



# Asian Law Caucus

IN DEFENSE OF CIVIL RIGHTS

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Customs and Border Protection Inspections:  
Restoration of Civil Rights and Civil Liberties  
Recommendations for the Presidential Transition Team  
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The Asian Law Caucus is a San Francisco-based nonpartisan, nonprofit organization that advocates for the legal and civil rights of Asian Americans and Pacific Islanders. The nation's first public interest legal organization serving the needs of the Asian American community, the Caucus has since 1972 championed the rights of individuals who have been denied civil liberties, victimized by hate crimes, or exploited by sweatshop employers. The Caucus has a long-standing commitment to national security policies that protect the equal rights and civil liberties of all American communities: the organization is perhaps best known for helping overturn the World War II-era conviction of Fred Korematsu for defying a federal order interning Japanese-Americans.

Since 2007, the Asian Law Caucus has received over thirty complaints from U.S. citizens and residents who have faced lengthy detentions, invasive questioning about religious and political beliefs, or intrusive searches of laptop computers and other possessions by U.S. Customs and Border Protection (CBP). These CBP practices have created widespread confusion, fear, and anxiety in the South Asian, Middle Eastern, and Muslim American communities and raised concerns about invidious profiling and the mismanaged terrorist watch list. In 2008, the Asian Law Caucus and the Electronic Frontier Foundation filed suit in federal district court under the Freedom of Information Act to require CBP to disclose its policies on searches and inspections.<sup>1</sup>

The Asian Law Caucus will be releasing a report in March 2009 with the Stanford Law School Immigrant Rights Clinic that includes a set of recommendations for the administration and Congress to restore civil liberties and privacy rights at the nation's borders and to safeguard against racial and religious profiling. A selection of these recommendations is presented in this paper.

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<sup>1</sup> For more information on the FOIA lawsuit, including the documents obtained and an index and analysis of those documents, please see <http://www.eff.org/cases/foia-litigation-border-searches>. See also Ellen Nakashima, Expanded Powers to Search Travelers at Border Detailed, Wash. Post, Sept. 23, 2008, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/22/AR2008092202843.html>



### *Intrusive Questioning and Searches*

The Asian Law Caucus continues to receive regular reports of travelers subject to invasive questioning about religious practices, political views, and associations with friends and family, in addition to intrusive searches of laptop computers, cell phones, digital cameras, and other electronic devices. CBP practices have had a chilling effect on Americans' First Amendment rights to the free exercise of religion, freedom of speech, and freedom of association.

For instance, a U.S. citizen college professor in San Francisco who writes for national magazines was grilled about his travels to the Middle East and the notes he had taken while reporting on political events abroad. Agents removed his laptop computer to another room for 45 minutes and told him they were downloading all the files from his computer. When he protested his treatment, he was told, "This is the border, and you have no rights." His attempts under the Freedom of Information Act to find out what files Customs and Border Protection retained from his computer have been unsuccessful.

A U.S. citizen IT consultant reported being questioned for almost 20 hours after five international trips, despite hearing an agent explain that he was not an actual match to a watch list. He was asked about his religion, whether he hated the U.S. government, whether he had visited mosques, and even told that he should "pray more." When he offered to give one agent his wife's phone number so the agent could verify his identity, he was asked, "Isn't it rude in Islamic culture to give a man a woman's phone number?" Customs agents inspected his company laptop computer, examined all the books in his luggage and recorded information on one book about the history of Islam, and prevented him from taking notes on the interview.

Other individuals have reported to the Asian Law Caucus that CBP agents asked them broad questions about their ideas and expressive activities such as: What do you think of events in Syria and Israel? What's your opinion of Iran's president? Where do you worship? What do you think about Jews? What kinds of political activism do you engage in? Do you volunteer at your mosque?

