

**United States House
Committee on Appropriations**

Hearing before the
House Appropriations
Subcommittee on Homeland Security

**US Customs and Border Patrol
US-VISIT**

Questions for the Record

March 6, 2008

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QUESTIONS FOR THE RECORD
Hearing on Border Security: Challenges and Priorities
March 6, 2008

SUBMITTED BY
CHAIRMAN PRICE

Questions for U.S. Customs and Border Protection

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Border Search Authority – Screening Travelers’ Electronic Data

There have been numerous press reports that travelers with laptops, cell phones, and similar devices are having them searched by CBP. Concerns have been raised about whether this threatens legitimate security or privacy interests. For example, business travelers may find that data from their laptop computers, if made public, could have trade secrets or otherwise proprietary information that might harm their business. In some cases, data has been reported erased or damaged.

28. How and when does CBP determine that it needs to search and seize data and systems, and is this practice increasing in frequency and thoroughness?

ANSWER: CBP officers are responsible for administering the broad spectrum of federal law at the border, including immigration and customs laws involving issues of admissibility, terrorism, and the entry of merchandise into the United States. In order to perform this function, CBP officers are authorized to examine international travelers and their belongings that are presented at the border. In the course of a border inspection, a CBP officer makes decisions to examine items in possession of a traveler, including any information that is presented, whether in documentary or electronic form, based upon various operational and administrative considerations.

CBP is charged with facilitating legitimate trade and travel while at the same time enforcing hundreds of U.S. laws. All persons, baggage and merchandise arriving in the United States are required to participate in CBP

processing. As part of the process, CBP strives to facilitate the routine processing of all travelers while determining admissibility.

It is not the intent of CBP to subject travelers to unwarranted scrutiny. However, unless exempted, all travelers entering the United States, including U.S. citizens, are required to participate in CBP processing. As part of the process, CBP officers are verifying admissibility and looking for violators, including possible terrorists, terrorist weapons, narcotics, and other contraband. Laptop computers may be subject to detention for violation of criminal law such as if the laptop contains information with possible ties to terrorism, narcotics smuggling, child pornography, or other criminal activity. CBP officers adhere to all requirements to protect privileged, personal, and business confidential information.

As more and more travelers carry information and merchandise across the border in electronic instead of documentary format, the frequency of the examination of such electronic devices naturally tends to increase. The Supreme Court has emphasized that the manner in which documentary material is carried across the border does not alter the authority of CBP officers to search such material to ensure compliance with law.

29. What steps does CBP take in the exercise of its search authority to avoid exacerbating legitimate concerns that travelers have for the privacy and security of personal and proprietary data they carry?

ANSWER: In the course of normal operation at the border, CBP officers are routinely entrusted with a great deal of sensitive and proprietary information. Every day, importers file thousands of entries with CBP that contain extremely sensitive trade secrets and business information. Whether CBP officers are dealing with such sensitive commercial information or private information carried across the border by travelers, they are trained to protect this sensitive information. CBP has stringent policies that restrict access to, or disclosure of, sensitive information. Employees that violate agency policy or federal law (e.g., the Trade Secrets Act, 18 U.S.C. 1905) are subject to criminal sanctions and/or discipline as may be appropriate under the applicable law or policy.

Not Responsive

Question#:	83
Topic:	search - 1
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: At the hearing, I asked you whether DHS conducted searches at the border of the contents of laptops or cell phones belonging to U.S. citizens without first determining that there was reasonable suspicion of a crime. You responded, “I think that searches with respect to documents at the border, whether they’re reduced to paper form or electronic form, don’t necessarily require a reasonable suspicion . . . requirement.”

In fact, in determining whether reasonable suspicion is required, the Supreme Court has drawn a distinction between the search of certain personal property, such as a car, and the search of a person, which implicates the “dignity and privacy interests of the person being searched.” *United States v. Flores-Montano*. However, the Supreme Court has not yet ruled on whether the search of a laptop – which can contain vast amounts of deeply personal information and can amount, in practice, to a search of the laptop owner’s thoughts – is more akin to the search of a person or the search of a car. A federal district court recently ruled that the search of a laptop implicates significant privacy and dignity interests and therefore does require reasonable suspicion.

Do you take the position that a laptop containing vast amounts of personal information implicates no greater privacy or dignity interests than the contents of a car trunk, purse, or wallet?

Response: On April 21, 2008, the United States Court of Appeals for the Ninth Circuit overruled the lower court decision you reference in your question, holding “that reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border.” See *U.S. v. Arnold*, --- F.3d --- (9th Cir. Apr. 21, 2008). We argued in support of the position ultimately taken by the court, a position that is also consistent with Supreme Court and Circuit Court precedent. See *U.S. v. Flores-Montano*, 541 U.S. 149 (2004); *U.S. v. Ramsey*, 431 U.S. 606 (1977); *U.S. v. Ickes*, 393 F.3d 501 (4th Cir. 2005).

