

**U.S. Immigration and Customs Enforcement
Homeland Security Investigations Training**

**HSI Academy
Legal Division**



Border Search Exception

Student Guide

2105106

HSI Special Agent Training

6th Edition (2018)

ENFORCEMENT LAW COURSE

Fourth Amendment: Border Search Exception

I. Motivation

As a Special Agent, you will perform searches and seizures in the field and ports of entry. By understanding your authority, which includes the border search exception, you can ensure your searches and seizures are legal and correctly performed, which will ultimately lead to a successful criminal prosecution.

II. Review of the Past and Advanced Organizer

In the Fourth Amendment Chapter, you learned how to apply the Fourth Amendment's general rule requirements as well as agency policy to determine if a search or seizure is lawful. You also learned warrant and probable cause exceptions that can be used in searches and seizures.

What are the three components that must be met under the general rule requirements?

Example:

What are the warrant exceptions that are available to you?

Example:

What are the warrant and probable cause exceptions you may use?

Example:

HSI SA Case Assignment
↓
Investigative Plan Development

(b)(5); (b)(7)(E)

III. Agenda

We will discuss the three elements of a lawful border search. Next, we will examine application of the Functional Equivalent of the Border and Extended Border Rules. Then, we will discuss how to lawfully border search people and items in compliance with the Fourth Amendment's reasonableness requirement. Finally, you will be given practice scenarios and exercises that require you to determine if a lawful border search was conducted. I will provide demonstrations and examples throughout the lesson. The practice questions at the end of the lesson are like the test questions on the legal exam.

IV. Objectives

Terminal Performance Objective – Given past case information or scenarios at a border or its equivalent, determine the legality of a search/seizure and what can be searched/seized; in accordance with the Border Search Exception outlined by law, caselaw and policy.

EPO	OBJECTIVE
1	Identify the relationship between the Fourth Amendment and border search authority and explain the border search general rule.
2	Explain and apply the Functional Equivalent of the Border (in an inbound setting) authority.
3	Explain and apply the Functional Equivalent of the Border (in an outbound setting) authority.
4	Explain and apply the Extended Border Search authority.
5	Determine when and how to border search people.
6	Determine, for the border search of an object, the level of suspicion required and any follow-up actions.

V. Identify the relationship between the Fourth Amendment and border search authority and explain the border search general rule (EPO 1).

A. Fourth Amendment Analysis

1. The Fourth Amendment commands that searches and seizures be reasonable. *US v Montoya de Hernandez*, 473 U.S. 531 (1985).
2. What is reasonable depends upon all the circumstances surrounding the search or seizure and the nature of the search or seizure itself. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
3. The permissibility of a particular law enforcement practice is judged by “balancing its **intrusion on the individual's Fourth Amendment interests** against its **promotion of legitimate governmental interests.**” *U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983).
4. Promotion of legitimate governmental interests:
 - a. The authority to conduct a **border search** is based upon the **inherent right of the sovereign to protect itself** by stopping and examining persons and property crossing into this country. *US v. Ramsey*, 431 US 606 (1977).
 - b. Travelers may be ... stopped in crossing an international boundary because of **national self-protection** reasonably requiring one entering the country to identify himself as

entitled to come in, and his belongings as effects which may be lawfully brought in. *Carroll v. U.S.*, 267 U.S. 132 (1925).

- c. Searches at the border are authorized to **regulate the collection of duties** and to **prevent the introduction of contraband into this country**. *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985).

5. Reasonableness:

- a. Searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by the fact that they occur at the border. *US v. Ramsey*, 431 US 606 (1977).
- b. Routine searches of the persons and effects of border entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant. *U.S. v. Ramsey*, 431 US 606 (1977) and *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985).
- c. The detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal. *U.S. v. Montoya de Hernandez*.

B. Border Search General Rule: *At the border* an **authorized agent** may stop (temporarily detain/seize) all people and objects that enter the United States from foreign to search those people and objects for **merchandise and evidence of merchandise**.

1. **Authorized Agent:**

- a. Art. I, § 8, cl. 3 – The Constitution gives Congress broad comprehensive powers “[t]o regulate Commerce with foreign Nations.” Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry. *US v. Ramsey*, 431 US 606 (1977).
- b. Act of July 31, 1789, ch. 5, 1 Stat. 29 – Congress granted authority to “**Officers of the Customs**” to conduct routine searches and seizures at the border, without probable cause or a warrant.

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- c. 19 U.S.C. § 1401 (i) – Officer of the Customs: Customs Officer. The terms “officer of the customs” and “customs officer” mean any **officer of the... “Customs Service”** or any **commissioned, warrant, or petty officer of the Coast Guard**, or any agent or other person, including foreign law enforcement officers, **authorized by law or designated** by the Secretary of the Treasury to perform any duties of an officer of the Customs Service.

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- d. Others authorized: **19 U.S.C. § 507** allows customs officers (relevant to this course, HSI Special Agents) to demand

assistance from any person when necessary to perform the agent's lawful duties. (One who provides assistance under 19 U.S.C. § 507 is not an "officer of the customs" as defined in 19 U.S.C. § 1401(i) and has no *independent* authority to perform border searches.).

e.

