

# Research on the Regulation of Mobile Phone Search in Criminal Proceedings

Bin Li

School of Law, People's Public Security University of China, Beijing 100038, China

## Abstract

**Based on the need to combat crime, mobile phones have generally become the object of search in various countries. However, unlike traditional search, mobile phone search has the characteristics of "two stages" in the process, unspecific search scope and invasion of privacy. In practice, mobile phone search shows some problems, such as starting search without approval, unreasonable use of incidental search, unlimited search scope, too simple execution procedure and insufficient relief afterwards, which seriously infringes on citizens' legal rights. Based on this, it is necessary to regulate it from four aspects: establishing a dual examination and approval system, limiting the scope of search, perfecting the execution procedure and strengthening the relief mechanism.**

## Keywords

**Mobile phone search; Electronic data; Rights protection; Criminal investigation.**

## 1. Introduction

Mobile phone is people's "mobile database", which brings fun and benefits to people's daily life, but also provides convenience for public security organs to find clues and solve cases. If investigators can make full use of the important evidence stored in the suspect's mobile phone, then investigation activities will undoubtedly be even more powerful. But can the police really search the information in the mobile phone without restrictions? The mobile phone may not only store all kinds of evidence, but also contain a lot of other information unrelated to the case. If investigators are allowed to search the contents of the mobile phone at will, the relevant rights of the people involved may be infringed, which will make the public security organs fall into a situation of illegal infringement. At present, China's laws do not clearly stipulate mobile phone search, so the author can't help but ask whether mobile phone search should be different from other searches. In practice, what are the problems in the search of mobile phones? In order to balance the relationship between safeguarding public rights, protecting private rights and satisfying investigation practice, how should we standardize mobile phone search?

## 2. The Realistic Dilemma of Mobile Phone Search in China

The special nature of mobile phone search determines that the risk of infringement of civil rights by mobile phone search is higher, but at present, China has not paid enough attention to it in both legal and practical aspects. Before 2012, because the application of mobile phones in case handling was not frequent, there were not many regulations on mobile phone search and electronic data in law. In 2012, the Criminal Procedure Law was revised to formally add electronic data as a kind of legal evidence, but this revision did not stipulate the conditions and procedures for searching and seizing electronic data. After that, three normative documents issued by relevant departments made some provisions on electronic data and mobile phone search: in 2014, the fifth part of the Opinions on Several Issues Concerning the Application of Criminal Procedure in Handling Cybercrime Cases issued by the Ministry of Public Security

made general provisions on the extraction of electronic data, the sealing of original media, and the production of extraction transcripts.

In 2016, the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security jointly issued the "Provisions on Several Issues Concerning the Collection, Extraction, Examination and Judgment of Electronic Data in Criminal Cases" (hereinafter referred to as "Several Provisions on Electronic Data" not only clearly defines electronic data, but also refines the provisions on the collection and extraction of electronic data, the transfer and display of electronic data, the examination and judgment of electronic data. In 2019, the "Rules for Obtaining Evidence of Electronic Data in Criminal Cases by Public Security Organs" issued by the Ministry of Public Security further refined the methods of obtaining evidence of electronic data in different situations and other relevant regulations. It can be seen that China pays more and more attention to the search and evidence collection of electronic data, but all these judicial interpretations and normative documents have one thing in common: they only stipulate the technical rules for collecting and reviewing electronic data, with the purpose of ensuring the authenticity and identity of the collected electronic data.

On the contrary, there are almost no provisions on the legal procedures for collecting electronic data, and there are few issues related to protecting the legitimate rights of the relative person and preventing public security personnel from abusing their power. It can be seen that most of the current legislative provisions in China can only regulate the first stage of mobile phone search, while the second stage, which is more likely to infringe on civil rights, is less restrictive. The author believes that in practice, mobile phone search in China mainly has the following problems.

