

Testimony of

Farhana Y. Khera

June 25, 2008

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President & Executive Director, Muslim Advocates

Hearing on

Laptop Searches and Other Violations of Privacy

Faced by Americans Returning from Overseas Travel

United States Senate Committee on the Judiciary

Subcommittee on the Constitution

June 25, 2008

Introduction

On behalf of Muslim Advocates, I welcome the opportunity to testify before the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution regarding invasive searches and interrogations at the nation's borders.

Muslim Advocates (www.muslimadvocates.org) is a national legal advocacy and educational organization dedicated to promoting and protecting freedom, justice and equality for all, regardless of faith, using the tools of legal advocacy, policy engagement and education and by serving as a legal resource to promote the full participation of Muslims in American civic life. Founded in 2005, Muslim Advocates is a sister entity to the National Association of Muslim Lawyers, a network of over 500 Muslim American legal professionals. Muslim Advocates seeks to protect the founding values of our nation and believes that America can be safe and secure without sacrificing constitutional rights and protections.

Since September 11, 2001, the Muslim American community has been subjected to heightened scrutiny by law enforcement authorities, including "voluntary" interviews conducted extensively in the community by the FBI; the NSEERS registration program targeting males from primarily Muslim and Arab nations to comply with special registration requirements with the INS (and later DHS); and concerns

about targeting the Muslim American community for data-gathering about where they live, their socioeconomic status, their interest in alternative forms of media, associations with ethnic organizations, where they worship, and other private information.

Muslim Advocates has received a number of complaints from U.S. citizens and legal residents in the Muslim, Arab and South Asian American communities who have experienced invasive questioning, searches and seizures at airports or land crossings upon their return to the U.S. after international travel. These activities include searches and seizures of laptops, cell phones, and digital cameras, as well as questioning about individuals' associations, or religious or political beliefs and activities. These incidents raise concerns about:

- (1) invasive questioning;
- (2) invasive searches and seizures, especially of data carrying devices; and
- (3) discriminatory policing at the border.

The U.S. Department of Homeland Security (DHS) and Customs and Border Patrol (CBP) have a critical responsibility to protect our nation's borders, including barring entry to those who would seek to do our nation harm. At the same time, DHS and CBP officials, who have been granted enormous law enforcement power by the American people, have an obligation to wield that power consistent with the rights and protections guaranteed by the Constitution to all Americans, regardless of religion, ethnicity or race.

My testimony presents a number of incidents from across the country that suggest that the First and Fourth Amendment rights of innocent Americans are being violated. The circumstances of these incidents also suggest that racial, ethnic and/or religious profiling is taking place at the border. My testimony therefore concludes with recommendations for Congress to help protect the rights of law-abiding Americans returning home.

Interrogations and searches at the nation's borders are invasive and pervasive.

Muslim Advocates and other civil rights groups have received numerous complaints from travelers who, upon re-entry to the U.S., are subjected to invasive questions and/or searches. Innocent Muslim, Arab and South Asian Americans from all walks of life have had their electronic devices searched by CBP agents, or have been interrogated by CBP agents about their political views and activities, religious beliefs and practices, and associations with organizations, friends and relatives - all without any reasonable suspicion that the individuals were engaged in unlawful activity.

Most of the complaints received involve experiences from 2007 to the present, at air and land ports of entry across the U.S., including Seattle, San Francisco, Houston, Detroit, Boston, and Newark. Although these complaints are not the result of a comprehensive study or a systematic collection of incidents, there is reason to believe that these cases are indicative of a pattern of similar cases at the border.

The following is a summary of some of the complaints received:

1. A corporate vice president of a major high-tech company based in the Seattle, WA area has been subjected to interrogations on at least eight separate occasions since Spring 2007. A business and community leader, he previously testified before the U.S. House of Representatives on measures to strengthen the American information technology industry and received the Walter Cronkite Faith and Freedom Award from the Interfaith Alliance Foundation in 2003. Since early 2007, he has traveled for business and personal reasons to a number of different countries, including Japan, Canada, United Kingdom (and other parts of Europe), and Turkey. Upon his return, CBP agents have interrogated him about the names, birth dates and addresses of family members living abroad and in the U.S., the identities of business and personal contacts with whom he met during his travels, his religious practices (e.g., which mosque he attends), and his activities on behalf of a Muslim charitable organization in the Greater Seattle area he helped establish, as well as the organization's activities. (This charity, which has never been designated as a terrorist organization, has worked closely with other faith communities in the Pacific Northwest as part of multi-faith efforts, including collaborative community service projects such as building homes for the needy.) CBP officials have searched his cell phone, made copies of various documents on several occasions, and extensively searched his belongings, as well as those of family members who traveled with him. This U.S. citizen has filed complaints with DHS, as well as the FBI and his members of Congress, but he has yet to receive a meaningful reply. One CBP agent told him that to avoid such interrogations he would have to cease international travel.