(b)(5); (b)(7)(E)

2. Search detained people and objects for ***merchandise and evidence of merchandise***
 - a. 19 U.S.C. §1401(c) – Merchandise means goods, wares, and chattels of every description and includes merchandise the importation of which is prohibited, and monetary instruments.
 - b. 19 U.S.C. § 482. Search of vehicles and persons. (a) Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is

merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

- c. 19 U.S.C. § 1581. Boarding vessels. (a) Customs officers - Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act [19 USC § 1701 et seq.], or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

3. **At the Border**

- a. The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. *U.S. v. Ramsey*, 431 US 606 (1977).
- b. **Border Defined**
 - 1) **Land Border** – Lines between U.S./Mexico and US/Canada.
 - 2) **Sea Border** – Waters adjacent to United States coasts claimed as part of United States sovereign territory.
 - 3) **Air Border** – Directly upward from the land or sea borders.

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of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

VI. Explain and apply the Functional Equivalent of the Border (in an inbound setting) authority (EPO 2).

(b)(5); (b)(7)(E)

Case law recognizing FEB inbound rule:

United States v. Victoria-Peguero, 920 F.2d 77 (1st Cir 1990)
United States v. Glaziou, 402 F. 2d 8 (2nd Cir. 1968)
United States v. Hyde, 37 F.3d 116 (3rd Cir. 1994)
United States v. Helms, 703 F. 2d 759 (4th Cir. 1982)
United States v. Amuny, 767 F.2d 1113, 1123 (5th Cir. 1985)
United States v. Williams, 617 F.2d 1063 (5th Cir. 1980)
United States v. Prince, 491 F. 2d 655 (5th Cir. 1974)
United States v. Jackson, 825 F.2d 853 (5th 1987)
United States v. Lawson, 461 F. 3d 697 (6th Cir. 2006)
Kaniff v. United States, 351 F. 3d 780 (7th Cir. 2003)
United States v. Oyekan, 786 F. 2d 832 (8th Cir. 1986)
United States v. Solmes, 527 F.2d 1370 (9th Cir. 1975)
United States v. Mayer, 818 F.2d 725 (10th Cir. 1987)
United States v. Garcia, 672 F.2d 1349 (11th Cir. 1982)
United States v. Carter, 760 F.2d 1568 (11th Cir. 1985)
United States v. Puig, 810 F.2d 1085 (11th Cir. 1987)
Denson v. United States, 574 F. 3d 1318 (11th Cir. 2009)
United States v. Gurr, 471 F.3d 144 (DC Cir. 2006)

A. Preliminary matters

1.

(b)(5); (b)(7)(E)

2. ***Reasonable Certainty*** defined: *The totality of the facts and circumstances within the officer's knowledge and of which they have reasonably trustworthy information in the light of their*

experience to warrant a firm belief that an event occurred (e.g., that a border crossing took place). Note:

(b)(5); (b)(7)(E)

3.

(b)(5); (b)(7)(E)

4.

B. Functional Equivalent of the Border (in an inbound setting) Rule

(b)(5); (b)(7)(E)

Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

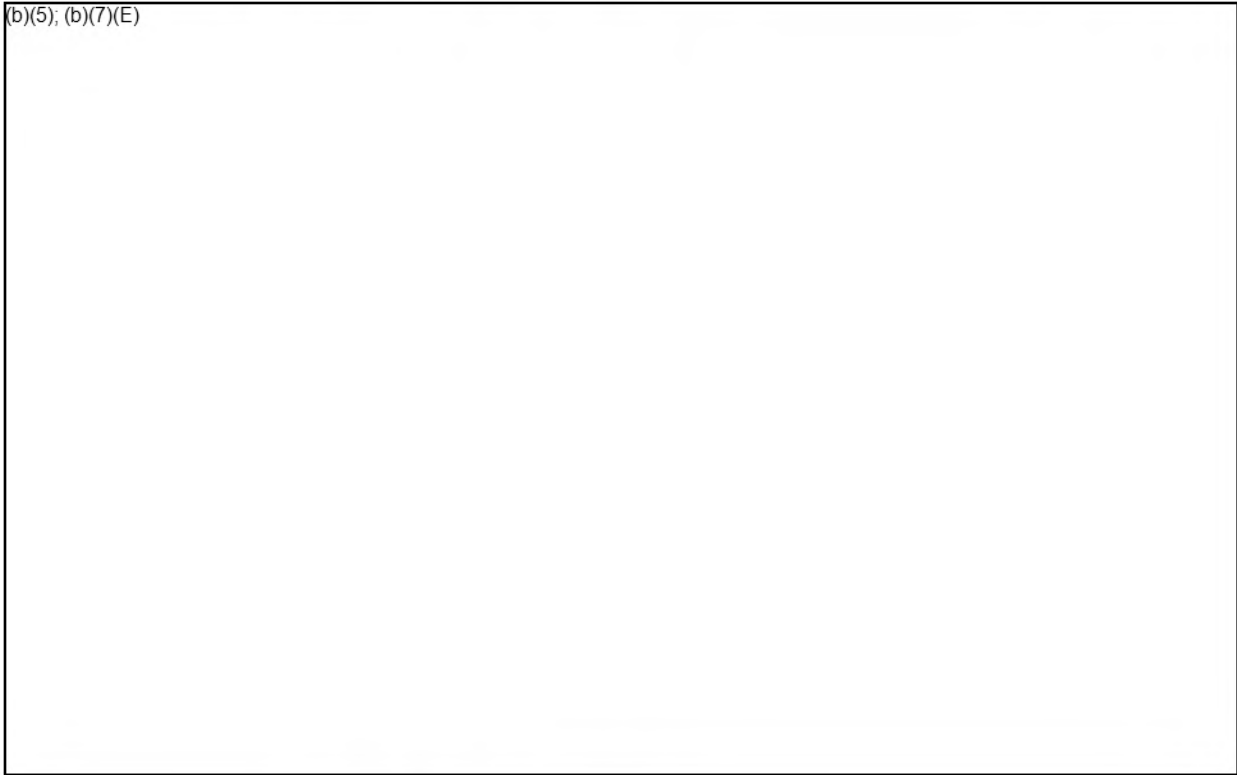
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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)