### **2.1. Searching Mobile Phone Information Does Not Require Any Approval**

According to the provisions of the Procedures for Handling Criminal Cases by Public Security Organs, the search can only be carried out with the approval of the person in charge of the public security organ at or above the county level, but this requirement only applies to the search of "people's body, articles, residence and other related places", and does not include the search of electronic data. The three normative documents mentioned above also lack regulation on the starting conditions of electronic data search. This means that as long as the police obtain the mobile phone through legal means, they can search the information stored in it at will, without being restricted by any department or even the internal organs. This view has also been recognized in court cases: for example, in the case of Zhu and others smuggling ordinary goods, the investigators seized the electronic equipment involved, such as computers and mobile phones, and then extracted electronic data such as mobile phone text messages and chat records from them. The defense argued that these electronic data violated the principle of due process and were illegal evidence and should be excluded. However, the court held that the procedures for seizure, extraction and inspection of these electronic data were legal, and the extracted documents were related to the case and should be used as evidence. That is to say, the mobile phone search in China has only been adjusted by the Criminal Procedure Law and other relevant laws and regulations in the first stage, but the information in the mobile phone does not need any approval. This fully shows that at present, China only protects the property of mobile phones, and the information stored in mobile phones can only be protected by the property rights of mobile phones, but not obtaining the guarantee procedure of independence will undoubtedly threaten citizens' constitutional rights such as privacy and freedom of communication.

### **2.2. Unreasonable Use of Incidental Search in Practice**

Incidental search is a kind of search without a license, which refers to the system that law enforcement officers can search the arrested defendant or criminal suspect's body, belongings, means of transportation, premises, residence or other premises that can be touched

immediately, even without a search warrant. As a legal search without a license, incidental search must meet one of the following two conditions in addition to the time condition of "at the time of arrest": First, the criminal suspect may carry weapons such as knives and guns, and if he or she is not searched in time, it may pose a threat to the safety of investigators; Second, if the search is not carried out in time, it may lead to the loss of evidence and affect the detection of subsequent cases. But no matter which condition, the mobile phone search does not meet the requirements. First, although the mobile phone as a tangible object may be used as an attack weapon, the probability is low and the harm is small, so it is basically impossible to pose a threat to the personal safety of investigators, and the electronic data in the mobile phone as a virtual object does not have security risks, so it is impossible to pass the review of the "security principle"; Second, although the electronic data stored in the mobile phone may be erased by remote control, Trojan horse program and other means in principle, investigators can also turn it off and put it in the mobile phone shielding bag to avoid it, so it does not meet the requirements of "protecting evidence". For the above reasons, in *Riley v. California* in 2014, the United States Federal Supreme Court established the dual judicial review rule of mobile phone search, that is, in addition to obtaining the mobile phone as a carrier (in principle), it is necessary to apply to the court for a writ, and if it is necessary to search and seize the information in the mobile phone, it is necessary to apply to the judge for a writ again.

In China, the incidental search of mobile phone information is still very extensive in practice. The author learned through interviews and investigations that after the suspects are arrested or detained, the police will seize their mobile phones and ask the suspects to provide the phone lock screen password, and then search the electronic data such as call records, text messages and WeChat chat records in their mobile phones to find clues or evidence related to the case. In this case, the police's search of the suspect's mobile phone is basically unrestricted, and even the internal approval of the public security organ is not needed, which will undoubtedly cause serious infringement on the suspect's privacy. The main reason is the lack of relevant laws and regulations.

### **2.3. The Scope of Mobile Phone Search is not Restricted**

Although investigators still have to issue a search warrant in the first phase of mobile phone search, there is no clear search tool on the search warrant. According to the provisions of "Model of Criminal Legal Documents of Public Security Organs (2012 Edition)", a search warrant only requires that the object to be searched be written, not the search scope. If the search object is a mobile phone, it means that the investigators can search, consult and extract all the information in the mobile phone at will, and the scope is completely at the discretion of the investigators. In practice, mobile phones are often searched for clues, which means that investigators have no clear purpose before searching the information in mobile phones, so it is impossible to have a clear search scope. Although such discretion is undoubtedly more conducive to the rapid detection of cases for investigation organs, it also leads to the complete exposure of personal privacy stored in mobile phones and even the privacy of third parties unrelated to the case to investigators, which is obviously not necessary for investigation activities. Unrestricted search scope of mobile phones may lead to abuse of public power.

