



Report: Limit Searches of Electronic Devices

By PETE YOST Associated Press
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Travelers carry so much personal information on laptops, computer disks and smartphones that routine searches of electronic devices at the nation's borders are too intrusive now, in the view of a bipartisan panel that includes a Republican conservative who once headed border security.

A report released Wednesday by The Constitution Project, a bipartisan legal think tank, recommended that the Homeland Security Department discontinue its policy of searching electronic devices without a reasonable suspicion of wrongdoing.

From Oct. 1, 2008, to June 2, 2010, over 6,500 people — almost half of them U.S. citizens — had electronic devices searched at the border, the report found.

"Technology is developing so much more quickly and the law needs to catch up," Sharon Bradford Franklin, The Constitution Project's senior policy counsel, said in an interview Tuesday. Franklin said safeguards could be instituted administratively without additional legislation.

DHS is responsible for protecting the border but must do so in a way that doesn't harm the lawful flow of commerce, said Asa Hutchinson, a former Republican congressman from Arkansas who was DHS undersecretary for border and transportation security during President George W. Bush's administration. Hutchinson was one of 19 experts who developed the report.

"I don't want anything to diminish security, but some business travelers have had their laptops held for months on end and a reasonable suspicion requirement for U.S. persons is a proper balance," said Hutchinson, who also headed the Drug Enforcement Administration during Bush's presidency.

Others who worked on the report include former longtime intelligence officials Paul Pillar and Mary McCarthy.

DHS spokesman Matt Chandler said searches of laptops and other electronic media are used in limited circumstances "to ensure that dangerous people and unlawful goods do not enter our country." He said the department has explained the searches, their privacy impact and the policies behind them clearly to the public.

Laptops and other electronic devices may be subject to searches for violations of law such as child pornography, narcotics smuggling, ties to terrorism or other criminal activity. DHS says less than 1/10th of 1 percent of travelers are subjected to laptop computer searches.

Since the nation's founding, border agents have conducted routine searches of travelers and their belongings when they enter the country.

Limited by what they could carry, travelers used to leave private documents, letters, photographs and other personal information behind at home.

Today, travelers packing electronic devices "are unknowingly subjecting volumes of personal information to involuntary and suspicionless search and review by federal law enforcement authorities," the report said. "This problem is compounded by the fact that many electronic devices are used to carry both personal and business-related information."

The result: growing tension between Fourth Amendment guarantees against unreasonable search and seizure and the border searches that historically had been viewed as a narrow exception to its requirements, the report concluded.

The Constitution Project found that "suspicionless" border searches open the doors to racial or religious profiling and cited a report in 2008 by the nonpartisan Congressional Research Service.

"If a customs official could conduct a search without providing cause, it would be difficult to deter ethnic profiling because the official would not need to explain why he conducted the search," the CRS report said.

In 2009, two DHS agencies — U.S. Customs and Border Protection and Immigration and Customs Enforcement — each issued directives allowing federal border agents reasonable time to conduct searches and receive technical assistance with translation or decryption in searching devices. Searches can take place at the port of entry or elsewhere and without the owner present.

Because of the changes in personal technology, The Constitution Project report said, CBP and ICE should require reasonable suspicion of wrongdoing before allowing agents to search electronic devices at the border.

In addition, when U.S. citizens and permanent U.S. residents are involved, border agents should get a warrant in court before retaining data from an electronic device or before

searching electronic devices for more than 24 hours, the report advocated. The Fourth Amendment requires probable cause to believe a crime has been committed to get a warrant.

Finally, the scope of a search should be tied to its underlying basis, so it does not become a fishing expedition or unnecessarily intrusive, the report added.

At least one court has ruled in favor of giving customs agents leeway.

A decision this year by the U.S. 9th Circuit Court of Appeals in San Francisco said customs officials can search a laptop or other personal electronic storage device at the border without reasonable suspicion of criminal activity.

Pillar is a former deputy chief of the CIA's counterterrorist center and served at the National Intelligence Council. McCarthy was a senior policy planner in CIA's science and technology directorate, was associate deputy inspector general at CIA and served at the National Security Council.

Online:

The Constitution Project: <http://www.constitutionproject.org/>

DHS searches: <http://www.dhs.gov/ynews/releases/pr—1251393255852.shtm>