

Testimony of

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Border Inspection "Search"

Strategies: Managing Risk and

Focusing Resources

Testimony before

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My name is James Jay Carafano. I am the Assistant Director of the Kathryn and Shelby Cullom Davis Institute for International Studies and a Senior Research Fellow for the Douglas and Sarah Allison Center for Foreign Policy Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

Mr. Chairman and other distinguished Members, thank you for the opportunity to testify before you today. In my testimony, I would like to (1) make the case that the public policy issues regarding searches and inspections at border ports of entry and exit (including searching electronic equipment, such as computers and personal digital devices) are more important than the narrow legal issues, (2) explain why searches are an important component of effective border security strategy and advocate for continuing to allow federal entities broad discretionary authority in implementing the searches and inspections at the border, and (3) offer some specific proposals on ensuring that border searches and inspections remain an efficient and effective component of border security strategy.

A War to Be Won

It should be acknowledged at the outset that there is clearly a need for effective searches and inspections at US ports of entry. Hundreds of millions of people cross the U.S. border each year in numbers approaching twice the population of the United States. The overwhelming majority travel

through legal points of entry and exit, such as land border crossing points, airports, and harbors. Billions of tons of goods, accounting for a third of the U.S. gross domestic product, transit America's borders as well. Terrorists and transnational criminals have attempted to exploit every known legal means for moving people, goods, and services across U.S. borders. In fact, virtually every known or suspected terrorist has exploited legal opportunities to enter or remain in the United States. Most passed through screening at an established point of entry.

These vulnerabilities make it likely that terrorists will continue to use sophisticated travel methods to enter the United States, including acquiring new passports to hide past travel. They will do this because there is still no viable, reliable means of ensuring that important information on terrorist travel gets to frontline officers.

Effective security at the points of entry and exit is essential not only to keeping bad things and bad people out of the United States, but also to protecting the border crossing cities-- key nodes in the networks that connect America to the world of global commerce. This security has to be provided while facilitating the free flow of goods, people, services, and ideas that are the lifeblood of the American economy and a key competitive advantage for the United States in the worldwide marketplace.

As the 9/11 Commission rightly noted, "The challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected." The most vital national security mission for U.S. border assets is to identify high-risk people and cargo entering the United States and take appropriate action.

Terrorist threats aside, there are numerous other criminal and malicious activities that routinely seek to exploit the relative freedom of traversing US borders. There is a rampant problem of drug, weapons, and human trafficking which occur at our borders. Thus, there is little question that searches and inspections are vital to US safety, prosperity, and security.

A Question of Policy

Many of the criticisms aimed at the government, and specifically the Custom and Border Protection, have claimed that intrusive border searches, including inspecting computers and other electronic devices, are illegitimate and unconstitutional. This practice of misusing or reinterpreting laws to make American actions appear illegitimate is called "lawfare," instead of debating whether or not this is a useful, practical and acceptable practice for the sake of national security. ¹ Federal authorities have an unquestionable right to conduct legitimate searches at ports of entry. The Ninth Circuit and Fourth Circuit courts agree that searching laptops at the border is legal. The concerns of privacy and civil liberties are always important. However, at this point finding ways to prove that the Department of

Homeland security is somehow conducting illegal searches is not prudent. Instead, we should be discussing if the policy is right or wrong and what we must do to make it better.

Enforcing Laws at the Border

Customs and Border Patrol agents have a difficult mission. At the border, these CBP agents must determine in a matter of minutes if persons represent a concern for public safety or security. They must do this in a manner that is (1) appropriate under US law, (2) does not unnecessarily impede legitimate trade and travel, and (3) safeguards US interests. In addition, CBP agents are also responsible for enforcing our customs laws. They are charged with preventing a variety of things from entering this country from fruits, pirated goods, and child pornography to explosives and biological weapons. In this regard, searches of laptops and other electronic equipment is not unreasonable. Electronic equipment can and has been used to carry illicit goods and information. There are numerous examples where border agents have found laptops contained files reflecting illegal activity. One such example would be the case of Michael Arnold who had his laptop searched in 2005, leading agents to find child pornographic pictures and arrest him.²

Nor are electronics exclusive of our enemies. Analysts have documented, for example, a steady increase in terrorists' use of the Internet.³ Searching laptops serve as an important layer for DHS's counter-terrorism efforts. There have been numerous instances where information gathered from terrorist laptops has provided crucial information.

Discretionary Authority

CBP must be able to adapt to threats for which our enemies will constantly be seeking new tactics to elude them. In order to be successful, CBP must avoid predictable patterns of behavior. We should retain the tradition of discretion of law enforcement officers to apply their judgment to when searches are appropriate.

