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War on terrorism collides with attorney-client privilege

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In an effort to combat the somewhat nebulous concept of "terrorism," laptops and other digital devices are currently subject to warrantless inspections at the border.

On July 16, in response to demands from civil liberties groups, two Department of Homeland Security agencies, the U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement, released policies on border searches of electronic devices, such as laptops and smart phones. The policies obviously are of great interest to any lawyer who travels internationally, in light of ethical obligations and the confidential nature of the information likely stored on such devices.

The policies provide, in relevant part: "[O]fficers may examine ... computers, disks, hard drives, and other electronic or digital storage devices...absent individualized suspicion...transported by any individual attempting to enter, reenter, depart, pass through, or reside in the United States. ... Officers may detain documents and electronic devices, or copies thereof, for a reasonable period of time to perform a thorough border search. ... [I]f after reviewing the information there is not probable cause to seize it, any copies of the information must be destroyed. ... To assist CBP in determining the meaning of such information, CBP may seek translation and/or decryption assistance from other Federal agencies or entities. Officers may seek such assistance absent individualized suspicion. ... [However] [n]othing in this policy limits the authority of an officer to make written notes or reports or to document impressions relating to a border encounter.

"Attorney-Client Privileged Material. Occasionally, an individual claims that the attorney-client privilege prevents the search of his or her information at the border. Although legal materials are not necessarily exempt from a border search, they may be subject to special handling procedures. Correspondence, court documents, and other legal documents may be covered by attorney-client privilege. If an officer suspects that the content of such a document may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of CBP, the officer must seek advice from the Associate/Assistant Chief Counsel or the appropriate U.S. Attor-

ney's office before conducting a search of the document."

In other words, U.S. officials virtually have unfettered discretion to conduct warrantless, suspicionless laptop and smart phone searches at the border, a policy that seemingly flies in the face of the Fourth Amendment and causes extreme consternation for privacy and civil rights advocates.



Despite the obvious privacy implications of the border search policies, so far both the Fourth and Ninth U.S. Court of Appeals for the Fourth and Ninth Circuits have upheld the legality of such searches, likening the search of a computer's hard drive to the search of the contents of a briefcase.

However, congressional hearings recently were conducted to examine the constitutionality of such searches and Senator Russell Feingold has said he intends to introduce legislation that would require reasonable suspicion as a prerequisite to border searches of electronic devices.

The border searches present a unique set of issues for lawyers who travel internationally. While the policies regarding the searches purport to provide for special procedures in the event attorney-client privilege is asserted, there is ample room for the arbitrary exercise of discretion on the part of border patrol agents when making the determination as to whether a device is subject to the special handling procedures applicable to attorney-client material.

A foolproof method for protecting confidential information has yet to be agreed upon universally. Some computer experts have suggested lawyers consider encrypting confidential client files, while others recommended using Web hosting services for e-mail and file storage in lieu of storing such information on a device's hard drive.

Until suspicionless laptop searches are declared unconstitutional or otherwise restricted, lawyers traveling internationally will face an unresolved ethical quandary worthy of inclusion on a bar exam.

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