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**From:** (b)(6); (b)(7)(C)  
**Sent:** Tuesday, May 06, 2008 10:31 AM  
**To:** (b)(6); (b)(7)(C)  
**Subject:** FW: Ninth Circuit Upholds Suspicionless Searches of Laptops at the Border

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See below for a request from Visa Corp. regarding border search policy.  
Please advise how you would like to handle.

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Associate General Counsel (Intelligence)  
Department of Homeland Security

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**From:** (b)(6); (b)(7)(C)  
**Sent:** Friday, May 02, 2008 2:28 PM  
**To:** (b)(6); (b)(7)(C)  
**Cc:** [REDACTED]  
**Subject:** FW: Ninth Circuit Upholds Suspicionless Searches of Laptops at the Border

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Good Afternoon!! FYI – The author of this note is the Senior VP for Security at VISA Corporation. We met with him recently as part of our OIA/HITRAC private sector outreach initiative. I believe his questions are more legal than policy, and I was hoping you could point me in the right direction. Thanks!!

V/R

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**From:** (b)(6); (b)(7)(C)  
**Sent:** Thursday, April 24, 2008 3:12 PM  
**To:** (b)(6); (b)(7)(C)  
**Subject:** Ninth Circuit Upholds Suspicionless Searches of Laptops at the Border

(b)(6); (b)(7)(C)

The decision by the Ninth Circuit has raised some questions among some of our executives . The questions include :

1. Can anyone advise if there is an obligation on the government and its border agents to keep confidential any business confidential info they see on the lap top?
2. Does anyone know if agents have the right to require individuals to give up passwords and whether they have the right to break into encrypted info both on lap top and even memory sticks?
3. Should Visa have a policy or a travel advisory for Visa employees to address this border situation?

Can you offer any insights into Dept of Homeland Security Policy or plans to implement . Specifically what if anything should Visa and other corporations put into policy . Thanks  
Best Regards,

3/11/2010

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### Ninth Circuit Decision

The Ninth Circuit has held that government agents may search laptops and other electronic devices at the border (including Customs control at airports) even without any suspicion that a crime has been committed. As we previously reported, a federal district court in California had ruled that Customs officers had no basis for suspecting a crime when they searched Michael Arnold's laptop at LAX and found child pornography, and therefore could not use the results of that search in prosecuting Arnold. The lower court had reasoned that electronic storage devices "function as an extension of our own memory," and that the laptop search was analogous to a "strip or body cavity search" and was thus "an intrusion into ... dignity and privacy interests." The Ninth Circuit, in *United States v. Arnold*, disagreed, relying on Supreme Court precedent establishing that a person's expectation of privacy is far lower at the border than inside the country. The Ninth Circuit also reasoned that the search of a "piece of property ... simply does not implicate the same 'dignity and privacy' concerns as 'highly intrusive searches of the person,'" citing the Supreme Court's ruling in *United States v. Flores-Montano*. This ruling suggests that privacy-conscious travelers might want to encrypt any sensitive information on their laptops or email it to their destination (though these options also carry their own risks).

The Ninth Circuit also found that the laptop search did not cause "exceptional damage to property" and was not performed in a "particularly offensive manner" -- the two situations in which the Supreme Court (in *Flores-Montano*) "had left open the possibility of requiring reasonable suspicion for certain border searches of property." It also noted that Arnold had failed to show why the search of his laptop should be treated differently from the "suspicionless border searches of travelers' luggage that the Supreme Court ... ha[s] allowed." In particular, it rejected Arnold's argument that the laptop's ability to store a large number of personal documents rendered it more analogous to home than a bag: in addition to noting that "one cannot live in a laptop," the court concluded that "case law does not support a finding that a search which occurs in an otherwise ordinary manner ... is 'particularly offensive' simply due to the storage capacity of the object being searched."