

Expanded Powers to Search Travelers at Border Detailed

By ELLEN NAKASHIMA
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The U.S. government has quietly recast policies that affect the way information is gathered from U.S. citizens and others crossing the border and what is done with it, including relaxing a two-decade-old policy that placed a high bar on federal agents copying travelers' personal material, according to newly released documents.

The policy changes, civil liberties advocates say, also raise concerns about the guidelines under which border officers may share data copied from laptop computers and cellphones with other agencies and the types of questions they are allowed to ask American citizens.

In July, the Department of Homeland Security disclosed policies that showed that federal agents may copy books, documents, and the data on laptops and other electronic devices without suspecting a traveler of wrongdoing. But what DHS did not disclose was that since 1986 and until last year, the government generally required a higher standard: Federal agents needed probable cause that a law was being broken before they could copy material a traveler was bringing into the country.

The changes are part of a broader trend across the government to harness technology in the fight against terrorism. But they are taking place largely without public input or review, critics said, raising concerns that federal border agents are acting without proper guidelines or oversight and that policies are being adopted that do not adequately protect travelers' civil liberties when they are being questioned or their belongings searched.

"For 20 years the government has at least implicitly recognized there were some First Amendment restrictions on reading and copy-

ing documents," said Shirin Sinar, a staff attorney with the Asian Law Caucus, which along with the Electronic Frontier Foundation sued the government under the Freedom of Information Act for disclosure of border search policies. "It's disturbing now that the government has jettisoned that policy in favor of one that violates First Amendment rights."

DHS spokeswoman Amy Kudwa said the updating of policies reflects an effort to be more transparent. In an e-mail, she wrote that the decision of U.S. Customs and Border Protection (CBP) "to change some of the standards in its old policies reflects the realities of the post-9/11 environment, the agency's expanded mission and legal authorities, and developments in the law, including the Homeland Security Act of 2003. Although certain aspects of the policies have changed, the policies have always reflected the notion that officers have the constitutional authority to inspect information presented at the border" without requiring suspicion of a particular traveler.

The 1986 policy was issued after a lawsuit was filed by a group of activists returning from Nicaragua who had their diaries, datebooks and other personal papers seized and photocopied by customs officers and shared with the FBI. The government argued that the customs agency had the right to enforce a law against importing subversive literature.

"Essentially they were using that as a pretext to do intelligence gathering on critics of our policies on Nicaragua," said David D. Cole, a Georgetown University law professor who was then a lawyer at the Center for Constitutional Rights, representing the activists suing the government in *Heidy v. U.S. Customs Service*.

To set guidelines on document searches, the agency issued the 1986 directive that made clear that

its officers "as a general rule . . . should not read personal correspondence." But, the policy noted, officers had the authority to scan material for evidence of violation of laws pertaining to copyright, sedition and contraband. With reasonable suspicion of a violation, they could detain the material. With probable cause of a violation, they could seize and copy it.

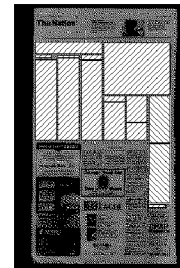
In July 2007, the government dropped the requirement that there be reasonable suspicion to review material but specified that the review had to take place in connection with laws enforced by CBP, according to a copy of a policy the groups obtained.

Then, this July, the government issued its broadest policy to date regarding information searches at the border, allowing documents and electronic devices to be detained for an unspecified period. Moreover, they may now be copied without any suspicion of wrongdoing, the lowest legal standard.

"The tragic events of 9/11 required the federal government to reexamine its law enforcement and counterterrorism efforts to ensure that all legally available means are employed to prevent another attack," Kudwa said.

But Marcia Hofmann, staff attorney for the Electronic Frontier Foundation, said that laptop computers may contain "a massive amount of private information such as personal e-mails, financial data or confidential business records" and that the government should not violate travelers' constitutional rights in the name of national security.

There is apparently wide interest among other government agencies in CBP's ability to collect information, according to a July 11, 2007, e-mail obtained by the groups. The e-mail originated from the agency's New York field office. "As we all know, CBP's data collection capabilities have been



widely discussed in the law enforcement community and we have been asked by many various agencies to copy and transmit documentation being carried by travelers for legitimate law enforcement reasons," said the writer, whose name was redacted.

The Heidy decision barred customs officers from sharing information they suspected was seditious with other federal agencies unless the agencies abided by CBP's restrictions on data retention. But the July policy allows the agency to share data obtained at the border if there is suspicion that a law enforced by it is being violated.

Cole said the government's search authority at the border is very broad, "so it is important that it not be turned into a loophole by which other law enforcement

agencies, which are not permitted to conduct searches without probable cause or reasonable suspicion, are able to avoid the constitutional limits on their authority."

Customs officers are trained to know under what circumstances sensitive law enforcement information may be shared and with whom, DHS spokesman Russ Knocke said.

Over the past several years, the Asian Law Caucus and other civil liberties groups have reported a surge in complaints from travelers who have been questioned about their religious practices and politi-

cal leanings. Many of the travelers say they have had their laptops or phones searched.

Yasir Qadhi, a 33-year-old Houston native who studied in Saudi Arabia from 1995 to 2005 and is pursuing a doctorate in Islamic studies at Yale University, said he is questioned every time he reenters the United States. He said he is routinely asked which mosques he has prayed in, what charities he donates to, what lectures he has delivered, what the lectures are titled. If he has notes, he said, they are photocopied.

In March 2006, when driving home to New Haven, Conn., from Toronto, he said, he was detained with his wife and three children at the border for 5½ hours. The agents, he said, asked about religion, and, noting his Saudi studies, asked him for classmates' names and whom he corresponded with in the United States.

They also detained his cellphone.

Then, this spring, an agent in the FBI's New Haven field office asked him to come by. Qadhi said the agent cited the March 2006 stop and said, "We went through your personal diary in your phone, and we discovered these numbers on there, and we want to know your relationship with these specific individuals."

Qadhi said: "And they went through each one of them."

Knocke said he could not com-

ment on an individual case. He said customs officers do not racially profile in any way but have the authority to "take and consider evidence concerning the privilege" of any person to enter the United States.

Nathan A. Sales, former DHS deputy assistant secretary for policy development, said that "in some instances, you can imagine it would be appropriate to ask questions" such as those asked of Qadhi. "But when you do, you're playing with fire."

Sales, a George Mason University law professor, said: "If you want to ask questions about a person's churchgoing or charitable contributions, you need to take steps to ensure it doesn't stray from legitimate questions to harassment. You need to have a clearly established policy that these sorts of questions are only asked in certain circumstances, and only when we have some indication to believe that a particular mosque or a particular charity might have some sort of terrorist tie."

Qadhi said he feels "frustrated" by a system that he thinks will never tell him what list he is on so that he can get off it. "I'm treated like a second-class citizen, and there's absolutely nothing I can do," he said. "This is simply not the America I grew up in."

Staff researcher Julie Tate contributed to this report.



BY MELINA MARA — THE WASHINGTON POST

U.S. customs officers search vehicles arriving from Canada at the port of entry in Blaine, Wash., in 2006.