Question#:	84
Topic:	search - 2
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: You testified that, “as a matter of practice,” DHS searches the contents of laptops or cell phones “only . . . where there’s a reasonable suspicion.”

Is there any written directive implementing this practice? If not, given DHS’s position that laptop and cell phone searches are permissible even without reasonable suspicion, why are border agents limiting themselves to searches based on reasonable suspicion, and what is your evidence that they are doing so?

I assume that DHS would not follow a practice of conducting searches of laptops and cell phones only upon reasonable suspicion (as you testified) if you considered such a practice insufficient to address valid security concerns. Given that the agency has apparently found it sufficient to limit these searches to cases in which reasonable suspicion exists, will you commit to making this practice a binding policy, regardless of whether you believe such a policy to be legally required?

Response: As explained in the prior question, and as I specifically stated at the hearing, CBP has the legal authority to conduct searches at the border of laptop computers and other items absent reasonable suspicion. My statement concerning CBP’s “practice” was intended only to reflect operational realities at ports of entry: CBP typically encounters well over a million travelers every day, and is responsible for enforcing over 600 federal laws at the border. Even if it was desirable to do so, it simply is not feasible for CBP to conduct searches of every laptop or cell phone in the possession of every traveler. As a result, when CBP conducts such a search it is ordinarily premised on facts, circumstances, and inferences that give rise to individualized suspicion. This being so, however, CBP must retain sufficient flexibility and nimbleness to accomplish its varied law enforcement and antiterrorism mission.

Question#:	85
Topic:	search - 3
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: You testified that you believed the agency uses a “probable cause” standard before seizing a searched laptop or cell phone or retaining copies of their contents. You also stated that you would verify whether this was, in fact, the standard applied. Please indicate what standard the agency uses when seizing laptops or cell phones or retaining copies of their contents.

You testified that any copies of the contents of laptops or cell phones were destroyed if not pertinent to a violation of the law. How is this destruction requirement communicated and enforced?

If DHS has issued any written guidance to its agents regarding the searching of laptops or cell phones or any policies regarding the copying and/or retaining of their contents, please provide a copy along with your answers.

According to the Washington Post, a customs training guide states that “[i]t is permissible and indeed advisable to consider an individual’s connections to countries that are associated with significant terrorist activity.” In response to my questioning, you testified that a U.S. citizen’s national origin could not, on its own, be considered a “connection” to a country associated with significant terrorist activity, but that the person’s “travel pattern” might be relevant.

Of course, a U.S. citizen of Pakistani origin, for instance, could be expected to have relatives in Pakistan and other valid reasons for visiting that country on a regular basis. If a U.S. citizen of Pakistani origin were to travel frequently to Pakistan, would that fact on its own, in your view, be a trigger for looking more closely at that individual when he or she crossed the border?

Response: When an initial inspection of property gives rise to probable cause of a violation of U.S. law, CBP (or ICE) may seize the property consistent with the Fourth Amendment. The Supreme Court and some lower courts have held that copying materials is permissible without a heightened level of suspicion when the materials were discovered as part of a lawful search. Under CBP procedures, however, it may copy materials when (i) there is heightened suspicion of a possible violation of U.S. law, such as possession of child pornography or a connection to terrorism; or (ii) there is a need for technical assistance, such as translation, to determine what the materials are. Information is retained so long as it is of continuing relevance to law enforcement activities. If, for example, technical assistance reveals the information to be not relevant, it is destroyed.

Question#:	85
Topic:	search - 3
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Internal policies also compel regular review and purging of information no longer relevant. Certain of these internal policies implicate classified or law enforcement sensitive information.

At the hearing, in response to your question on a person's connections to countries associated with significant terrorist activity, I stated that "U.S. citizens are not treated differently based upon their ethnic background, but their individualized behavior could be a basis for singling them out, or if they matched a physical description it could be a basis for singling them out." When encountering an arriving person, CBP officers rarely have advance knowledge about whether that person's frequent travel is for valid reasons or otherwise. One of the primary objectives of the CBP inspection process is to establish that a person is lawfully entering the United States and does not pose a threat to the safety and welfare of our nation. Thus, a U.S. citizen's frequent travel to countries associated with significant terrorist activity may give our officers reason to question that person's reasons for travel. As soon as the officers are satisfied that the person had valid reasons for the frequent travel, and there are no other areas of concern or potential violations, the person would be cleared.