2. The SA must (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

a. A material change is one that is important or impacts the SA's underlying border search authority.

- 1) (b)(5); (b)(7)(E)
 - 2)
-
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b. Remember:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

c.

d.

Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

C. Demonstration scenarios:

FEB Inbound Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

FEB Inbound Example:

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

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of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

VII. Explain and apply the Functional Equivalent of the Border (in an outbound setting) authority (EPO 3).

(b)(5); (b)(7)(E)

Functional Equivalent of the Border (Outbound)

(b)(5); (b)(7)(E)

- A. Functional Equivalent of the Border (FEB) Outbound: a border search of people or objects that are just about to leave the United States. We have extended the rationale underlying the suspicionless search of persons and effects *entering* the country to situations where persons or articles attempt to *exit* the country as well. **United States v. Boumelhem, 339 F.3d 414 (6th Cir.2003).**

Julian v. United States, 463 U.S. 1308 (1983)
California Bankers Association v. Shultz, 416 U.S. 21 (1974)
United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980)
United States v. Ezeiruaku, 936 F.2d 136 (3rd Cir. 1991)
United States v. Oriakhi, 57 F.3d 1290 (4th Cir. 1995)
United States v. Berisha, 925 F. 2d 791 (5th Cir. 1991)
United States v. Boumelhem, 339 F.3d 414 (6th Cir. 2003)
United States v. Udofot, 711 F.2d 831 (8th Cir. 1980)
United States v. Duncan, 693 F.2d 971, 977 (9th Cir. 1982)
United States v. Hernandez-Salazar, 813 F. 2d 1126 (11th Cir. 1987)
United States v. Barena-Burgos, 739 F. Supp. 772 (E.D.N.Y. 1990)

- B. Functional Equivalent of the Border (in an outbound setting) Rule

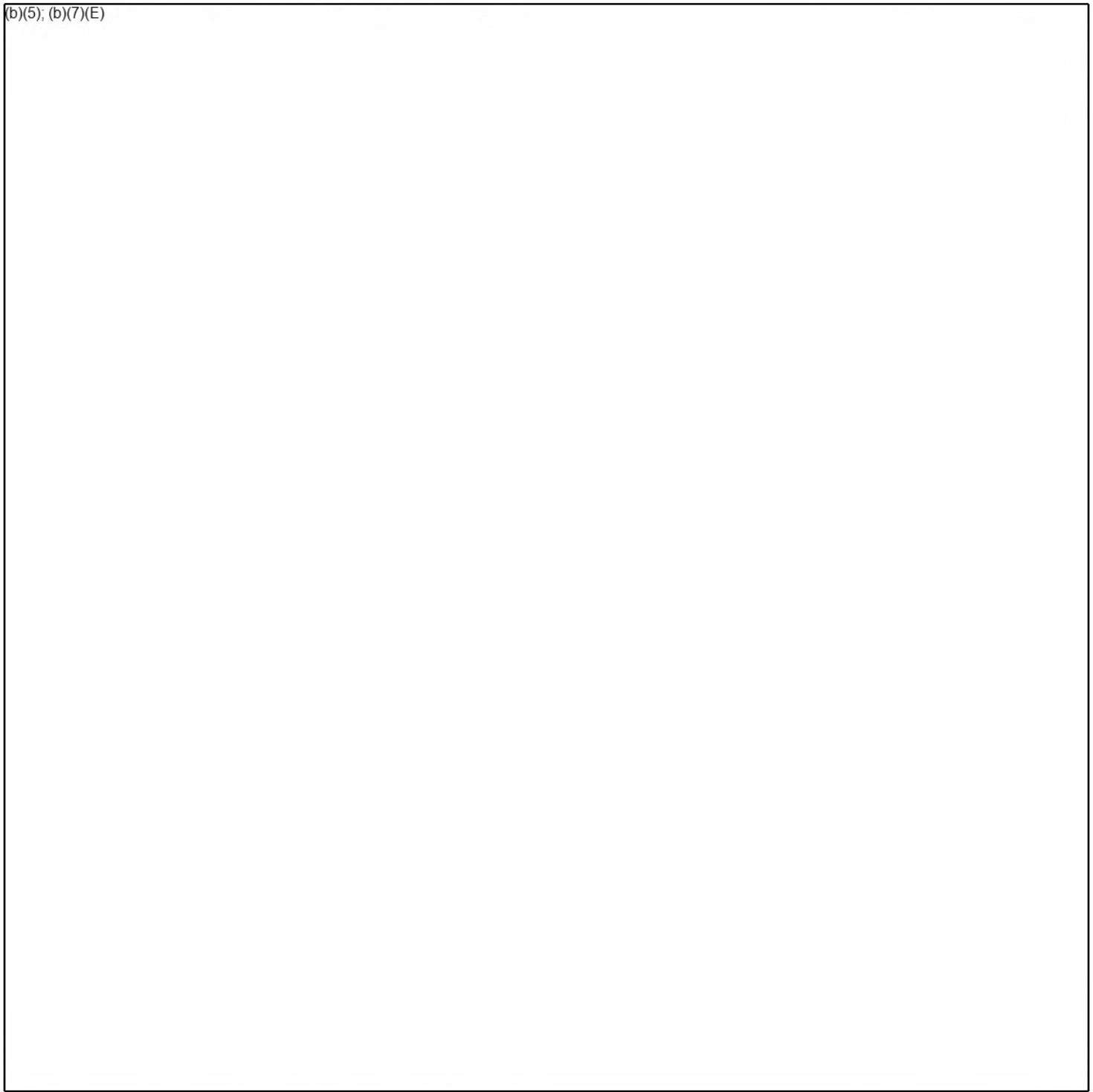
(b)(5); (b)(7)(E)

