

June 20, 2008

The Honorable Patrick J. Leahy
The Honorable Arlen Specter
United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter:

We write to urge the U.S. Senate Committee on the Judiciary to hold hearings on interrogations and searches by the Department of Homeland Security (DHS) and Customs and Border Protection (CBP) of law-abiding Americans returning from international travel. These practices raise concerns about civil liberties across a range of contexts.

Many of the undersigned organizations recently urged Congress to hold hearings on CBP's routine, suspicionless searches of laptops and other personal belongings.¹ We now write to urge you to also (1) address in your oversight the full range of abusive CBP practices, including invasive interrogations, and their impact on the rights of Americans at the border; and (2) consider legislation to prevent invasive interrogations by CBP agents and to protect law-abiding Americans against routine scrutiny.

In addition to suspicionless searches that offend the Fourth Amendment, Americans returning home from abroad also face arbitrary questions from authorities that chill the exercise of core First Amendment freedoms. Specifically, Americans from all walks of life have been interrogated by CBP agents about their political views and activities; religious beliefs and practices; and associations with friends and relatives.

- **This problem is pervasive.** Civil rights groups have received numerous complaints from travelers who, upon re-entry to the U.S., were subjected to invasive questions. The press has also reported disturbing stories of CBP agents subjecting even U.S. citizens traveling *within* the U.S. to “aggressive questioning.”²
 1. For instance, a religious scholar born in the U.S. is subjected to scrutiny routinely when returning from frequent international travel. 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 have also interrogated him about his views of particular religious doctrines. Further, CBP agents at various locations have on several occasions photocopied his lecture notes and reviewed files on his computer, and agents at the Niagara Falls border crossing also 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

¹ See Letter from ACLU, Electronic Frontier Foundation et al. to Chairman Leahy and Ranking Member Specter (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).

² See, e.g., Sara Jean Green, *Border Patrol "spot checks" on ferries provoke outrage in San Juan Islands*, SEATTLE TIMES (April 22, 2008).

concerns, however, authorities have denied him any explanation for the scrutiny he continues to endure, or guidance about how to relieve it. Ironically, this U.S. citizen is currently pursuing a doctoral degree in Islamic studies at Yale University, 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 by government officials at agencies including the National Counterterrorism Center and the Department of State.

2. A lawyer in California was interrogated by CBP agents at San Francisco International Airport upon her return to the U.S. from a trip to visit overseas relatives. Upon establishing 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. The CBP agent then posed questions about her political views of candidates in the 2008 presidential election.
 3. An engineer in the information technology sector was detained for several hours, searched and interrogated at San Francisco International Airport after returning from an overseas business trip that included a visit with family members. CBP agents seized and searched his checkbook, asked questions about his donations to particular charitable and religious organizations, and also investigated his associations with particular community leaders. The agent demonstrated familiarity with the organizations and their leaders — none of whom have been designated by the federal government as targets of scrutiny. 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 some 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.
- **Invasive interrogation offends several core constitutional rights.** CBP practices described in this letter burden substantive constitutional rights, including the Fourth Amendment guarantee against unreasonable searches and seizures and the First Amendment freedom to maintain political views, religious views and personal associations without inviting government scrutiny.
 - **The privacy, security and liberty of law-abiding Americans are at stake.** Even the privacy of Americans who are not themselves traveling across the border stands at risk. Invasive interrogation about individuals' relationships with family and friends burdens the First Amendment right of association. Similarly, routine 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. Finally, known scrutiny of individuals on the basis of their participation in religious communities chills third parties from exercising their constitutional right to participate in those communities.

- **The government’s “profiles” are arbitrary, opaque, and demonstrably inaccurate, and they violate prior guidance from the Executive Branch.** CBP has confirmed the use of profiles so broad as to be meaningless. For instance, travelers deemed presumptively “suspicious” include all men between the ages of 20 and 59 traveling from Asia.³ Similarly, CBP training materials suggest “it is permissible and indeed advisable to consider an individual’s connections to countries that are associated with significant terrorist activity,” which could essentially entail “targeting people because they are Arab or Muslim,” absent any potentially protective policies.⁴ This guidance runs counter to the President’s pledge to end racial profiling⁵ and highlights why previous guidance issued by the Department of Justice remains inadequate to protect Americans from arbitrary scrutiny on the basis of their race, religion or ethnicity.⁶
- **The government refuses to disclose its actual practices.** Despite informal requests, as well as formal requests under the Freedom of Information Act, agencies have refused to disclose meaningful information about any potential policies and procedures for interrogations, searches or seizures at the border. Moreover, as the press has reported, “the factors agents use to single out passengers are not transparent, and travelers generally have little access to the data to see whether there are errors.”⁷
- **The CBP’s assertion of authority over returning travelers is *ultra vires*.** CBP agents are questioning travelers — including U.S. citizens — about matters well outside the agency’s institutional purview.⁸ Whether, when, how, and under what legal authority the agency’s authority has expanded remains unknown to the public. Moreover, many of these questions would be impermissible to raise in other settings. For example, absent a warrant, an FBI agent would not be entitled to detain a citizen within the country in order to interrogate him or her about religious practices or donations to local houses of worship.
- **CBP’s detentions, searches, seizures and interrogations are inherently coercive.** CBP’s position at the border generally intimidates returning citizens, who are tacitly led to believe

³ See Editorial, *Looking into Laptops*, LOS ANGELES TIMES, Nov. 11, 2006.

⁴ Ellen Nakashima, *Clarity Sought on Electronics Searches*, WASHINGTON POST (February 7, 2008).

⁵ 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>.

⁶ 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.”).

⁷ Nakashima, *supra* note 4.

⁸ See 8 C.F.R. § 287.1 (2008).

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that they must answer CBP questions in order to gain entry to the country. Travelers are rarely aware of their rights at the border, leaving them vulnerable to invasive interrogation by overzealous CBP officials eager to insinuate their authority.

Accordingly, Congress must exercise its oversight authority to ensure that border interrogations and searches respect the Fourth Amendment and do not chill the exercise of beliefs and activities protected by the First Amendment. CBP should not be allowed to continue exceeding its authority by leveraging the inherently coercive setting of interrogations at the nation's border to subject law-abiding Americans to questions that violate their rights.

We urge the Committee to hold swift hearings on CBP and DHS border search practices, and to consider legislative action to protect law-abiding Americans from arbitrary and invasive interrogation when returning home from abroad.

For additional information, please contact Muslim Advocates Counsel Shahid Buttar at (415) 692-1512 or Shahid@MuslimAdvocates.org.

Respectfully submitted,

Asian Law Caucus
American-Arab Anti-Discrimination Committee
American Civil Liberties Union
Association of Physicians of Pakistani-descent of
North America
Bill of Rights Defense Committee
Center for National Security Studies
Defending Dissent Foundation
Electronic Frontier Foundation
Fairfax County Privacy Council
The Freedom and Justice Foundation
Friends Committee on National Legislation
Liberty Coalition
NAACP Legal Defense Fund, Inc.

Mexican-American Legal Defense and
Educational Fund
MAS Freedom
Muslim Advocates
Muslim Bar Association of New York
Muslim Consultative Network
National Lawyers Guild
National Council of La Raza
People for the American Way
Privacy Times
Privacy Journal
South Asian Americans Leading Together
Sikh Coalition
Unitarian Universalist Service Committee
U.S. Bill of Rights Foundation