2. An American Muslim of Pakistani descent, who is a graduate of Georgetown University Law Center and now practicing with a major law firm on the west coast, was interrogated by CBP agents at San Francisco International Airport after visiting relatives overseas in the Spring 2008. Upon confirming her citizenship status, she thoroughly answered initial questions about her travels and identity. Nevertheless, without any reason to believe that this U.S. citizen was carrying prohibited items or was otherwise engaged in unlawful activity, the CBP agent arbitrarily insisted on searching her luggage, seized her digital camera and reviewed the images -- reflecting pictures from her travel with her family, as well as various photos taken in the United States prior to her travel. The agent interrogated her about the identities of the people in her travel photos, their location, and her relationships to them. Upon seeing a book in her bag about a presidential candidate, the CBP agent then posed questions about her political views of candidates in the 2008 presidential election.

3. A firefighter, 20-year former member of the National Guard, Gulf War veteran, and current member of the local Homeland Security Emergency Response Team in Toledo, OH has been questioned on numerous occasions since 2006 at the Detroit Ambassador Bridge while trying to visit family members in Ontario, Canada.¹ He was detained at times for up to four hours. CBP agents have searched his car and his cell phone and have asked about why he chose to convert to Islam. In one encounter, CBP officials confronted him with a letter to the editor he wrote in a local Toledo newspaper criticizing U.S. foreign policy. CBP agents asked what inspired him to write it and whether he personally knew anyone mentioned in the piece. On at least ten occasions, he has been asked about any foreign associates he or his wife, who is of Lebanese descent, may have and his financial transactions.

This military veteran has persistently sought redress for this scrutiny, but has only been told by DHS that his "records have been modified." After receiving this response, he has been detained at the border three additional times, during the most recent of which he was handcuffed in front of his children as a CBP agent said, "look at what you have got yourself into." He has also been intimidated at the border by a CBP agent who emptied and reloaded a gun while interrogating him.

4. An American Muslim graduate student at Yale University is frequently subjected to scrutiny when returning from international travel. This U.S. citizen is currently pursuing a doctoral degree in Islamic studies, has been cited by press outlets including The Houston Chronicle and The Washington Post as an expert on mainstream Islam and the integration of Muslims in the U.S., and has been consulted as an expert by federal government agencies, including the National Counterterrorism Center and the Department of State. The scrutiny appears to have begun in 2005 and continues to the present. CBP agents at Newark International Airport have interrogated him several times about the contents of his lectures, the places where he has lectured, and even the mosques in which he has prayed. In addition, CBP agents at Houston Intercontinental Airport also interrogated him in Spring 2005 about his views of particular religious doctrines. CBP agents at various locations have photocopied his lecture notes on several occasions, and agents at the Niagara Falls border crossing in late 2005 seized and recorded data from his cell phone before interrogating him about his relationships with individuals who appeared in it. He has asked authorities both informally and formally about the basis for the apparent suspicion he has received. Citing national security concerns, however, authorities have denied him any explanation or guidance about how to relieve it.

5. A Muslim American of South Asian descent who is an engineer in the information technology sector was detained for several hours, searched and interrogated at San Francisco International Airport in Summer 2007 after returning from an overseas business trip that included a visit with family members. CBP agents searched and seized his checkbook and asked questions about his donations to specific charitable and religious organizations and his associations with specific Muslim community leaders in the San Francisco Bay Area. The agent demonstrated familiarity with the Muslim organizations and their leaders -- none of whom have been designated by the federal government as entities or individuals with whom Americans are prohibited from doing business. After seizing (and ultimately confiscating) the traveler's cell phone, the agent advised him that he "would be in big trouble" if a search of its contents

revealed the names of particular leaders of charitable organizations to which he had donated. This traveler's cell phone was ultimately returned, in a broken and inoperable condition, five months after this incident - around the same time that he became a naturalized U.S. citizen.