Example:

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

(b)(5); (b)(7)(E)



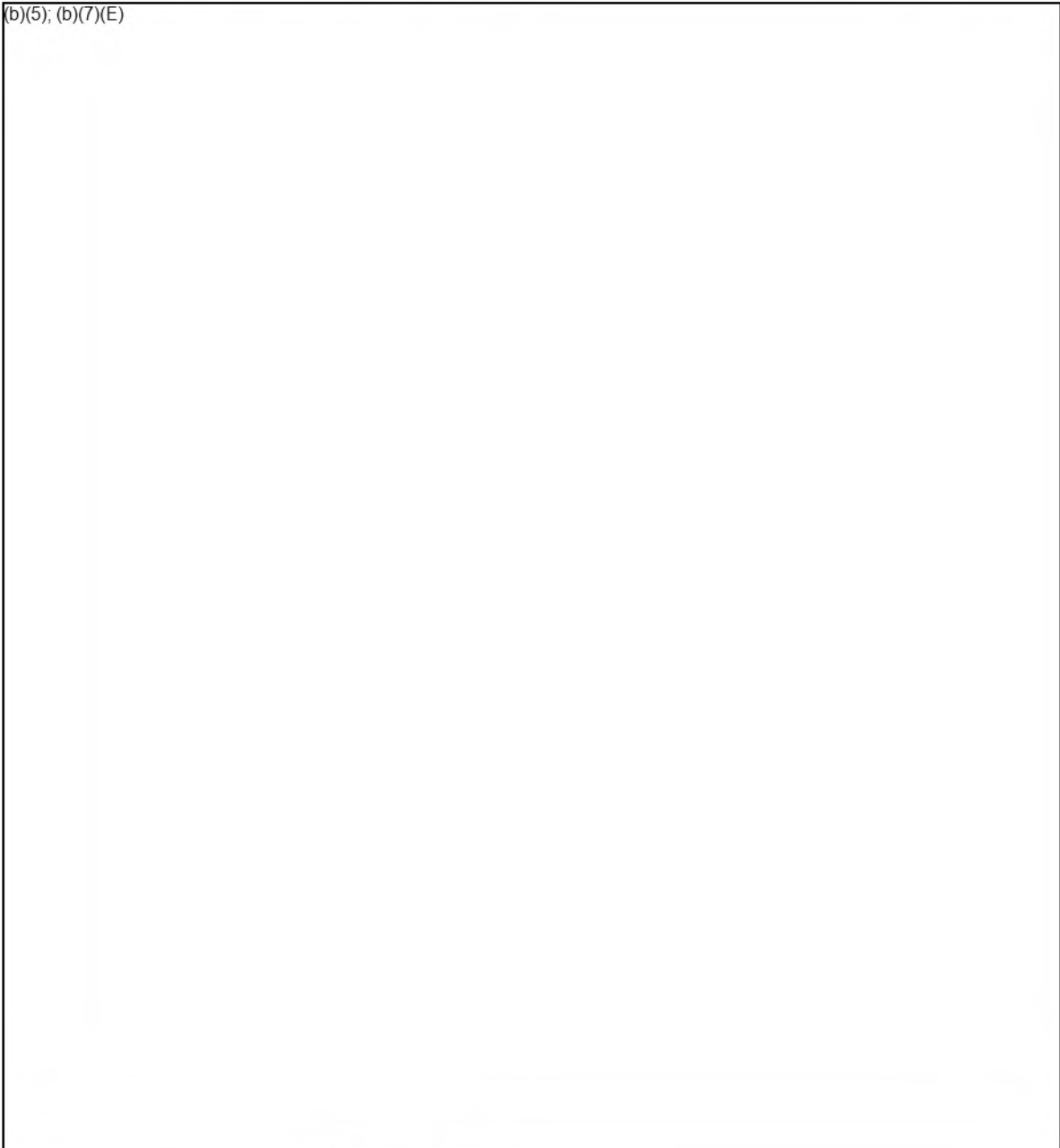
C. Demonstration scenarios:

