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**From:** (b)(6); (b)(7)(C)  
**Sent:** Wednesday, June 25, 2008 8:37 AM  
**To:** (b)(6); (b)(7)(C)  
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**Subject:** Fw: Ahern Testimony

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**Attachments:** \_0624184039\_001.pdf



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See below - it was sent at 6:46 last night.

In line to get in right now...

Thanks.

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

Assistant Director  
U.S. Department of Homeland Security  
Office of Legislative Affairs  
Washington, D.C. 20528

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----- Original Message -----

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**To:** (b)(6); (b)(7)(C)

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

**Cc:** (b)(6); (b)(7)(C)

**Sent:** Tue Jun 24 18:46:38 2008

**Subject:** Ahern Testimony

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

Assistant Director  
Department of Homeland Security  
Office of Legislative Affairs  
Washington DC 20528

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

**STATEMENT  
OF**

**Jayson P. Ahern  
Deputy Commissioner  
U.S. Customs and Border Protection**

**Department of Homeland Security  
Before  
The Senate Committee on the Judiciary  
Constitution Subcommittee  
“Laptop Searches and Other Violations of Privacy Faced  
By Americans Returning from Overseas Travel”  
Washington, DC  
June 25, 2008**

Chairman Feingold, Ranking Member Brownback, distinguished Members of the Subcommittee, I am pleased to submit this testimony to you to discuss U.S. Customs and Border Protection (CBP) policies and practices with regard to searching the contents of laptops and other digital devices at our nation’s ports of entry. My testimony today will provide you with specific information that the subcommittee has requested on how CBP inspects these items.

At the outset, I want to emphasize that CBP disagrees with the premise contained in this hearing’s title: CBP’s efforts do *not* infringe on Americans’ privacy. It is important to keep in mind that CBP is responsible for enforcing over 600 laws at the border, including those that relate to narcotics, intellectual property, child pornography and other contraband, and terrorism. CBP’s ability to examine what is coming into the country is crucial to its ability to enforce U.S. law and keep the country safe from terrorism. This notion is not novel. As the U.S. Supreme Court has stated, “since the

beginning of our Government,” the Executive Branch has enjoyed “plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.”

More recently, federal courts throughout the country have recognized that CBP’s efforts at the border with respect to digital devices--like our efforts with respect to vehicles, suitcases, backpacks, containers of hard-copy documents, and other conveyances--are consistent with long-standing constitutional authority at the U.S. border and other laws.. This past April, in *United States v. Arnold*, the U.S. Court of Appeals for the Ninth Circuit upheld the suspicionless search of an international traveler’s laptop computer that uncovered child pornography, stating that “[c]ourts have long held that searches of closed containers and their contents can be conducted at the border.” Likewise, in 2006 a U.S. citizen was convicted following the discovery of child pornography on his laptop during a border search. The Ninth Circuit refused to vacate the conviction. And a similar conclusion was reached by the U.S. Court of Appeals for the Fourth Circuit in *United States v. Ikes*, which also involved a conviction for possession of child pornography.

In addition to several successes in arresting individuals possessing child pornography, CBP border searches also have been helpful in limiting the movement of terrorists, individuals who support their activities and threats to national security. During border searches of lap tops CBP officers have found violent jihadist material, information about cyanide and nuclear material, video clips of Improvised Explosive Devices (IEDs) being exploded, pictures of various high-level Al-Qaida officials and other material

associated with people seeking to do harm to U.S. and its citizens. These materials have led to the refusal admission and the removal of these dangerous people from the United States.

Another example of how a border search led to disruption of a national security threat is the case of Xuedong Sheldon MENG . In November 2004, ICE agents learned that MENG, a Canadian national, allegedly stole proprietary software programs from a U.S. company and attempted to sell the software to the People's Republic of China (PRC). Two of the software programs are both controlled items for export under the AECA and the International Traffic in Arms Regulations (ITAR). On December 6, 2004, MENG traveled from China to Orlando, FL, to attend a defense conference. ICE agents coordinated with CBP to conduct a border search of MENG and his belongings when he entered the United States at Minneapolis, MN. During the search, CBP officers identified a laptop computer and portable hard drive belonging to MENG. A preliminary search of the laptop revealed that it contained software belonging to the American company which is a controlled item for export under ITAR.

On June 18, 2008, MENG, was sentenced in the Northern District of California to two years incarceration for violations of 18 USC 1831, the Economic Espionage Act; and 22 USC 2778, the Arms Export Control Act. MENG also received a \$10,000 fine and 3 years probation. Additionally, this is the first ICE case involving a conviction under 18 USC 1831. This is also the first conviction and sentencing for violations of 22 USC 2778 involving computer software. This joint ICE and FBI investigation was made possible by information gained by the initial CBP border search of his lap top and portable hard drive.

CBP and Immigration and Customs Enforcement (ICE) continue to carry out border searches within their legal authorities and have been able to arrest criminals and limit the entrance of dangerous people to the U.S. as a result. To treat digital media at the international border differently than CBP has treated documents and other conveyances historically would provide a great advantage to terrorists and others who seek to do us harm. As the U.S. Court of Appeals for the Second Circuit stated in the case *United States v. Irving*, which upheld the border search of luggage and a subsequent search of a camera and computer diskettes, treating the computer diskettes differently than other closed containers “would allow individuals to render graphic contraband, such as child pornography, largely immune to border search simply by scanning images onto a computer disk before arriving at the border.” The same could be said for terrorist communications. Indeed, the Fourth Circuit in *United States v. Ickes* rejected an argument that additional protections should apply to certain material contained on computers, stating that this logic “would create a sanctuary at the border” for all such material, “even for terrorist plans.”

