

The Electronic Frontier: Homeland Security's Border Spying Operations

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New documents obtained by the Electronic Frontier Foundation ([EFF](#)) and the Asian Law Caucus ([ALC](#)) revealed that the Department of Homeland Security's (DHS) Customs and Border Protection (CBP) subunit "reversed a two-decades-old policy that restricted customs agents from reading and copying the personal papers carried by travelers, including U.S. citizens."

After suing DHS under the Freedom of Information Act (FOIA), the civil liberties organizations received 661 pages of heavily redacted files from the department and will be seeking withheld documents as well as the blacked-out material in federal district court this fall.

Antifascist Calling has reviewed many of these [files](#); in some cases 50% or more of the documents have been censored. One might call it DHS' lame attempt at remaking the 1980 hit thriller *Fade to Black!*

In 2007, CBP quietly loosened 1986 federal guidelines restricting the examination of travelers' documents and papers. More than 20 years earlier a lawsuit, [Heidy v. U.S. Customs Service](#), was filed by a group of solidarity activists targeted by the government after returning from Nicaragua. Their suit, charging the state with an illegal seizure of books, documents and personal papers led to the Reagan administration guidelines.

During the 1980s Nicaragua was a target of U.S. destabilization programs and a "dirty war" waged by the CIA and their [drug-dealing Contra allies](#) against the leftist Sandinista government. Reagan-era Customs agents claimed they had a right to seize "subversive literature" at the border.

Based on dubious legal authority, agents confiscated diaries, datebooks and other personal papers and photocopied the files. U.S. Customs then shared the activists' personal details with the FBI on the grounds that the government was engaged in a "counterintelligence operation" against a "hostile power." According to [The Washington Post](#),

"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*. (Ellen Nakashima, "Expanded Powers to Search Travelers at Border Detailed," *The Washington Post*, Tuesday, September 23, 2008; A02)

As the [Center for Constitutional Rights](#) documented, "Pretrial discovery revealed a

broad pattern of Customs abuses, including the use of Customs authority to gather intelligence about returnees from Nicaragua and the entry of that information into a nationwide Customs computer.”

The *Heidy* decision, in other words, specifically barred Customs officials from rifling through travelers files in pursuit of so-called “actionable intelligence.” The state was specifically barred from sharing the spoils of these illegal searches with other federal agencies. Fast-forward 22 years. As EFF [revealed](#),

The documents show that in 2007, Customs and Border Protection (CBP) loosened restrictions on the examination of travelers’ documents and papers that had existed since 1986. While CBP agents could previously read travelers’ documents only if they had “reasonable suspicion” that the documents would reveal violations of agency rules, in 2007 officers were given the power to “review and analyze” papers without any individualized suspicion. Furthermore, whereas CBP agents could previously copy materials only where they had “probable cause” to believe a law had been violated, in 2007 they were empowered to copy travelers’ papers without suspicion of wrongdoing and keep them for a “reasonable period of time” to conduct a border search. The new rules applied to physical documents as well as files on laptop computers, cell phones, and other electronic devices. (“Internal DHS Documents Detail Expansion to Read and Copy Travelers’ Papers,” Electronic Frontier Foundation, September 23, 2008)

In keeping with an avalanche of rule changes governing the expansive reach of America’s intelligence agencies, the “quaint” notion of “probable cause”—that a targeted individual is suspected of a crime—is now a thing of the past, replaced by the Orwellian concept of “thought crimes” where *everyone* is miraculously transformed into a “suspect” by securocrats.

Under the guise of “keeping America safe,” counterterrorism is the new stand-in for what covert operators once referred to as countersubversive operations that targeted left-wing political groups for destruction. As America’s constitutional guarantees circle the drain awaiting only the final flush into oblivion, the religious and political beliefs of citizens and legal residents re-entering the country are now considered “fair game” by Bushist spooks.

ALC staff attorney Shirin Sinar denounced these patently illegal moves by the administration saying, “For more than 20 years, the government implicitly recognized that reading and copying the letters, diaries, and personal papers of travelers without reason would chill Americans’ rights to free speech and free expression. But now customs officials can probe into the thoughts and lives of ordinary travelers without any suspicion at all.”

It appears that simply attempting to legally cross the border constitutes “suspicious behavior” and is an occasion for state security agencies to have access to all our personal details, regardless of their relevance to an “ongoing terrorism investigation.” Or, as is more likely in America’s “new normal” regime, border crossings now serve as a pretext for *future* “terrorism investigations.”