FEB Outbound Example: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

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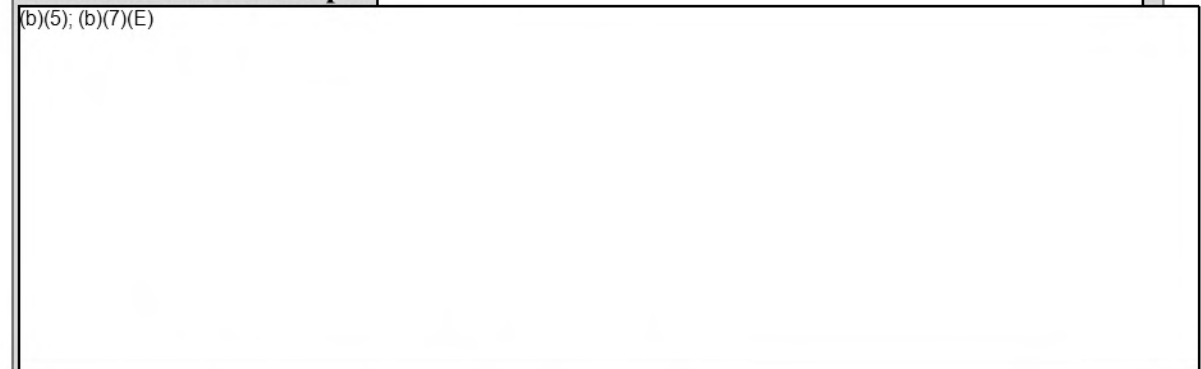
(b)(5); (b)(7)(E)



FEB Outbound Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)



(b)(5); (b)(7)(E)

VIII. Explain and apply the Extended Border authority (EPO 4).

Border Search Exception

(b)(5); (b)(7)(E)

Extended Border

(b)(5); (b)(7)(E)

A. “Extended Border” – an inbound border search conducted at some point beyond the FEB. The Extended Border Search Doctrine allows authorized government officials to conduct warrantless searches and seizures beyond the border or its functional equivalent on reasonable suspicion of criminal activity.

1.

(b)(5); (b)(7)(E)

2. Requiring reasonable suspicion stems from the notion that an extended border search involves a delay which entails a greater level of intrusion on legitimate expectations of privacy than the ordinary border search. **US v. Abbouchi, 502 F.3d 850 (9th Cir 2007).**

3. Continuous surveillance is not a requirement of an extended border search.

United States v. Glaziou, 402 F. 2d 8 (2nd Cir. 1968)
United States v. Hyde, 37 F.3d 116, 120 n.2 (3rd Cir. 1994)
United States v. Bilir, 592 F.2d 735 (4th Cir. 1979)
United States v. Espinoza-Seanez, 862 F.2d 526 (5th Cir. 1988)
United States v. Flynn, 664 F.2d 1296, 1306, n.17 (5th Cir. 1982)
United States v. McGinnis, 247 Fed. Appx. 589 (6th Cir. 2007)
United States v. Teng Yang, 286 F.3d 940 (7th Cir. 2002)
United States v. Caicedo-Guarnizo, 723 F.2d 1420 (9th Cir. 1984)
United States v. Garcia, 672 F.2d 1349 (11th Cir. 1982)

B. Extended Border Search Rule

(b)(5); (b)(7)(E)

Example: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

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(b)(5) ; (b)(7)(E)

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(b)(5); (b)(7)(E)

Example: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

4. 19 U.S.C. § 1595(b) authorizes a “customs officer” (HSI SA) to enter the private lands and buildings of another, **but not dwellings**, to perform border searches and seizures.

a. There is no geographical limitation on the exercise of 19 U.S.C. § 1595(b) authority (unlike 8 U.S.C. § 1357(a)(3), which is limited to lands located within 25 miles of the U.S. border/100 miles per regulation).

b. In the example above, (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

5. Ninth-Circuit Caveat: One panel of the Ninth Circuit Court of Appeals has indicated that SAs conducting an extended border search must seek a warrant if the illegal merchandise is deposited into a privately-owned building (non-dwelling). *United States v. Mendoza-Ortiz*, 262 F.3d 882 (9th Cir. 2001).

C. Demonstration scenarios:

Extended Border Search Example (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

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(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

IX. Determine when and how to border search people (EPO 5).

A. Fourth Amendment Analysis

1. The **reasonableness of a search** is determined by balancing the legitimate governmental interests against the offensiveness of the intrusion. *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985).
2. **Routine searches** of a person's belongings and effects are made reasonable by his decision to cross the border. *U.S. v. Ramsey*,

431 US 606 (1977). *United States v. Irving*, 452 F.3d 110 (2d Cir.2006).

3. **Routine searches** of the persons and effects of border entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant. *U.S. v. Ramsey*, 431 US 606 (1977) and *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985).