6. A San Francisco Bay Area software engineer reported being questioned for almost 20 hours after three international trips, despite hearing a CBP agent explain to another agent that he was not an actual match to a watch list. This U.S. citizen was asked about his religion, whether he hated the U.S. government, whether he had visited mosques, and even told that he should "pray more." When he offered to give one agent his wife's phone number so the agent could verify his identity, he was asked, "Isn't it rude in Islamic culture to give a man a woman's phone number?" Customs agents inspected his company laptop computer, examined all the books in his luggage, recorded information on one book about the Quran, and interfered when he attempted to take notes about the screening. Despite sending complaint letters to multiple federal agencies, he has been unable to resolve his situation.²

7. A California businessman has been detained, interrogated, and searched numerous times upon his return to the United States. He has been asked what he thinks of Iran's president, whether he supports terrorism, whether he met any terrorists during the Hajj pilgrimage to Saudi Arabia, and what he thinks about Jews and the state of Israel. This U.S. citizen's laptop computer was removed from his presence for over two hours, and he was told that officers were examining all the files, including letters from his wife and children.³

8. A software engineer in Northern California has been subjected to scrutiny beginning in January 2007 at San Francisco International Airport after returning from a religious pilgrimage to Saudi Arabia. His digital camera was searched and CBP agents made him identify other people accompanying him on the pilgrimage who appeared in the pictures. In June and July 2007, this U.S. citizen was scrutinized during consecutive weekend trips to Canada for a self-development workshop organized by a Muslim organization. On each occasion his cell phone was searched and was used to search another SIM card he had. The interrogations lasted up to two hours, and his attempt to return from Ottawa, Canada in June 2007 was impeded by a detention, interrogation and laptop and cell phone search that forced him to miss his flight. 4 CBP agents posed questions about the particular conference he attended, its host, and the host's religious views. CBP agents questioned him at length about whether he believed the founder of the conference has ties to terrorists, and whether the traveler himself could have encountered terrorists, or terrorist sympathizers, at mosques he attends.

Citing concerns about CBP agents recording his family members' information, this traveler chose to suspend international travel and has resumed only after purchasing an extra cell phone and laptop with no stored data. After the most recent interrogation in Toronto, Canada in July 2007, a CBP agent affirmatively apologized for posing such invasive questions and suggested that he was required to do so.

9. An American Muslim has been detained, questioned and searched at Logan International Airport on several occasions from 2002 to the present upon returning home from pursuing graduate studies abroad. CBP agents have searched his laptop computer on at least two occasions and have taken his flash drives and CD's to a back room where he presumes that the information has been copied. After confirming his citizenship, he has been asked about his religious practices, beliefs, and even directly challenged about why he is a Muslim. Invasive interrogations and searches offend several core constitutional rights.

CBP practices described herein burden substantive constitutional rights, including the Fourth Amendment guarantee against unreasonable searches and seizures and the First Amendment freedom to maintain political views, religious practice and personal associations without inviting government scrutiny. The recent decision of the U.S. Court of Appeals for the Ninth Circuit in *U.S. v. Arnold*, 2008 U.S. App. LEXIS 8590 (9th Cir., Apr. 21, 2008), holding that CBP can conduct searches of laptops without reasonable suspicion, magnifies these concerns. That decision effectively grants CBP the authority to conduct searches of Americans returning home arbitrarily and without cause.

The privacy, security and liberty interests of law-abiding Americans are at stake. In the wake of the *Arnold* decision, a broad array of over 20 civil libertarian, civil rights, interfaith and community organizations from across the ideological spectrum recently called on Congress to conduct oversight of CBP's investigatory activities at the border and to consider legislation to protect the constitutional rights of Americans returning home from international travel.⁵

Invasive questioning at the border about individuals' political opinions, religious views, or individuals' houses of worship, pilgrimage or other religious practice significantly burdens First Amendment rights to religious freedom and free expression. Invasive questioning about individuals' participation in charitable organizations or conferences or relationships with family and friends also significantly burdens the First Amendment right of association. Similarly, intrusive searches of digital cameras, cellular phones and handwritten notes place at risk of potential scrutiny the various subjects of a traveler's photos, cell phone contacts, or even people merely referenced in a traveler's private personal diary.

The statute creating DHS charged the new agency with securing the borders and preventing the entry of terrorists and instruments of terrorism into the United States. In the incidents described above, however, CBP appears to be asking questions about First Amendment protected activities and expression that are unrelated to specific criminal activity or border security.⁶ Instead, these questions, as well as the invasive searches and seizures of electronic data, seem to be part of a general data-gathering activity by CBP. If so, a general data-gathering activity raises significant privacy and civil liberties concerns, including why this data is being gathered, who is being targeted, what data is being gathered, and how the data is being stored, shared and used. CBP's conduct raises concerns about racial, ethnic and religious profiling and runs counter to equal protection guarantees.

The complaints received from Muslim, Arab and South Asian Americans suggest that racial, ethnic or religious profiling is taking place at the borders and airports.

