

United States Senate

WASHINGTON, DC 20510

April 25, 2024

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
3801 Nebraska Ave NW
Washington, D.C. 20528

Dear Secretary Mayorkas:

We are writing to request information regarding the use of the border search authority by both U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) to search phones and other electronic devices and download their content. Both CBP and ICE assert broad authority under the border search exception to the Fourth Amendment's warrant requirement, which permits officers to conduct *routine* inspections and searches of all persons, including U.S. citizens, crossing the U.S. border without warrant, probable cause, or reasonable suspicion. We are concerned that the current policies and practices governing the search of electronic devices at the border constitute a departure from the intended scope and application of border search authority. This divergence is evident in the growing circuit split in the federal court of appeals about how this authority may be used.

Further, we understand that CBP and ICE use this border search authority to support the intelligence and law enforcement work of other agencies on occasion. The ability of these agencies to inspect property at the border—or at locations considered its functional equivalent—without a warrant, and under different legal standards than those applicable to law enforcement agencies without border search authority, is distinct. Specifically, we request information on how other agencies utilize CBP and ICE's border search authority to access information on individuals' electronic devices in situations where they would otherwise be required to obtain a warrant.

As such, we request a briefing for our staffs on the following in the next two weeks:

1. Border Search Authority.

- i. Which U.S. Department of Homeland Security (DHS) components officially hold border search authority, including those that have previously exercised this authority? How does each identified component use its border search authority?
- ii. Please provide the most recent guidance provided to each of these components with regards to the use of the border search authority, including all guidance that may vary by judicial circuit.

2. Secondary Inspection Data Request.

- i. How many secondary inspections were conducted in the last five fiscal years by CBP, broken down by port of entry or the functional equivalent and the direction of travel (in vs. out)?

- i. How many of the inspections were of U.S. citizens, legal permanent residents, or non-U.S. persons? For non-U.S. citizens, please provide data on each nationality.
- ii. In the last five calendar years, how many persons referred to secondary inspection had their electronic devices searched, broken down by type of search (basic or advanced) and the outcome (detention and seizure).
 - i. Please clarify whether these searches of electronic devices were conducted pursuant to warrant, with consent, due to abandonment, in response to exigent circumstances, or pursuant to the “national security concern” exemption to the requirement for reasonable suspicion of a violation of laws enforced or administered by CBP. Please provide detailed data for each category.
 - ii. Is “consent” for such searches documented by any component conducting a search? If yes, please share all relevant guidance and data.
- iii. Has there ever been an instance in which a DHS component, government entity, government contractor, and/or other third party installed software, firmware, or hardware on electronic devices during a search? If so, please specify the frequency of such instances and the nature of these installations.

3. Data Storage and Retention.

- i. What are all the systems used to store data/information obtained from searches of electronic devices at the border or its functional equivalent, including data/information from advanced searches?
- ii. What is the duration for which data/information obtained from these searches is retained? Please include the retention timelines for each type of search.

4. Access to Data.

- i. How many DHS staff, and from which components or offices, have access to the electronic data obtained using the border search authority?
 - i. What restrictions or limitations, if any, are imposed on access to this data? Please provide details on the enforcement of these restrictions.
 - ii. What federal and non-federal entities outside of DHS have access to the data/information obtained through electronic device searches, including any instances in which CBP or ICE (or other DHS component) participation in a Joint Terrorism Task Force or other joint activity that would enable access by other entities.
 - iii. Through which systems do they have access?
 - iv. When participating in such joint activities, what measures are in place to monitor and control access to this data by both DHS personnel and external entities?
 - v. How is unauthorized access prevented, detected, and addressed?

5. Requests for Assistance

- i. Are searches conducted by CBP, ICE, or other DHS components ever influenced by recommendations from entities outside of CBP, ICE, or DHS, even when the final decision to proceed with the search was independently made by CBP, ICE, or the involved DHS component?
 - i. What criteria or considerations prompt CBP, ICE, or any other DHS component to initiate an electronic device search based on a recommendation from an external entity, and through what process are these recommendations submitted?
 - ii. How is information regarding searches initiated based on external recommendations tracked and recorded by CBP, ICE, or other DHS components?
 - iii. Please provide specific metrics or statistics related to searches influenced by external recommendations, including the number of searches, the outcomes of these searches, and any notable trends observed over the past year.
 - iv. When a search is executed based on an external recommendation, what specific information about the search (e.g., outcomes or findings) is shared with the external entity that made the recommendation?

6. Content of Tear Sheets

- i. The current CBP tear sheet on Border Search of Electronic Devices does not clearly state whether travelers have the right to refuse consent for the search without legal penalty, other than device detention. What are the specific rights of individuals regarding consent to searches, and what are the potential consequences of refusal? Please explain CBP's rationale for omitting this information from the tear sheet.
- ii. The tear sheet lacks detail on the timeline for notification and the process for contesting the seizure of devices that are detained or seized. Please elaborate on the typical duration before notification and the steps required to contest a seizure or detention.
- iii. If CBP retains data from a device, what rights do individuals have regarding the knowledge of what data was retained, the purpose of its retention, and how long it will be kept? How is this information communicated to individuals whose electronic devices are searched if not explicitly included on the tear sheet?

7. Evaluating Effectiveness and Protections

- i. How do you evaluate the effectiveness of the use of the border search authority in searching electronic devices?
- ii. What is the process that you have in place to protect the rights of individuals in these processes?
- iii. What mechanisms do you have in place for reviewing the appropriateness or legality of acting on external recommendations for searches?

- iv. How do the results of searches inform future operations or policy adjustments within CBP, ICE, or other DHS components?

Thank you for your prompt attention to this matter.

Sincerely,



Gary C. Peters
Chairman
Committee on Homeland Security
and Governmental Affairs



Rand Paul, M.D.
Ranking Member
Committee on Homeland Security
and Governmental Affairs



Ron Wyden
Chairman
Senate Committee on Finance



Mike Crapo
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