In a further move to subvert the 1986 guidelines, ALC and EFF noted that “CBP’s wide latitude to collect this data attracted significant attention from other law enforcement agencies that sought to access it.” In other words, under cover of conducting “counterterrorist” border searches, dodgy outfits such as the CIA, FBI, and the NSA are now

asserting a “right” to have access to data seized from travelers’ cell phone directories, laptops, financial data or confidential business records stored in CBP databases “available” for their perusal.

DHS spokeswoman Amy Kudwa told the *Post* “the updating of policies reflects an effort to be more transparent.” Or cover DHS ass-ets since they were forced to release the files in the first place! The policy change according to Kudwa “reflects the realities of the post-9/11 environment,” that is, an unaccountable Executive branch that has assumed “plenary” (unlimited) powers “during a time of war” (of their own choosing).

All is not well in Homelandia, however.

As *The Washington Post* [reported](#) two weeks ago, “In the five years since it was created, the Department of Homeland Security has overseen roughly \$15 billion worth of failed contracts for projects ranging from airport baggage-screening to trailers for Hurricane Katrina evacuees, according to congressional data.” Dana Hedgpeth wrote,

The contracts wound up over-budget, delayed or canceled after millions of dollars had already been spent, according to figures and documents prepared by the House Committee on Homeland Security. A panel of experts is to testify today before the House Subcommittee on Management, Investigations and Oversight on how to fix problems with the DHS acquisitions process. ...

The experts are to talk about a series of problem projects: About \$351 million was wasted and not properly overseen in the U.S. Coast Guard’s Deepwater program after ships were built and then scrapped, according to Homeland Security committee staffers and oversight agency reports. A \$1.5 billion Boeing program to help secure U.S. borders with electronic sensors and other equipment is being shelved after it was over-budget, late and had technology problems. (“Congress Says DHS Oversaw \$15 Billion in Failed Contracts,” *The Washington Post*, Wednesday, September 17, 2008; D02)

While \$15 billion may seem like chump change in today’s climate of trillion dollar financial bailouts for Washington’s favorite grifters in the banking and securities industry, neither Congress nor DHS have a “fix” for these wasteful programs, unless that is, *the fix is already in* and taxpayers not privy to information available to various “wise men” peacefully ensconced in their “secure, undisclosed locations” remains “classified.”

But I digress...

Documents [revealed](#) that a July 11, 2007 email originating from CBP’s New York office noted the “wide interest among other government agencies in CBP’s ability to collect information.” Indeed, the nameless CBP bureaucrat wrote, “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.”

And under current rule changes enacted in July, DHS is allowed to share data obtained at the border with other agencies if there is a “suspicion” a law is being violated. Last year, documents revealed that the Assistant Commissioner, Office of Field Operations wrote:

There may be situations where an agency or entity, in furtherance of its

respective mission, wishes to retain or disseminate copies of the information provided to it by CBP for technical assistance. Any such retention and/or dissemination will be governed by that agency or entity's existing legal authorities or policies, including periodic reviews of retained materials to evaluate and ensure continued relevance. (Memorandum for: Directors, Field Operations, Office of Field Operations. From: Assistant Commissioner, Office of Field Operations. Subject: Border Search/Examination of Documents, Papers, and Electronic Information, July 5, 2007)

What these "situations" are that might merit sharing personal information with the CIA, FBI or NSA (or the [Main Core database](#) for that matter) and what would constitute "continued relevance" is not specified by the Assistant Commissioner.

As the civil liberties groups noted, ALC received more than two dozen complaints from U.S. citizens, particularly those who were Muslim, South Asian, or Middle Eastern. Those illegally detained "were grilled about their families, religious practices, volunteer activities, political beliefs, or associations when returning to the United States from travels abroad."

Since "traveling while Arab" is apparently an enforceable offense, these individuals had their books, hand written notes, personal photos, laptop computer files and cell phone directories scrutinized and copied. Indeed, as EFF/ALC averred "CBP appears to have no policy constraining agents from questioning travelers on their religious practices or political views, in spite of the fact that many travelers have complained about being grilled on such First Amendment-protected activities."

Nor will CBP agents be "constrained" from violating our constitutional rights. While some will chalk it up to America's "enhanced security environment" where Bushist cronies reap the spoils of their ill-gotten wealth, "business as usual"-as always-is standard operating procedure in post-Constitutional America.

Oh, and by the way, *Welcome to the United States!*

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