With the CBP asserting a broad authority to engage in searches, seizures and questioning, it raises legitimate concerns about how this authority is being carried out and whether there is an unfair and disparate impact on certain racial, ethnic or religious communities.⁷ If, especially after the Arnold decision, a CBP agent is not required to have particularized suspicion to search or question, then there is an even greater likelihood that bias or impermissible factors can influence a CBP agent.

Such conduct would be wrong and in violation of the equal protection rights guaranteed by the Constitution. The administration has taken steps to end race or ethnic based profiling by federal law enforcement agencies. In 2001 during his first address to Congress, President Bush pledged to end racial profiling.⁸ The U.S. Department of Justice (DOJ) later issued guidance purporting to ban racial and ethnic profiling by federal law enforcement agencies.⁹ That DOJ Guidance stated:

"Racial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society."

The DOJ Guidance then set forth the following principles:

"In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be helpful."

"In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful."

The DOJ Guidance then set forth two exceptions - for national security and border integrity. In these contexts, the DOJ Guidance states that federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution or federal law.

The Department of Homeland Security subsequently adopted the DOJ Guidance:

"It is the policy of the Department of Homeland Security to prohibit the consideration of race or ethnicity in our daily law enforcement activities in all but the most exceptional instances, as defined in the DOJ Guidance. DHS personnel may use race or ethnicity only when a compelling governmental interest is present. Rather than relying on race or ethnicity, it is permissible and indeed advisable to consider an individual's connections to countries that are associated with significant terrorist activity."¹⁰

At a hearing before the Senate Judiciary Committee on April 2, 2008, responding to a question from Senator Feingold, Homeland Security Secretary Michael Chertoff denied that ethnic profiling is taking place and explained that CBP agents consider factors such as individualized behavior and travel patterns in determining whether a U.S. citizen's connections to high risk countries merit further questioning and search.

While we welcome Secretary Chertoff's rejection of racial and ethnic profiling, DHS guidance allows him to do so. In addition, his response leaves unresolved the questions of how "individualized behavior" is defined and what factors are used by CBP agents to determine whether reasonable suspicion exists. For example, does CBP consider a traveler's appearance (e.g., wearing a beard or headscarf (hijab)) or nature of travel (e.g., religious pilgrimage) the basis for subjecting the traveler to secondary search and/or questioning? Similarly, is the country from which someone has traveled a proxy for religion or ethnicity? If so, these factors would be either discriminatory on their face, or so imprecise as to lead to a disparate impact on travelers who are Muslim or of Arab or South Asian descent.

Furthermore, the DHS guidance and Chertoff's assertions do not address concerns about religious or national origin profiling, which, like racial and ethnic profiling, should have been addressed by DOJ and DHS. Indeed, the fact that a number of complainants have noted that they have been asked about their religious practice and views underscores the need for clear federal authority - and ideally a federal law - on this issue.

Moreover, if CBP is found to be wielding its authority broadly, targeting Americans based on their religion or ethnicity, then CBP is not only engaging in discriminatory conduct, but has too much discretion, and the result is a waste of resources. Training and more rigorous scrutiny and oversight of CBP would improve security.

Finally, we note that DHS has rebuffed prior public requests to disclose its actual practices. Despite informal requests, as well as formal requests under the Freedom of Information Act filed by the

Electronic Frontier Foundation and the Asian Law Caucus, DHS has refused to disclose meaningful information about any potential policies and procedures for interrogations, searches or seizures at the border.

Recommendations

Muslim Advocates urges the Committee to examine CBP and DHS border search and interrogation practices, and to consider legislative action to protect law-abiding Americans from arbitrary and invasive interrogations and searches when returning home from abroad.

1) Muslim Advocates recommends that Congress consider legislation that incorporates the following elements:

? Clarifies that searching data and electronic devices goes beyond a routine border search and requires reasonable suspicion.

? Clarifies that seizing data and electronic devices requires probable cause.

? Clarifies that questions about an individual's political or religious views or activities or lawful associations with individuals or groups are impermissible.

? Clarifies that the country from which an individual travels cannot be a pretext for religious, national origin or ethnic based investigatory activities.

? Clarifies that race, ethnicity, national origin or religion should not be considered in deciding upon the scope and substance of investigatory or other law enforcement activity, except where race, ethnicity, national origin or religion, along with other factors, is part of a suspect's description based on specific, credible information linking that suspect to a criminal incident.

? Requires CBP to report to Congress its policies and procedures on searches and questioning, including the standards for determining whether someone is sent to secondary inspection and whether to search or seize data or electronic devices, and the training that CBP agents receive to engage in questioning and electronic data searches and seizures, including copies of training materials and guidance.