At the same time, CBP officials reportedly forced returning travelers to hand over laptop computers, books, letters, digital cameras, confidential company documents, personal notebooks, cell phone SIM cards, and stacks of business cards collected from colleagues abroad. As they searched these materials, sometimes for hours, officers recorded the titles of books that travelers were reading, examined websites that travelers had viewed, downloaded files from laptop computers, questioned people about their personal contacts, and even read complaint letters that individuals had previously written to members of Congress.

Documents uncovered through the Asian Law Caucus and Electronic Frontier Foundation FOIA lawsuit showed that in 2007, DHS quietly reversed a two-decades-old policy that had previously restricted CBP agents from reading and copying the personal papers carried by U.S. travelers.



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 Customs 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 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.

### *Relationship with the Terrorist Watch List*

Moreover, the intersection of overbroad CBP practices with the mismanagement of the terrorist watch list exacerbates civil liberties threats to ordinary Americans. Every person entering the United States is screened against several law enforcement databases, including the spiraling centralized watch list, or Terrorist Screening Database (TSDB). A number of people who have contacted the Asian Law Caucus report being subject to elaborate secondary inspections each time they return to the United States, suggesting that an apparent match to the TSDB may be responsible. Some travelers who are flagged by CBP because of the watch list may not in fact be on the list, but are misidentified with a watch listed person due to a similar name. Others may be on the list, but should not be: for instance, they may be listed because of false allegations or outdated information. Both categories of individuals – those who are "misidentified" and those who are "mistakenly listed" – end up suffering from the humiliation, stigma, anxiety, and inconvenience of repeated screenings at the border.

Recent government investigations suggest that the process for adding individuals, including U.S. citizens, to the TSDB lacks adequate safeguards to ensure that only those who pose a real threat are included.<sup>2</sup> There is little independent review of the designation of individuals to the terrorist watch list, increasing the risk that innocent, law-abiding U.S. citizens and immigrants may be added to the list.

### *Recommendations for Transition Team:*

1. Require the Department of Homeland Security to issue a directive prohibiting CBP from questioning individuals on religious practices, political views, and other such expressive activities except where clearly relevant to a person's admissibility for immigration purposes (as in the case of an individual on a religious worker visa) or where there is

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<sup>2</sup> See, e.g., U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 08-16, AUDIT OF THE U.S. DEP'T OF JUSTICE TERRORIST WATCHLIST NOMINATION PROCESS 7-10 (March 2008); U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL (OIG), FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER iii (Sept. 2007); UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GAO-06-1031, "TERRORIST WATCH LIST SCREENING: EFFORTS TO HELP REDUCE ADVERSE EFFECTS ON THE PUBLIC (Sept. 2007).



specific intelligence information linking that individual to a national security threat in relation to which such questioning is appropriate;

2. Require the Department of Homeland Security to issue a directive prohibiting CBP from searching laptop computers, digital cameras, cell phones, and other such electronic devices except where there is reasonable suspicion justifying the search<sup>3</sup>;
3. Require the Department of Homeland Security to protect travelers' First Amendment rights by issuing a directive restoring restrictions on reading and copying travelers' materials that existed until 2007;
4. Require the Department of Homeland Security to issue a directive prohibiting CBP from selecting travelers for searches or secondary inspections based on race, ethnicity, religion, national origin, and nationality, and to prohibit CBP officers from relying on individuals' travel patterns as a proxy for invidious profiling;
5. Require the Terrorist Screening Center to conduct a comprehensive review and cleansing of the records in the Terrorist Screening Database (TSDB) and to conduct periodic reviews thereafter, and to report regularly to Congress and the public on the results of such reviews.

The Asian Law Caucus looks forward to working with the Presidential Transition Team and the new administration to implement policies that would restore fundamental civil rights and civil liberties protections at the nation's borders.

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<sup>3</sup> The Travelers' Privacy Protection Act of 2008, a bill introduced by Senator Russell Feingold, includes a number of protections for travelers against unreasonable laptop searches and seizures at the border, including a reasonable suspicion standard. See <http://www.govtrack.us/congress/bill.xpd?bill=s110-3612>