hunch--something that wouldn't convince a judge that it was okay to search this person had they been within the United States.

**Roman Mars:** Wow. So, they really are-- This is a legal test so that they can do more than just stop Montano.

**Elizabeth Joh:** Right. So, this is an argument because they won. Essentially the Court's saying, "It's fine to have not only a warrantless search of the border but a search with no suspicion at all." In reality, again, they may have some idea. They didn't just randomly pull him over; that's quite unlikely. But they don't have to tell a court. They don't have to explain why they did it. And that's a very substantial power that the government has.

**Roman Mars:** Now, one of the things that Trump is known for both as a candidate and now as the president is his emphasis on the border.

**Elizabeth Joh:** He has literally tweeted about it dozens of times. On October 19th, 2016, he tweeted, "One of my first acts as president will be to deport the drug lords and then secure the border." On January 11th, he tweeted, "The Democrats seem intent on having people and drugs pour into our country from the southern border, risking thousands of lives in the process. It is my duty to protect the lives and safety of all Americans. We must build a Great Wall, think Merit and end Lottery & Chain. USA!"

**Roman Mars:** Exclamation point.

**Elizabeth Joh:** Understandably, most people associate Trump's focus on the border with building his wall and his attempts to limit immigration and travel to the United States. But the government's power at the border can affect anyone who travels into the country--maybe in ways you hadn't thought about before and in circumstances that the Supreme Court hasn't addressed yet. Remember, in that 2004 case, the Court said that the government didn't violate the Fourth Amendment when it searched a car at the border without a warrant or any suspicion whatsoever. Most people can understand the government's claim that it needs to prevent the entry of dangerous weapons or drugs--things like that--into the country. That's why the usual Fourth Amendment rules are suspended. But here's another question. Does that rule apply equally to our cell phones and laptops at the border? Customs and Border Protection is the name of the federal agency that's responsible for policing the nation's border. CBP officials say that routine searches of digital devices can be done in the same way--with no warrant or legal suspicion whatsoever. So, what this means is at the border, the government says that in theory it can look at your cell phone, your tablet, your laptop--and look through it for any reason or no reason at all. They don't have to state a legal reason or probable cause or obtain a warrant--things that they would typically need to search the same device if it were inside of the United States.

**Roman Mars:** And these searches can happen to American citizens and foreign visitors alike.

**Elizabeth Joh:** And the border is more than the physical border. It applies to every place where people can come into the United States, like international terminals and airports. So, the question is, is a cell phone like a suitcase or a car? It is a container of sorts, but arguably it's pretty different. Maybe it's more like a portal to your whole life. In a 2014 case about the police, the Supreme Court said that a cell phone provided a way to, quote, "reconstruct the sum of an individual's private life."

**Roman Mars:** But the federal government doesn't see it that way.

**Elizabeth Joh:** Customs and Border Protection official policies, which were updated on January 5th, still take the basic position that the same rules apply, whether they're searching suitcases, gas tanks, cell phones, or laptops. And the Supreme Court itself hasn't yet decided whether they think that those rules apply to our digital devices. It's something that they'll probably take a look at, sometime in the near future. But so far, not yet. So, one thing I want to make clear--the policy on searching cell phones at the border isn't new. It happened under the Obama administration and received a lot of criticism then, too. So why bring it up with Trump? Two reasons. First, the numbers. We now know that according to the agency's own records, digital device searches at the border have gone way up just in the first year of Trump's presidency. In January, the federal government itself reported that about 30,000 digital devices were searched at the border in 2017. That's almost a 60% increase from the previous year when Obama was president. I mean, of course, it's a small percentage of the millions of people traveling to the United States, but still, it's a large increase in border searches. Second, allowing the government to search your cell phone or laptop without a warrant or suspicion just because you happen to be at the border has special significance in Trump's world. Securing the border was and is an important theme of his presidency. Remember, Trump repeatedly promised a "big, beautiful wall" during his campaign. And a customs official said in January that "in this digital age, border searches of electronic devices are essential to enforcing the law and to protect the American people."

