



Global Trends and Customs:

Laptop Searches By U.S. Customs

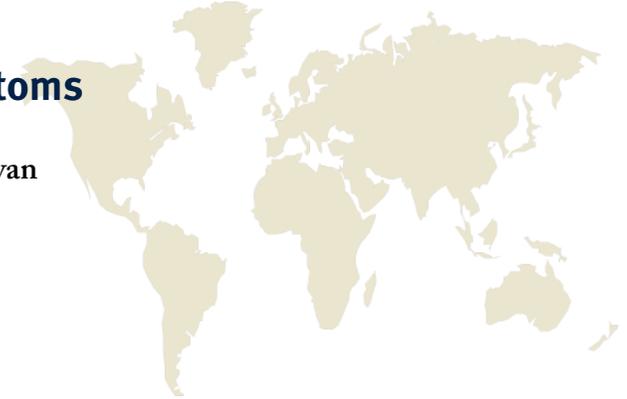
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With increasing frequency, international business travelers are being confronted with the distinct possibility that U.S. Customs and Border Protection (“U.S. Customs”) may seize and extensively examine the content of laptop devices routinely carried across international borders. Business travelers, concerned in large measure about the security and protection of proprietary and personal information stored on laptops and other electronic devices are complaining about the justification and intrusiveness of these searches. Not surprisingly, such developments have led to the filing of lawsuits in some jurisdictions as to whether or not U.S. Customs’ actions are constitutional and, if so, within the administrative authority of U.S. Customs.

As a general rule, U.S. Customs has broad authority to conduct searches of the personal belongings of international travelers under the so-called “border search exception” to the Fourth Amendment. Although neither a warrant nor probable cause is required for routine searches of persons and belongings, the courts have clearly stated that more intrusive or non-routine searches must be based upon a reasonable and articulable suspicion of wrongdoing. Border searches in either case are generally subject to a reasonableness standard, which may involve a judicial determination that balances the intrusion into an individual’s legitimate privacy and dignity interests against the Government’s legitimate interest in the subject of the search.

The constitutionality of border searches of laptop computers has been the subject of a limited number of court decisions. Judicial review in this area will

undoubtedly increase as more cases are filed by international business travelers and their employers. To date, courts in at least two jurisdictions have upheld the search and analysis of laptop computers by the Government under the broad plenary power afforded to U.S. Customs pursuant to the border search doctrine. These decisions are consistent with U.S. Customs’ stated position that computer devices are conceptually no different than other containers such as carry-on luggage, paper documents, handbags or miscellaneous other types of containers. As recently stated by the Public Liaison Office at U.S. Customs Headquarters in Washington, D.C., “[L]aptop computers may be subject to detention for violation of criminal law such as if the laptop contains information with possible ties to terrorism, narcotics smuggling, child pornography, or other criminal activity.”

In a recent, important case in California, a Federal District Court decided that the opening and examination of confidential computer files by U.S. Customs was unreasonable, overly invasive, and violated the constitutional rights of an international business traveler and U.S. citizen who had arrived at Los Angeles International Airport from the Philippines. The Court concluded that the U.S. Customs officer failed to articulate a reasonable suspicion that the confidential information stored on the traveler’s computer laptop and USB drive contained evidence of a crime. The Government’s argument that suspicionless non-destructive property searches by U.S. Customs are reasonable per se was rejected. Instead, the Court ruled emphatically that border searches of laptops and other electronic devices

are unconstitutional under the Fourth Amendment unless supported by reasonable and articulable suspicion of criminal activity.

Unfortunately, last week the United States Court of Appeals for the Ninth Circuit reversed the Federal District Court's decision in its entirety. The Court ruled that U.S. Customs may examine the electronic contents of a passenger's laptop computer and other electronic devices without any particularized suspicion of criminal wrongdoing. Moreover, the Court soundly rejected the argument that the search of laptop computers is fundamentally different from the examination of traditional closed containers, despite their unique capacity to store large quantities of confidential information.

The possibility that U.S. Customs may confiscate and search the contents of a laptop in the possession of an international business traveler has significant implications with regard to the establishment of effective policies for the protection of business proprietary and personal

information. This fact notwithstanding, a 2006 survey by the Association of Corporate Travel Executives indicated that 87% of its members were unaware that U.S. Customs had the authority to examine the hard drive and other electronic media of travelers arriving at the United States border from abroad.

Companies should instruct their employees to limit or omit personal data on electronic devices carried during travel - including financial and other information in which one might otherwise have a reasonable expectation of privacy. In addition, important data stored on the business traveler's laptop should be backed up on the company's system in the event U.S. Customs elects to retain custody of the laptop for a protracted period of time. Finally, business travelers may also wish to consider labeling programs and data on laptops in a generic manner to minimize the likelihood and extent to which U.S. Customs will conduct searches of important and sensitive information. Taking such precautionary measures will decrease the likelihood of laptop searches by U.S. Customs officers. ■

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