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

4. The degree of invasiveness or intrusiveness associated with any particular type of search determines whether or not that search qualifies as routine. *US v Braks*, 842 F. 2d 509 (1st 1988).
5. Factors courts consider for determining the degree of intrusiveness:
- whether the search results in the exposure of intimate body parts or requires the suspect to disrobe;
 - whether physical contact between Customs officials and the suspect occurs during the search;
 - whether force is used to effect the search;
 - whether the type of search exposes the suspect to pain or danger;
 - the overall way the search is conducted; and
 - whether the suspect's reasonable expectations of privacy, if any, are abrogated by the search;

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

6. Border searches of people (in search room) deemed routine by lower courts include:
- Currency found in bra.
 - Narcotics found under girdles, underpants.
 - Pat-down searches.
 - Raising a skirt or pant leg.
 - Outer clothing removal (e.g., jackets, shoes, etc.).
 - Examining contents of purses, wallets, or pockets.
 - Pat-down followed by removal of shoes.
7. An **intrusive body search** (i.e., non-routine) at the border is justified only if the border official can **articulate facts** “based upon something more than the border crossing” that raise the

suspicion of illegal concealment. U.S. v Asbury, 586 F. 2d 973 (2nd 1978).

8. To justify **an intrusive body search** (i.e., non-routine) conducted at the **border** the circumstances must warrant a “**reasonable suspicion**” that the party to be searched is guilty of illegal concealment (e.g., (b)(5); (b)(7)(E))

(b)(5); (b)(7)(E)

9. Lower courts have identified several articulable facts (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- a. Excessive nervousness. U.S. v. Chiarito, 507 F. 2d 1098 (5th Cir. 1975); U.S. v. Mastberg, 503 F. 2d 465 (9th Cir. 1974); U.S. v. Diaz, 503 F. 2d 1025 (3rd Cir. 1974).
- b. Unusual conduct. U.S. v. Diaz, 503 F. 2d 1025 (3rd Cir. 1974); U.S. v. Shields, 453 F. 2d 1235 (9th Cir. 1972).
- c. An informant's tip. U.S. v. Afanador, 567 F. 1325 (5th Cir. 1978); U.S. v. Castle, 409 F. 2d 1347 (9th Cir. 1969).
- d. Computerized information showing pertinent criminal propensities. U.S. v. Kallevig, 534 F. 2d 411 (1st Cir. 1976).
- e. Loose-fitting or bulky clothing. U.S. v. Kallevig, 534 F. 2d 411 (1st Cir. 1976); U.S. v. Chiarito, 507 F. 2d 1098 (5th Cir. 1975); U.S. v. Diaz, 503 F. 2d 1025 (3rd Cir. 1974).
- f. An itinerary suggestive of wrongdoing. U.S. v. Kallevig, 534 F. 2d 411 (1st Cir. 1976); U.S. v. Chiarito, 507 F. 2d 1098 (5th Cir. 1975); U.S. v. Diaz, 503 F. 2d 1025 (3rd Cir. 1974); U.S. v. Shields, 453 F. 2d 1235 (9th Cir. 1972).
- g. Discovery of incriminating matter during routine searches. U.S. v. Wilson, 488 F. 2d 400 (5th Cir. 1973); U.S. v. Flores, 477 F. 2d 608 (1st Cir. 1973); U.S. v. Summerfield, 421 F. 2d 684 (9th Cir. 1970).
- h. Lack of employment or a claim of self-employment. U.S. v. Smith, 557 F. 2d 1206 (5th Cir. 1977).
- i. Needle marks or other indications of drug addiction. U.S. v. Shields, 453 F. 2d 1235 (9th Cir. 1972).
- j. Information derived from the search or conduct of a traveling companion. U.S. v. Wilson, 488 F. 2d 400 (5th Cir. 1973); U.S. v. Gil de Avila, 468 F. 2d 184 (9th Cir. 1972).
- k. Inadequate luggage. U.S. v. Smith, 557 F. 2d 1206 (5th Cir. 1977); U.S. v. Diaz, 503 F. 2d 1025 (3rd Cir. 1974); U.S. v. Holtz, 479 F. 2d 89 (9th Cir. 1973).

- l. Evasive or contradictory answers. U.S. v. Himmelwright, 551 F. 991 (5th Cir. 1977).

10. **Non-routine personal searches** include:

- a.
- b.
- c.
- d.
- e.

(b)(5); (b)(7)(E)

B. **Border Searching people at the Ports of Entry:**

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

C. **Personal Searches at the POE:**

(b)(5); (b)(7)(E)

a.

(b)(5); (b)(7)(E)

b. a **partial body search** permits the officer to lift or remove the clothing in that area of the body to determine the nature of the merchandise that remains hidden. This concept includes the removal and search of an artificial limb. *US v Sanders*, 663 F. 2d 1 (2nd 1981).

