

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**  
ABIDOR, et al., : 10-cv-4059-ERK  
                  Plaintiff, :  
                                  :   
          - versus - : U.S. Courthouse  
                                  : Brooklyn, New York  
NAPOLITANO, et al., :  
                  Defendant : July 8, 2011  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE  
BEFORE THE HONORABLE EDWARD R. KORMAN  
UNITED STATES SENIOR DISTRICT JUDGE

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## Proceedings

1 THE CLERK: Abidor v. Napolitano. Your  
2 appearances, counsel.

3 MS. SOWLES: Marcia Sowles for the defendant.

4 MS. CRUMP: Catherine Crump for the plaintiff.

5 MR. SCHACHNER: Elliot Schachner, also for the  
6 defendant.

7 MS. SCHROIBMAN: Sandra Schroibman, Department  
8 of Justice, also for the defendant.

9 MR. PRICE: Michael Price for the National  
10 Association.

11 MR. SIRACUSA HILLMAN: Benjamin Siracusa  
12 Hillman (inaudible).

13 THE COURT: I can't hear you.

14 MR. SIRACUSA HILLMAN: Benjamin Siracusa  
15 Hillman (inaudible).

16 UNIDENTIFIED SPEAKER: (Inaudible).

17 THE COURT: Okay. It's your motion.

18 MS. SOWLES: Okay.

19 THE COURT: I think it is.

20 MS. SOWLES: Right, Yes, your Honor. The  
21 Supreme Court has held that border searches of a person  
22 and their baggage are subject to search without any  
23 reasonable suspicion. This has been a long established  
24 rule and pursuant to that procedure, the border -- the  
25 United States Customs and Border Protection and ICE has

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1 issued policies which basically apply that policy to  
2 electronic searches.

3           The plaintiffs in this case are challenging it,  
4 alleging that this policy violates the Fourth and First  
5 Amendment. The defendants in this case believe that it  
6 should be dismissed for primarily two reasons. First,  
7 with respect to their facial challenge to the policy, it  
8 should be dismissed because the plaintiffs have not shown  
9 standing to bring such a facial challenge and seeking  
10 prospective relief.

11           And second, if you look at the merits, it  
12 should also be dismissed because pursuant to the long  
13 established rule that --

14           THE COURT: Okay. I mean there is standing to  
15 challenge it as applied, at least to the person who  
16 computer was searched.

17           MS. SOWLES: Searched. That is correct,  
18 your Honor, with regard to him. And with regard to that,  
19 there's -- in any case, there's no merit to their claim  
20 that it violates the Fourth Amendment because there is  
21 this long-established rules and courts have repeatedly  
22 found that with regard to computer searches, that there's  
23 no reason to treat them any differently. And the same  
24 with regard too their First Amendment, that both the  
25 Fourth and the Ninth Circuit rejected those Fourth

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1 Amendment -- the First Amendment claims.

2           Turning first to standing and the facial  
3 challenge, as the courts have recognized that past  
4 exposure to alleged harm or alleged unconstitutional  
5 behavior is not sufficient to allow for prospective  
6 injunction. And that instead, you have to show some  
7 immediate danger that you're going to be repeatedly  
8 subjected to this, that challenged behavior.

9           And in this case, the plaintiffs cannot simply  
10 show this, that while there is a policy that there's --  
11 that if you look at their own statistics that they cite  
12 in their complaint, there's only one in 90,000 for every  
13 past traveler that -- who has their laptop searched and  
14 that statistics, even if you look at the actual  
15 plaintiffs in this case, that Mr. Abidor, even though he  
16 says that he's a regular repeat traveler and frequently  
17 travels abroad, he has only had one instance where his  
18 laptop was actually searched. And with regard to the  
19 organizational plaintiffs, even though that they have --  
20 you know, they say that they have several thousand  
21 members, again they only point to one member who was  
22 searched in 2007 and another member in 2008.

23           And so that they do not show this immediate  
24 threat that's required for any challenge to the facial  
25 challenge, and therefore with regard to the facial

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1 challenge, it should be dismissed for that basis.

2           But even if this court were to reach the  
3 merits, there's simply no basis for either the Fourth or  
4 First Amendment challenge. With regard to again, a  
5 facial challenge to the policy, the plaintiffs have a  
6 very heavy burden. They have to, with regard to a facial  
7 challenge, you would have to show not just that it may be  
8 unconstitutional applies to certain instances but that  
9 every application of the policy would be unconstitutional  
10 and they just simply can't show that in this case.