### **2.4. The Implementation Procedures are Crude and Lack the Necessary Humanistic Care.**

The search execution procedure sets a preset track for the operation of the investigation power, which is not only conducive to ensuring the rational operation of the investigation power, but also enables the people to establish reasonable expectations and appropriate supervision over the exercise of the investigation power. [9] However, the current Chinese law does not stipulate the procedural norms of mobile phone search, and the procedures of mobile phone search are simple in practice. First, there is no regulation on the way to search mobile phone information,

and grassroots practice is rather chaotic. During the investigation, the author found that there are two main ways to search the mobile phone. One is to open the mobile phone through the password provided by the person involved, and then directly check the SMS, WeChat and other information in the mobile phone; The second is to copy the information stored in the mobile phone to a specific device through technical means, and then search the copied data stored in the device. Second, there was a lack of witnesses during the search, and there was no video recording of the process. In practice, the search of mobile phones is usually carried out by only one investigator, which does not meet the requirement that the search should be carried out by more than two investigators, and also lacks the supervision of witnesses and video recordings on the search process, which makes it possible for the electronic data in mobile phones to be deleted, which affects the authenticity of evidence. Third, there is a lack of necessary notification procedures. At present, investigators do not have any notification requirements for searching mobile phones. The searched people do not know whether their mobile phones have been searched, what part of information has been searched, whether the data in their mobile phones are at risk of leakage and whether irrelevant data have been deleted, which is not conducive to the relevant personnel to safeguard their legal rights. Fourth, electronic data storage is not professional enough. China has detailed provisions on the custody of physical evidence, but lacks legal provisions on the custody of electronic data. Improper storage of electronic data will not only pollute the authenticity of evidence, affect the ability of proof of evidence, but also leak the privacy of citizens. At the same time, due to the lack of a clear custody system, The deletion of irrelevant information is not timely, and the massive electronic data in the mobile phone will inevitably involve a large number of citizens' privacy, and the fact that the data irrelevant to the case has been kept all the time is also an infringement on citizens' privacy.

There is a saying in the law that "there is no right without relief", that is to say, to judge whether someone really enjoys a right, the key is to see whether there are effective relief measures for this right, not whether there are provisions in the legal provisions. At present, the ex post remedy for mobile phone search is obviously insufficient, which makes people worry. First of all, according to the relevant principles of the Administrative Procedure Law, criminal investigation behavior does not belong to the scope of accepting cases in administrative litigation, so citizens cannot remedy their rights by bringing administrative litigation. Secondly, although Article 245 of China's Criminal Law stipulates the crime of illegal search, it can only regulate illegal search with serious circumstances, and most cases in practice can hardly constitute this crime, so it is difficult for citizens to get relief from criminal law. Finally, citizens can't get state compensation after their privacy rights are violated. In the third chapter of the State Compensation Law, criminal compensation only stipulates state compensation when citizens' personal rights or property rights are violated. Therefore, even if mobile phone search infringes on citizens' privacy rights and causes great mental harm to them, it is still impossible for citizens to remedy their legal rights through state compensation. That is to say, under the existing system, after the mobile phone search infringement accident, the infringed can only deal with it through the internal procedures of the public security, and this time-consuming and labor-intensive internal treatment is obviously not conducive to the infringed's protection of their legitimate rights.

In addition, the current law lacks ex post facto justice for mobile phone search. According to Article 56 of the Criminal Procedure Law, electronic data cannot be the object of the exclusionary rule of illegal evidence. Although Article 28 of "Several Provisions on Electronic Data" in 2016 stipulates that some electronic data shall not be used as evidence, it is not difficult to find that these three provisions only involve the authenticity of electronic data, and do not review the legality of the electronic evidence collection process. As a result, as long as the electronic data is true, it will be recognized as legal and effective evidence by the court.