**Roman Mars:** The Supreme Court may ultimately decide that searches of cell phones and laptops at the border require different rules under the Constitution because of the immense amount of information they can contain.

**Elizabeth Joh:** But for now, these searches fit with a favorite Trump theme. On January 18th, he tweeted, "The wall is the wall. It has never changed or evolved from the first day I conceived of it. Parts of it will be, of necessity, see through. And it was never intended to be built in areas where there is natural protection, such as mountains, wastelands, or tough rivers or water." The physical wall has yet to be built, but the very aggressive use of the search power for our cell phones and laptops is a less visible--one might say see-through--policy by the Trump administration. But it's one consistent with what the president himself tweeted as part of "strong borders and extreme vetting."

**Roman Mars:** The wall is the wall, even when that wall is invisible and 100 miles wide. I ask Elizabeth a few more questions about the border and the law after this. So, I've been thinking about Trump's wall as a piece of infrastructure a lot recently. But I was wondering if you felt that the physical wall matters more or the wall as a policy that allows the government to search people without cause, you know, matters more to you?

**Elizabeth Joh:** Oh, I think absolutely the wall that matters most in terms of law is the government's ability to interfere with our liberties at the border, even if it seems like an invisible power that we don't really see. That matters much more than a symbolic wall, which will be, I think, pretty easily circumvented by lots of means--drones, catapults, or people just using other means. So, it's symbolic. It's been politically toxic, of course. But in terms of sheer power of what the government can do, the border search doctrine is a long standing but potentially even scarier power for the government to have depending on who's in office.

**Roman Mars:** Has the border search power ever been used in ways that were particularly surprising, like walking in and out of an embassy or something like that? Has it only been used on international borders of some kind?

**Elizabeth Joh:** So, there are a number of cases where you find a surprising definition of the border or cases where the government asserts its ability to use the border search ability, which again means that they don't have to have a warrant or any suspicion whatsoever, even though they might actually have a hunch. Not the Supreme Court, but other courts--lower courts--have looked at this issue. So, there's a case in which a lost teenager in Michigan ended up near the Canadian border. He didn't cross a Canadian border, but he asked, "Can I turn my car around?" And the agents there said, "Sure." And he was in the turnaround, he got pulled over, and they found some pot in his car. He argued, "You can't do that. You had no reason to think I had marijuana in my car." And they said, "Well, you were at the border." And he said, "I never left the United States." And the federal appellate court there said, "Too bad. You're at the border. That's the border."

**Roman Mars:** What constitutes the border? Is it, like, wider than I think it is? Or is it a line? What is it?

**Elizabeth Joh:** Right. So, the Court has allowed the government to define the border pretty broadly. So, the government has an assertion that the border for Fourth Amendment purposes can go as far as 100 miles inland. So, if you're in Michigan, you're probably living in the border for Fourth Amendment purposes.

**Roman Mars:** Wow.

**Elizabeth Joh:** Yeah.

**Roman Mars:** Wow. 100 miles?

**Elizabeth Joh:** Right. So, if they have so-called "fixed checkpoints" for immigration and things like that, they can make that assertion and have done so. It gets challenged all the time. So, it's not as if this is absolutely set in stone. But the government tries to push as far as they can, saying, "This is where we get to assert our border authority." And yeah, they can have these inland border checks where you think, "Well, this is just ordinary policing, right?" But, you know, they say no. I mean, at times I think his tweets are almost poetic. "The wall is the wall." I feel like that will be remembered for a long time.

**Roman Mars:** This story was produced by Elizabeth Joh and me, Roman Mars. You can find us at [trumpconlaw.com](http://trumpconlaw.com), on Facebook, and on Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop Collective. The music in this specific episode is from Dangerous Jumps, the new full length from SHREDDERS, a new group consisting of P.O.S., Sims, Paper Tiger, and Lazerbeak. They are on tour right now. I

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