(b)(5); (b)(7)(E)

Note: A (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

D. Demonstration/scenarios:

Personal Search Example: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

Personal Search Example: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

Personal Search Example: (b)(5); (b)(6); (b)(7)(C); (b)(7)(E)
(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

(b)(5); (b)(7)(E)

Personal Search Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

X. Determine, for the border search of an object, the level of suspicion required and any follow-up actions (EPO 6).

A. Fourth Amendment Analysis

1.

(b)(5); (b)(7)(E)

2. (b)(5); (b)(7)(E)

B. Routine searches of items/objects authorized with no warrant and **zero suspicion**.

1. Personal belongings and effects – baggage, luggage, other containers in a traveler’s possession, outer clothing, a purse, wallet, pockets, or shoes which, unlike strip searches, do not substantially infringe on a traveler's privacy rights. *See US v. Irving*, 452 F.3d 110 (2nd Cir 2006).
2. Cargo and other commercial items
3. Conveyances – Cars, trucks, buses, planes, trains, vessels
4. Use of technology – density busters, x-ray/VACIS, and radiation pagers

C. Non-routine searches of items/objects authorized with no warrant but still require **reasonable suspicion**. These involve situations in which the courts have deemed the search so intrusive or invasive that makes the search non-routine.

1. Destructive searches – Cutting, serious damage to or destroying an object:

(b)(5); (b)(7)(E)

2. Examples:

- a. (b)(5); (b)(7)(E)
- b.
- c.

d. (b)(5); (b)(7)(E)

3. Use of drills/probes. [See SDR BSE-2 Use of drills to inspect conveyances and containers, CBP Directive 3340-019A, April 20, 2004 – CBP policy requires reasonable suspicion when drilling].

a. (b)(5); (b)(7)(E)
b.
c.

4. Cruise ship cabins/sleeper cabin trains/cargo ship cabin

a. (b)(5); (b)(7)(E)
b.
c.
d.

Non-routine searches of items/objects Example (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

- D. Border search of documents. *See SDR BSE-2 ICE Directive 7-6.0; July 8, 2008 Use of Border Search Authority for Documents and Electronic Media.*
1. **Policy:** HSI SAs acting under border search authority may search, detain, seize, retain, and share **documents**. With no suspicion, the SA may review the information transported by any individual attempting to enter, reenter, depart, pass through, or reside in the United States. [7-6.0 Part 6].

2. **Document defined:** All papers and other written documentation including but not limited to, those relating to the alien's identity and/or admissibility (e.g., passports, visas, credit cards, licenses, social security cards, evidence of direct threats, criminal terrorist or a threat to national security); those relating to the import and/or export of goods and merchandise to or from the United States; other materials such as books, pamphlets, and printed/manuscript material; monetary instruments; and written materials commonly referred to as "pocket trash" or "pocket litter." [7-6.0 Part 5.2].
3. SAs may make written notes, reports, and document impressions relating to a border encounter. [7-6.0 Part 6-Note].
4. SAs may detain documents for further review, either on-site at the place of detention or at an off-site location. The search must be conducted in a reasonable time. Factors include:

(b)(5); (b)(7)(E)

5. (b)(5); (b)(7)(E)

6. Translation and decryption (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

7. Subject matter assistance – (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Example: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

8.

9. Review and handling of certain types of information

a. Attorney-Client privilege – This privilege protects communications between attorney and client. Unless the document contains some form of communication (e.g., (b)(5); (b)(7)(E) it is not privileged. The document, however, may be protected under the Work Product Privilege. FR Evidence, Rule 502. Refer such matters to ICE Chief Counsel.

b. Work product privilege – Reflects an attorney’s opinions and impressions regarding the defense of the client’s case. The court must hold an evidentiary hearing to determine whether the documents contain true attorney work product under the privilege. FRE Rule 502. (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

c. Doctor-Patient privilege – The purpose of the physician-patient privilege is to protect those who are required to consult physicians from the disclosure of secrets imparted to them to protect the relationship of patient and physician, to prevent physicians from disclosing information which might result in humiliation, embarrassment, or disgrace to patients, and to encourage full disclosure by the patient so that the physician can advise and treat correctly. (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

d. Business information – Certain commercial information may be confidential pursuant to the Trade Secrets Act or the Privacy Act. (b)(5); (b)(7)(E)

e. Identification documents – May be copied for any legitimate government purpose without any suspicion of illegal activity.

- f. **Sealed letter class mail.** Border searches of mail are governed by particularized law and policy. See 19 C.F.R. Part 145; 19 U.S.C. § 1583. [REDACTED]

[REDACTED]

Letter Class Mail. U.S. first class mail and its international equivalent. This includes postcards, aerogrammes, letter packets, etc., mailed at the letter class rate or equivalent class or category of postage. [7-6.0 Part 5.4].

To be considered first class mail, a letter must be presently in the U.S. postal system. Only articles presently within the U.S. postal system are deemed "mail," even if they are stamped. Letters that are to be mailed, whether carried or in baggage, are not considered to be letter class mail. [7-6.0 Part 5.4].

Letters carried by individuals or private carriers such as DHL, UPS, or Federal Express, for example, are not considered to be mail, even if they are stamped, and thus are subject to border search as provided in this Directive. See 19 C.F.R. Part 145.3. [7-6.0 Part 8.7 1) b)].