Therefore, even if the basic rights of citizens are violated during the mobile phone search, the evidence will not be excluded. The exclusionary rule of illegal evidence is not only an important rule to ensure the fair trial of cases, but also a powerful review of whether the process of obtaining evidence is legal. If the evidence obtained by infringing on citizens' basic rights cannot be reasonably excluded, then the rights of the infringed person cannot get procedural relief.

### **3. The Regulatory Path of Mobile Phone Search**

Compared with computers, tablets, USB sticks and other electronic devices, mobile phone memory. There are more kinds of information stored, which are more closely related to people's production and life, and there are countless hidden information such as citizens' privacy, so mobile phone search should be more strictly regulated.

#### **3.1. The Establishment of a Dual Examination and Approval System for Mobile Phone Search**

The "two-stage" feature of mobile phone search determines the "double approval" principle of mobile phone search. Among them, the first stage is the process of finding the carrier of mobile phone through the search of "person, goods and residence". This stage is no different from the traditional search and has been regulated by China's Criminal Procedure Law, so this article will not repeat it. Therefore, the first problem is to establish the examination and approval system for the second phase of mobile phone search. Traditionally, it is thought that you can search the contents of a wallet and other items, because the wallet and its contents are unified items, but the analogy of this idea to mobile phones and the massive data information contained in them is doubtful. [10] The citizen's privacy contained in the massive data in the mobile phone must be equally protected by law, so the investigation organ needs to obtain permission again before searching the internal information of the mobile phone. First of all, it is necessary to clarify the approval subject of the second stage search. Considering the characteristics of China's judicial system, the author believes that the second stage of search and approval can still be carried out by the heads of public security organs at or above the county level. First, it can limit the investigation power; Second, it can improve the efficiency of handling cases by public security organs and reduce the pressure at the grassroots level. Secondly, it is necessary to clarify the criteria for starting the second phase of search. There should be reasonable reasons for starting a search, which should be based on facts and meet the standard of "reasonable suspicion". The standard of starting a search cannot be replaced by the purpose of "collecting criminal evidence", otherwise there will be no restrictions on starting a search. Finally, re-create the format of the search warrant, and clearly state the reasons, scope and relief procedures of the search on the search warrant to ensure that the search is reasonable and well-founded.

#### **3.2. Limit the Scope of Mobile Phone Search**

As mentioned above, although the characteristics of mobile phone search make it difficult to meet the specific requirements, this does not mean that the scope of mobile phone search can be unlimited. The author believes that the scope of mobile phone search should be based on the principle of type regulation, supplemented by the principle of "being clear at a glance". The so-called typological regulation is to apply for different search scopes for different types of cases. If there are special circumstances that need to change the search scope, it is necessary to provide sufficient reasons. For example, for telecom fraud cases, the search scope can be limited to call records, transfer records, WeChat chat records, etc., and it is forbidden to search the photo albums or videos in the mobile phone involved; When committing a crime against a gang, you can only search the chat records and call records between the people involved, but not the chat records between other unrelated people; For homicide cases, in principle, only the location

information in the mobile phone can be searched, but If there is sufficient reason to believe that the suspect has a mobile phone transfer record for purchasing the murder weapon, he can apply for viewing the transaction record. Whether the reasons for the application are sufficient or not is judged by the court through the exclusionary rule of illegal evidence. In addition, it needs to be supplemented by the principle of "being clear at a glance". The principle of "at a glance" comes from the United States, which means that as long as the police are legally in the proper position to observe, everything that can be seen at a glance can be searched, and the evidence obtained by the search is legal and effective. [11] The reason why the principle of "be clear at a glance" should be stipulated as a supplement is because the information involved in the mobile phone is usually intertwined with other information, and it is impossible for investigators to completely separate it. These information are likely to contain other evidence irrelevant to the case. For example, when searching the chat records of criminals and their associates, they accidentally find evidence of another crime, so according to the principle of "at a glance", investigators can directly extract and fix this part of evidence without applying for another license. Through the cooperation of typological regulation and the principle of "be clear at a glance", it can not only limit the scope of mobile phone search, prevent carpet search by investigators, effectively protect citizens' legitimate rights, but also meet the needs of convenient investigation and save grass-roots police resources.