? Requires CBP agents to collect data on border searches and interrogations and report this information to the public and to Congress, allowing Congress to monitor whether CBP policies are having a disparate impact on individuals based on their race, ethnicity, national origin, or religion. The data collected should include the CBP's agent's basis for reasonable suspicion (or probable cause, if a seizure of data or electronic devices) in flagging the individual for secondary inspection; the race, religion, ethnicity and national origin of the individuals stopped; whether data was searched; whether data or property was seized; and what kind of law enforcement action was taken based on the data seized or questions asked.

2) Muslim Advocates urges Congress to request that the General Accountability Office (GAO) conduct a thorough investigation and review of CBP policies and procedures, as well as actual practices, for selecting individuals for secondary inspection.

3) Muslim Advocates urges Congress to pass the End Racial Profiling Act (S.2481/H.R. 4611) ("ERPA"). As discussed above, there is need for a clear prohibition of racial, ethnic, national origin and religious profiling by federal law enforcement. The current DOJ guidance, and its adoption by DHS, does not explicitly prohibit profiling based on religion or national origin and contains overly broad exceptions for border security. In addition, data collection to allow the relevant federal agencies, Congress and the public to understand the scope of the problem and to monitor improvements in the application of solutions is critically needed. ERPA would address these concerns. Congress must ensure that innocent, law-abiding Americans are able to travel freely, visit friends and relatives abroad, and engage in commerce, without fear that federal law enforcement will use the inherently coercive context of a border crossing to engage in violations of their privacy and First Amendment protected beliefs and activities.

Congress must ensure that CBP both protects our nation and respects our nation's constitutional rights and protections.

1 See U.S. Citizens Question Terror Watch Lists, CBS News (December 8, 2007), available at <http://www.cbsnews.com/stories/2007/12/08/eveningnews/main3595024.shtml>. See also Ellen Nakashima, Collecting of Details on Travelers Documents, WASHINGTON POST (September 22, 2007).

2 This individual was identified through the Asian Law Caucus, a San Francisco-based civil rights organization.

3 This individual was identified through the Asian Law Caucus.

4 See Ellen Nakashima, *Clarity Sought on Electronic Searches*, *The Washington Post* (February 7, 2008).

5 See Letter from Muslim Advocates, et al. to U.S. House of Representatives, Committee on Homeland Security, et al. (June 20, 2008), available at http://www.muslimadvocates.org/more.php?id=43_0_1_0_M; Letter from ACLU, Electronic Frontier Foundation et al. to U.S. House of Representatives, Committee on Homeland Security Committee (May 1, 2008), available at <http://www.eff.org/press/archives/2008/05/01/border-search-open-letter>; *U.S. v. Arnold*, 2008 U.S. App. LEXIS 8590 (9th Cir., April 21, 2008).

6 We note that, to the extent the questioning is taking place without a tie to specific criminal activity, the nature of the setting - secondary questioning at a port of entry when an American, probably tired from a long flight, is seeking to get home - is coercive and would not be permissible in other settings within the U.S. For example, an FBI agent cannot detain a citizen within the country in order to interrogate him or her about religious practices, political views, or participation in local houses of worship or charitable organizations.

7 The Association of Corporate Travel Executives, law firms, high tech companies and other businesses that conduct international travel have also reported that electronic devices have been searched and seized. It appears, however, that intrusive questioning on First Amendment protected activities have focused primarily on travelers who are Muslim or of Arab or South Asian descent.

8 See President George W. Bush, Memorandum for the Attorney General (Feb. 27, 2001), available at <http://www.whitehouse.gov/news/releases/2001/02/20010228-1.html>; The White House, *Record of Achievement: Fighting Crime* (noting that "Less than six weeks after taking office, President Bush called for an end to racial profiling in Federal law enforcement."), available at <http://www.whitehouse.gov/infocus/achievement/chap16.html>.

9 See Dep't of Justice, *Justice Department Issues Policy Guidance to Ban Racial Profiling* (June 17, 2003), available at http://www.usdoj.gov/opa/pr/2003/June/03_crt_355.htm ("The racial profiling guidance bars federal law enforcement officials from engaging in racial profiling . . . has been adopted by the President as executive policy for federal law enforcement, and governs all federal law enforcement

activities . . ."); see also Exec. Order No. 12,333, §2.4 ("Agencies within the Intelligence Community shall use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad.").

10 See U.S. Dep't of Homeland Security, The Department of Homeland Security's Commitment to Race Neutrality in Law Enforcement Activities (June 1, 2004), available at http://www.dhs.gov/xlibrary/assets/CRCL_MemoCommitmentRaceNeutrality_June04.pdf.