**BORDER SEARCH OF
DOCUMENTS**

(b)(5); (b)(7)(E)

E. Demonstration/Exercise – Border searching documents

Review documents provided by the instructor. Assume these documents were discovered during a lawful border search. Determine if the documents can be reviewed based on law and policy.

F. Border search of electronic devices.

1. *U.S. v. Cotterman*, 709 F.3d 952 (9th Cir. 2013 en banc) – Forensic examination of a computer requires *reasonable suspicion*. Reasons given: (1) volume of private information an electronic device can hold is vast; (2) electronic devices are offices and personal diaries; (3) electronic devices hold browsing histories and records of deleted files; and, (4) with cloud computing the government could interact with information stored in a home location not just the electronic device.

- 2. U.S. v Kolsuz, 890 F. 3d 133 (4th Cir. 2018) – In 2012 Kolsuz was stopped outbound while attempting to export firearms parts without the required license. This happened again in 2013. In both instances, the parts were seized with no further action. In 2016, HSI New York notified CBP Dulles that Kolsuz planned to leave the country and HSI asked CBP to search his luggage. During this outbound search, CBP found more unlicensed firearms parts. While in secondary, CBP conducted a manual search of his iPhone (scroll through recent phone calls and text messages). He was then interviewed and arrested. HSI CFA then conducted a second “forensic search” of the phone offsite. The search was done as the phone was in airplane mode so did not reach information stored on the cloud. This process took 1 month to complete and resulted in an 896-page report.

Search of phone offsite deemed a border search:

(b)(5); (b)(7)(E)

- a.
- b.
- c.
- d.

Border search of phone offsite **deemed non-routine**:

(b)(5); (b)(7)(E)

- a.
- b.

(b)(5); (b)(7)(E)

c. **Reasonable suspicion** required to conduct forensic search.

3. HSI Legal Update – Border Search of Electronic Devices [May 9, 2018]: Although the Office of the Principal Legal Advisor (OPLA) advises Homeland Security Investigations (HSI) nationwide that it

(b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

4. U.S. Customs and Border Protection, CBP Directive No. 3340–049A, *Border Search of Electronic Devices* 5 (1-4-2018).

a. **Basic Search** – without suspicion an officer may examine an electronic device and may review and analyze information encountered at the border.

b. **Advanced Search** – with reasonable suspicion of activity in violation of laws enforced by CBP, or in which there is a national security concern, with supervisory approval, may conduct an advanced search. Defined as: *search in which an officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its content.*

F. U.S. v. Carpenter, 138 S. Ct. 2206 (2018) – The Government's acquisition of Carpenter's cell-site records was a Fourth Amendment search.

1. Cell-site location information (CSLI) provides a time stamped record each time phone connects to cell-site. Wireless carriers collect and store CSLI for business purposes.

(b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- 2. Person’s expectation of privacy in physical location and movements – *Knotts* (placement of beeper in car not a search); *Jones* (placement of GPS tracker on car deemed a search requiring a search warrant).
- 3. What a person keeps for himself and what he shares with others – there is no legitimate expectation of privacy in information a person shares with a third-party. That remains true “even if the information is revealed on the assumption that it will be used only for a limited purpose.” U.S. v. Miller, 425 U.S. 435 (1976). Miller (banks records not protected); *Smith* (phone records not protected).
- 4. Held: CSLI involves a person’s physical location and movement so government’s acquisition of the CSLI from the wireless carrier is a search.

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

XI. Student Practice

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2042

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of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

CONCLUSION

I. Summary of Main Ideas

(b)(5); (b)(7)(E)

II. Integration

In this lesson we examined the three elements of a lawful border search and discussed the Functional Equivalent of the Border and Extended Border. We have discussed the lawful means to collect physical evidence, the methods employed to do so, and how to avoid various pitfalls when collecting such evidence. In the next lesson, we will look at the evidence collection process in terms of collecting evidence in the form of statements.

III. Objectives

Terminal Performance Objective – Given past case information or scenarios at a border or its equivalent, determine the legality of a search/seizure and what can be searched/seized; in accordance with the Border Search Exception outlined by law, caselaw and policy.

EPO	OBJECTIVE
1	Identify the relationship between the Fourth Amendment and border search authority and explain the border search general rule.
2	Explain and apply the Functional Equivalent of the Border (in an inbound setting) authority.
3	Explain and apply the Functional Equivalent of the Border (in an outbound setting) authority.
4	Explain and apply the Extended Border Search authority.
5	Determine when and how to border search people.
6	Determine, for the border search of an object, the level of suspicion required and any follow-up actions.

IV. Motivation

The HSI mission is an important one, but it must be done reasonably and legally. As a Special Agent, it is imperative that you understand the laws and policies that govern your professional behavior, specifically the Fourth Amendment. Your ability to accurately apply the rules we discussed will enable you to more effectively perform your job and avoid sanctions.

V. Test or Final Activity

You will be tested on your knowledge of the Fourth Amendment as it relates to searches, seizures, and warrants on the legal multiple-choice exam after the Sentencing Guidelines Chapter. However, your ability to address these legal questions will be tested during other practical exercises and each time you conduct a search or seizure.

Attachments (determine if document can be border searched)

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

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