11           That the Courts have repeatedly recognized that  
12 the border searches are reasonable by the very nature and  
13 that's nature and that's because it's -- you're  
14 protecting the borders so that historically the sovereign  
15 has the authority to protect the borders and therefore,  
16 individuals and their belongings can be searched without  
17 any reasonable suspicion and that has been upheld.

18           And that the Courts have recognized that  
19 there's no difference with regard to computers and there  
20 shouldn't be any difference. The plaintiffs in this case  
21 try to suggest that there should be differences because  
22 that they may contain personal information, they may even  
23 contain expressive material but again, if you look at the  
24 -- at each of these, that same could be true of the hard  
25 copies, that hard copies that -- or other items that are

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1 in your possession in two cases can also be very personal  
2 in nature. It can be a prescription. It could be  
3 pictures of the family. It can be, you know, a very  
4 private thing; diaries.

5           And that just because it's on a computer, it  
6 shouldn't be any more protected; in other words, under  
7 their theory, that you could have the very same piece of  
8 paper, the very same thing, that's on their computer, and  
9 it could be searched if it's in a hard copy and in their  
10 suitcases. So there's no reason that it should be  
11 protected simply because it's on the computer.

12           The same with regard to expressive materials.  
13 Again, the courts have repeatedly found that borders --  
14 with regard to border searches, there's no special  
15 exception for expressive materials. Indeed, if you look  
16 at the authority for the CBP and ICE, their authority  
17 includes -- you know, it's like child pornography and  
18 things that are very, by their very nature, are  
19 expressive in nature or films and things like that.

20           Furthermore, they didn't try to distinguish it  
21 on the fact that there's a size. And they say well, size  
22 should matter in this case and because computers can have  
23 several thousand documents. But again, the size  
24 shouldn't matter. I mean that would be a really perverse  
25 standard, sort of suggesting that the more you bring

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1 across the border, the less the government has a right to  
2 search it. And again, there's no requirement for that.  
3 It just doesn't make sense.

4           They furthermore say well, there's a need, that  
5 somehow computers are becoming more and more, just an  
6 every day device and therefore it's something that you  
7 need and therefore, you can't be without it. But again,  
8 that could be said of any number of things that --

9           THE COURT: Assuming it's true.

10          MS. SOWLES: What?

11          THE COURT: Assuming it's true.

12          MS. SOWLES: True. Right. And that that, in  
13 fact, as you point out, I mean there's things that you  
14 can leave at home. In fact, you know, a lot of  
15 corporations have suggested that because of the problems  
16 of theft and interception and by, you know -- over the  
17 internet and just security in other countries that,  
18 sometimes it's best to take less than to take more on the  
19 computer. And maybe leave it at home if at all possible.

20                 But with regard to -- and that again, so  
21 there's no matter how you slice it, there's really no  
22 difference and that to suggest as the plaintiffs are  
23 suggesting that you should carve out this exception,  
24 would really just be creating a gigantic loophole because  
25 to the extent that they're saying they're more and more

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1 common, then for that very reason, you shouldn't be  
2 creating this loophole because, you know, again the very  
3 same, you know, document that you could find if you were  
4 in a suitcase, we shouldn't allow them to hide it by  
5 having it in a computer.

6           And again, the -- under the policy that does  
7 allow for detention and time to search but again, they  
8 try to say that that somehow makes it unconstitutional.  
9 But again, there are, if you actually look at the  
10 guidelines, the guidelines are actually protective. I  
11 mean they add more things than probably the Fourth  
12 Amendment even requires by having time limits and that if  
13 you see those time limits, then you would have to have  
14 supervisory checks. And that they also may safeguard and  
15 the computer by saying that, you know, it's going to --  
16 if it's kept that it's, you know, kept in a secure area.  
17 Not everybody can look at it.

18           So -- and even just the fact that they've  
19 issued the guidelines themselves and make the directive  
20 public, that that's a safeguard because it's alerting  
21 people that they are going to be subject to a search,  
22 that it's not something that is coming as a surprise.

23           That, you know, and the government has been --  
24 you know, is cognizant of, you know, privacy concerns and  
25 they have tried to protect those privacy concerns but at



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1 the same time the government has also recognized that  
2 just as with regard to anything else that you bring  
3 across the border, there are important security, you  
4 know, concerns with regard to terrorists. There's also  
5 just they have enforcement activities.

6           And again, you shouldn't create a rule in which  
7 you can allow a child pornography picture to see it and  
8 seize it if it's in hard copy but it can be protected if  
9 it's on the computer.