As America’s frontline border agency, CBP employs highly trained and professional personnel, resources, expertise, and law enforcement authorities to meet our twin goals of improving security and facilitating the flow of legitimate trade and travel. CBP is responsible for preventing terrorists and terrorist weapons from entering the United States, for apprehending individuals attempting to enter the United States illegally, and stemming the flow of illegal drugs and other contraband. We also are protecting our agricultural and economic interests from harmful pests and diseases and safeguarding American businesses from theft of their intellectual property. Finally, we

are regulating and facilitating international trade, collecting import duties, and enforcing United States trade laws.

One goal of the CBP inspection process is to establish that a person attempting to enter the United States does not pose a threat to the safety and welfare of our nation. Our ability to search information contained in documents and electronic devices, including laptops, is just one enforcement tool aimed at defending against these threats. As you know, all persons, baggage, and other merchandise arriving in or departing from the United States are subject to inspection and search by CBP officers. As part of the inspection process, officers verify the identity of persons, determine the admissibility of aliens, and look for possible terrorists, terrorist weapons, controlled substances, and a wide variety of other prohibited and restricted items. Every person seeking to enter the United States must be examined by a CBP officer at a designated port of entry. This may include checking names and conveyances in law enforcement databases; examining entry and identity documents; examining belongings and conveyances; collecting biometric information where applicable; and questioning the traveler.

Aliens have the burden of establishing that they are admissible to the U.S., or are entitled to the immigration status they seek. U.S. citizens also have to establish their citizenship to the satisfaction of the officer and may be subject to further inspection if they are the subject of a lookout record, if there are indicators of possible violations (such as the possible possession of prohibited items, narcotics, or other contraband), or if they have been selected for random compliance examination.

At the Senate Judiciary Committee's hearing on the oversight of the Department of Homeland Security (DHS), held on April 2, 2008, a question was asked about the

inspection of individuals with connections to countries associated with significant terrorist activity. At that hearing, Secretary Chertoff 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." 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, an individual's frequent travel to countries associated with significant terrorist activity, narcotics smuggling, or sexual exploitation of minors, may give our officers reason to question that person's reasons for travel. When officers are satisfied that the person has valid reasons for the frequent travel, and there are no other areas of concern or potential violations, the person may be cleared to enter the United States. There are no special rules for personal belongings or documents. However, CBP does enforce numerous laws concerning material in paper or electronic form, both of which are treated the same conceptually and constitutionally. For example, U.S. laws prohibit the importation of child pornography, that constitutes pirated intellectual property, or that contains any threat to take the life of or inflict bodily harm upon any person.

In regards to the privacy of these searches, CBP officers conduct their work in a manner designed to adhere to all constitutional and statutory requirements, including those that are applicable to privileged, personal, and business confidential information. The Trade Secrets Act prohibits federal employees from disclosing, without lawful authority, business confidential information to which they obtain access as part of their official duties. Moreover, CBP has strict policies and procedures that implement

constitutional and statutory safeguards through internal policies that compel regular review and purging of information that is no longer relevant. CBP will protect information that may be discovered during the examination process, as well as private information of a personal nature that is not in violation of any law.

One example of an instance where CBP determined it necessary to conduct a search of a laptop computer and other electronic equipment occurred on July 17, 2005, when a Michael Arnold arrived at Los Angeles International Airport on a flight from Manila, Philippines. Mr. Arnold was selected for a secondary examination, and exhibited nervous behavior when questioned about the purpose of travel to Manila. After failing to provide consistent answers about the individual's occupation and purpose of travel, a declaration was obtained and the individual's luggage was inspected. Upon the inspection of the laptop and CDs found in the individual's luggage, officers found images of adults molesting children. U.S. Immigration and Customs Enforcement (ICE) then conducted an interview of the individual and searched the contents of the individual's laptop, CDs, and memory stick. These items were detained, and turned over to ICE for investigation. During his subsequent prosecution, the district court suppressed the evidence on the ground that the search violated the constitution. The government appealed, and the lower court's decision was overturned by the Ninth Circuit, which held that "reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border." As the U.S. Supreme Court noted in the *Flores-Montano* decision in 2004, the Government's interest in preventing the entry of unwanted persons and effects – and the corresponding search authority of the sovereign – is at its zenith at the international border.



It is important to understand that CBP typically encounters well over a million travelers every day and is responsible for enforcing over 600 federal laws at the border. CBP does not have the resources to conduct searches on every laptop or cell phone that pass through our ports of entry, nor is there a need to do so. When we do conduct a search, it is often premised on facts, circumstances, and inferences which give rise to individualized suspicion, even though the courts have repeatedly confirmed that such individualized suspicion is not required under the law.

CBP's frontline officers and agents will continue to protect America from terrorist threats and accomplish our traditional enforcement missions in immigration, customs, and agriculture, while balancing the need to facilitate legitimate trade and travel. As I mentioned, the initiatives discussed today are only a portion of CBP's efforts to secure our homeland, and we will continue to provide our men and women on the frontlines with the necessary tools to help them gain effective control of our Nation's borders.

I would like to thank the Subcommittee, for the opportunity to present this testimony today, and for your continued support of DHS and CBP