This ability for CBP agents was crucial in stopping the millennium bomber. In 1999, CBP agents elected to search Ahmed Ressaam's vehicle due to suspicious behavior while answering usual questions at the border. The ability for agents to act on their suspicions led them to discover explosives in Ressaam's trunk. ⁴

Responsible Implementation

The public policy debates about security and civil liberties are often framed in a zero sum context--where any advance in national security policies necessarily comes at the expense of civil liberties. In practice, however, good public policies equally advance the causes of enhancing public safety and security and protecting individual liberties. It is important that we take into consideration concerns over privacy when conducting searches on an individual's laptop, and thus this practice should be done in a responsible manner. The best strategy to secure this country is a layered and risk-based approach.

The Department of Homeland Security should

? Effectively employ intelligence and information sharing to better target border searches. CBP must work closely with Immigration and Customs Enforcement and other federal law enforcement agencies, as well as state and local law enforcement partners to identify high risk travelers and target searches more effectively. Connecting the dots, making sure that the right information gets to the right person in order to do the right thing, is the single greatest capability needed to integrate international, border, and internal enforcement. DHS lacks an integrated intelligence plan and mechanisms to distribute information effectively. A more concerted intelligence effort is required.

DHS should make development of an integrated plan for intelligence, surveillance, and reconnaissance for border and internal enforcement a top priority. The department should work with the Director of National Intelligence to better leverage other capabilities of the intelligence community (such as those of the CIA and the Pentagon) in support of border operations.

? Obtain traveler information earlier. Continuing to push the border outward is a smart strategy. A new program DHS is launching for travelers from visa waiver countries called Electronic System for Travel Authorization (ESTA) allows travelers to enter information online prior to departure. ESTA will be used to replace the paper based forms travelers must complete while on the airplane. That coupled with initiatives like checking flight manifests, allow CBP agents more time to examine information, and will greatly enhance their ability to target the real threats. ESTA should be improved to ensure full participation by making it available for all potential users, that is providing the application in other languages and in non web-based form. In addition, DHS should have a grievance procedure that provides information for denied applicants.⁵

? Conduct searches based on a risk-based assessments. By taking a targeted approach, CBP agents can focus their time and resources on those they identify as posing a risk. A vast majority of travelers do not proceed to secondary screenings, however, those who require it could have their laptops searched if needed.

? Improve human capital and continuous technology. Continue to emphasize training of one face at the border so that they have skills to do effective risk assessments and deploy technologies so they have the information they need to do this better. At the Nogales port of entry, CBP is testing an advanced computerized screening system that checks people as they cross the border. The real value of these systems is not checking and scrutinizing every individual, rather it is looking for anomalies and patterns that allow border enforcement to target criminal smuggling gangs. The technologies being tested at Nogales speed up legitimate trade and travel and allow border enforcement at the ports of entry to focus criminal activity.

Conclusion

It is not reasonable to ignore the potential threats that come with laptops. Conducting searches in responsible manners helps protect the American public in a respectful manner. Thank you for the opportunity to discuss this important issue and I look forward to your questions.

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1 Lee A. Casey and David B. Rivkin, Jr., "International Law and the Nation-State at the U.N.: A Guide for U.S. Policymakers," Heritage Foundation Backgrounder No. 1961, August 18, 2006, at www.heritage.org/Research/WorldwideFreedom/bg1961.cfm.

2 Gautham Nagesh, "Groups ask court to reverse ruling, limit laptop searches at border," NextGov, June 13, 2008, at http://www.nextgov.com/nextgov/ng_20080613_2643.php (June 19, 2008).

3 For example, see Jim Melnick, "The Cyberwar Against the United States," The Boston Globe, August 19, 2007, at www.boston.com/news/globe/editorial_opinion/oped/articles/2007/08/19/the_cyberwar_against_the_united_states (January 31, 2008).

4 "Millenium Bomber' sentenced to 22 years for bomb plot," U.S. Customs and Border Protection Today, Vol. 3, Nos. 7/8 (July/August 2005), at http://www.cbp.gov/xp/CustomsToday/2005/Jul_Aug/other/ahmed_ressam.xml (June 20, 2008).

5 Jena Baker McNeill, "Electronic Travel Authorization: Important for Safe and More Secure Overseas Travel," Heritage Foundation WebMemo No. 1964, June 19, 2008, at <http://www.heritage.org/Research/HomelandSecurity/wm1964.cfm>.