### 3.3. Improve the Rules of Execution Procedures for Mobile Phone Search

In addition to establishing the "double approval" start-up procedure, the execution procedure of mobile phone search should also be improved to make the process of mobile phone search more standardized, so as to limit public rights and protect private rights. First of all, it is necessary to establish a copy system of mobile phone data, and it is forbidden to search the original data directly on the mobile phone to prevent the original data from being damaged or lost. Secondly, it is necessary to establish a system of audio and video recording and witness for mobile phone search. Because electronic data can be easily modified, investigators can modify the information with a casual action, so they need people with certain professional ability as witnesses to supervise the search process. However, when no witnesses with professional knowledge can be found, the whole process can be recorded by audio and video recording, so as to judge whether the investigators' search activities are legal or not. Thirdly, it is necessary to establish a notification procedure for mobile phone search. Before the search, the search personnel should inform them of the reasons for the search, the scope of the search and the rights and obligations of the searched person; After the search, it is necessary to inform them of the results of the search and the processing methods of irrelevant electronic data, so that the searched person can always know whether his legitimate rights and interests have been infringed. Finally, the custody system of electronic data should be strictly enforced. Because of its easy modification, the authenticity of electronic data will be seriously affected if there is a problem in the custody chain, so it is necessary to have a professional shielding box for storage, and professionals are responsible for the custody. Not only that, but also the establishment of electronic data destruction system, for the number stored for more than a certain period of time and unrelated to the case. It is reported that it should be destroyed in time to prevent data leakage from infringing on citizens' privacy rights.

### 3.4. Strengthen the Right Relief Mechanism of Mobile Phone Search

In addition to regulating the procedure of mobile phone search in law, we should also improve the right relief of mobile phone search. The author believes that the right relief of mobile phone search should be considered from two aspects. First, we should broaden the relief channels for the infringed. For investigators who violate relevant regulations, the infringed can not only complain to their units and give them disciplinary and punishment on their posts, but also complain to the procuratorate to correct the misconduct of investigators through legal

supervision. At the same time, we should also give the infringed the right to obtain state compensation. In the process of mobile phone search, citizens' privacy may be infringed, and the infringement of privacy will bring torture and pain to the infringed person's spirit. This kind of mental damage is sometimes more serious than personal and property damage, so the infringed person should be given the right to request state compensation and the infringement of privacy should be included in the scope of state compensation. Second, strengthen judicial review afterwards and exclude electronic data obtained through illegal procedures. At present, the exclusion of illegal evidence pays more attention to the authenticity of the evidence itself, but lacks the review of the legality of obtaining evidence. Therefore, applying the exclusionary rule of illegal evidence to electronic data is not only conducive to protecting the rights of the searched person, but also conducive to further standardizing the search behavior of the investigation organ. Of course, the exclusion rules of illegal evidence cannot be applied across the board. The judicial organs should resolutely exclude electronic data obtained through serious violations of the law and serious violations of the legitimate rights of the searched person, and prohibit them from being used as conclusive evidence; For those electronic data obtained through defective behaviors with less infringement, the investigation organ or investigator can provide reasonable supplementary evidence, and those that can be supplemented or explained can not be excluded.

#### 4. Conclusion

With the development of electronic technology and the advent of the 5G era, mobile phones are playing an increasingly important role in people's lives, and the information hidden in mobile phones can be said to be even worse than that in houses. But, The investigation organ can not only see the convenience brought by the information stored in the mobile phone to solve the case, but also fully respect the legitimate rights of citizens. In this era of awakening rights, we must keep a high degree of vigilance and constantly explore and improve the system and procedures of mobile phone search through practice to adapt to the trend of wide application of electronic data.

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