



## Civil Rights/Civil Liberties Impact Assessment

### **Border Searches of Electronic Devices**

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## **Executive Summary**

The Department of Homeland Security's (DHS) Office for Civil Rights and Civil Liberties (CRCL) has completed a Civil Rights/Civil Liberties Impact Assessment examining DHS's policies guiding searches of electronic devices at the United States' borders. CRCL conducted this assessment in accordance with its statutory role to advise Department leadership on constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department. *See* 6 U.S.C. § 345. This assessment has been provided to the Secretary, the Commissioner of U.S. Customs and Border Protection (CBP), and the Director of U.S. Immigrations and Customs Enforcement (ICE). This document sets out CRCL's findings and recommendations, which CBP and ICE have accepted and are implementing with CRCL's assistance.

### ***Background***

ICE and CBP exercise longstanding constitutional and statutory authority permitting suspicionless and warrantless searches of merchandise at the border and its functional equivalent. Two public Directives issued in 2009 (CBP Directive No. 3340-049 "Border Search of Electronic Devices Containing Information" and ICE Directive No. 7-6.1 "Border Searches of Electronic Devices") impose requirements governing use of this authority in searching, reviewing, retaining, and sharing information contained in electronic devices.

### ***Fourth Amendment***

The overall authority to conduct border searches without suspicion or warrant is clear and longstanding, and courts have not treated searches of electronic devices any differently than searches of other objects. We conclude that CBP's and ICE's current border search policies comply with the Fourth Amendment. We also conclude that imposing a requirement that officers have reasonable suspicion in order to conduct a border search of an electronic device would be operationally harmful without concomitant civil rights/civil liberties benefits. However, we do think that recording more information about why searches are performed would help managers and leadership supervise the use of border search authority, and this is what we recommended; CBP has agreed and has implemented this change beginning in FY2012.

### ***First Amendment***

Some critics argue that a heightened level of suspicion should be required before officers search laptop computers in order to avoid chilling First Amendment rights. However, we conclude that the laptop border searches allowed under the ICE and CBP Directives do not violate travelers' First Amendment rights.

### ***Time Limits and Privileged Materials***

Current policies ensure reasonable efforts at promptness and, accordingly, we do not believe that setting specific time limits is necessary. We also find that the 2009 ICE and CBP Directives appropriately address the need to take special precautions when dealing with sensitive information, such as attorney-client materials, attorney work product, business information, trade secrets, and medical records. Additional safeguards are not needed.

### Improved Notice About Redress

In order to provide travelers with consistent information and facilitate their access to the existing civil rights complaint process, CBP should improve the notice given to travelers subjected to electronic device searches by updating tear sheets to refer travelers to DHS TRIP if they seek redress. CBP has agreed and the change is being implemented in the next printing of the tear sheets. TRIP intake has also correspondingly been augmented to allow travelers to check any of several different civil rights complaints, as their concern, including not only “I feel my civil rights have been violated because I was discriminated against on the basis of my race, ethnicity, religion, disability, or gender,” but also “I feel my civil rights have been violated because my questioning or treatment during screening was abusive or coercive,” and “I feel my civil rights have been violated because a search of my person or property violated freedom of speech or press.” (See <https://trip.dhs.gov/>.)

### Equal Protection and Religion/Ethnicity/National Origin Discrimination

The Constitution forbids intentional and invidious discrimination by the federal government on account of race, religion, or ethnicity. Accordingly, we recommended that CBP supplement the Department’s overarching antidiscrimination policy by stating explicitly in policy that it is generally impermissible for officers to discriminate against travelers—including by singling them out for specially rigorous searching—because of their actual or perceived race, religion, or ethnicity, and that officers may use race, religion, or ethnicity as a factor in conducting discretionary device searches only when (a) the search is based on information (such as a suspect description) specific to an incident, suspect, or ongoing criminal activity, or (b) limited to situations in which Component leadership has found such consideration temporarily necessary based on their assessment of intelligence information and risk, because alternatives do not meet security needs. CBP agreed and this change has been implemented.

In addition, we recommended that CBP improve monitoring of the distribution of electronic device searching by race and ethnicity by conducting routine analysis, including semi-annual examination of electronic device searches by port of entry. After controlling for known relevant and permissible factors, such as port traveler demographics, and inclusion in watchlists, lookouts, and targeting rules, the analysis should assess whether travelers of any particular ethnicity—estimated using document information and name analysis—at any port of entry are being chosen for electronic device searches in substantial disproportion to that ethnicity’s portion of all travelers through the port. Data and results should be shared with CRCL. This recommendation is being implemented on an ongoing basis.

As part of conducting the impact assessment, we reviewed data on all non-watchlist-related device searches in FY2009 and FY2010 (Oct. 1, 2008–Sept. 30, 2010); we did not find evidence that searches were prompted by the ethnicity of travelers. If from future analysis of data it appears that electronic device searching in any port has a substantial unexplained skew towards travelers of one or more ethnicity, we have recommended that CBP work with CRCL on developing appropriate oversight mechanisms; subsequent steps generally should include a requirement of supervisory approval for searches (absent exigent circumstances) or enhanced training, and may include other responses to ensure that such concentration is not the result of bias or other inappropriate decision-making. CBP has agreed.