10           Again, with regard to the First Amendment,  
11 agin, both this is an issue that has been considered by  
12 the Fourth Circuit and the Ninth Circuit and they have  
13 rejected the fact that it doesn't violate the First  
14 Amendment, that this is not a case where they try to  
15 compare it with Tababb (ph.) but in that case, the  
16 individuals there was a personal search, not a search of  
17 their property that they were complaining about. And  
18 they were also targeted because they had, in fact,  
19 attended a Muslim conference in Canada. And they were  
20 specifically targeted for that -- their First Amendment  
21 activity.

22           In this case, there's no suggestion that the  
23 directives, you know, targeted any particular person.  
24 That, in fact, you know, just the opposite; that there  
25 doesn't require a reasonable suspicion. And to the

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1 extent that they may incidentally by looking at their  
2 computer, be aware of maybe or reading interest or things  
3 like preferences, that that's again the same thing could  
4 be said in looking through your suitcase.

5           So no matter how you slice it, either as a  
6 First Amendment challenge or a Fourth Amendment  
7 challenge, that basically they're asking to carve out the  
8 special exception for computers and that there's really  
9 no logical basis in law for it because -- and it would be  
10 creating an actual, you know, danger to enforcement  
11 activities because it's something that it would be  
12 creating basically a loophole.

13           MS. CRUMP: In this case, the border agents  
14 took Mr. Abidor's laptop and they looked at his personal  
15 photographs, his correspondence with his girlfriends, his  
16 e-mail exchanges, his tax returns, his class notes. The  
17 policies that plaintiffs challenge purport to authorize  
18 the government to go through electronic devices and look  
19 at this personal and sensitive material for any reason or  
20 no reason at all.

21           In plaintiff's view, the Fourth and the First  
22 Amendments require the government to have at least  
23 reasonable suspicion before they can search electronic  
24 devices.

25           Searches of electronic devices implicate

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1 significant privacy interests. Electronic devices often  
2 contain vast quantities of information.

3 THE COURT: Well they do but if we were here  
4 ten or fifteen years ago, we wouldn't be having this  
5 conversation. Somehow we all managed to live without  
6 carrying all of this stuff around.

7 MS. CRUMP: That's true. But the world has  
8 changed. People now travel with their laptops. The  
9 legal profession has changed. The National Association  
10 of Criminal Defense Lawyers --

11 THE COURT: They've changed?

12 MS. CRUMP: -- have members who frequently  
13 travel overseas. And they need to have their laptops  
14 with them in order to be able to conduct their practices.  
15 It's simply not the same world it was before. The  
16 reality is that we cross the border with these devices.  
17 And the question is how to apply the Fourth and the First  
18 Amendment in the face of this new reality.

19 And plaintiff's view is that because of not  
20 just the volume of information that can be on these  
21 devices, but also the frequently sensitive nature of  
22 them, that a higher standard should apply.

23 THE COURT: Well all of that could  
24 theoretically be true of materials that are not carried  
25 in a computer, that are carried in a suitcase or a

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1 briefcase.

2 MS. CRUMP: Yes, and the plaintiffs believe  
3 that Judge Kozinski was correct in his dissent in Seljan  
4 that all expressive material should be subject to  
5 reasonable suspicion requirement. This court doesn't  
6 need to go that far in this particular case because  
7 plaintiffs are specifically challenging an electronic  
8 device search policy.

9 I think the documents that Mr. Abidor's  
10 computer had on them search illustrate how sensitive the  
11 materials on laptops can be but those sensitivities,  
12 they're also magnified for lawyers who travel  
13 internationally with their clients' materials on their  
14 laptops. And also journalists, particularly journalists  
15 covering events overseas who may have sensitive source  
16 information on their laptop such as members of the  
17 National Press Photographs Association.

18 The policies that plaintiffs challenge are --

19 THE COURT: And what do they do -- how did they  
20 travel before computers became so widespread?

21 MS. CRUMP: Well --

22 THE COURT: I mean what did they do?

23 Presumably whatever information was really essentially  
24 had to be carried, I think there's a lot of -- materials  
25 on the computer that do not need to be there and are

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1 there for convenience, and that changed the scope of your  
2 argument but in terms of all of the materials on a  
3 computer, people keep things there for convenience and  
4 not necessarily need. But what did a lawyer do fifteen  
5 years ago when he had a client who presumably made notes?  
6 I mean I don't carry a laptop computer with me but I  
7 never leave the court -- I never take a court document, I  
8 never take anything from the file. Even when I take a  
9 draft of an opinion, I tear off the first page and the  
10 last so God forbid I should lose it, nobody should be  
11 able to -- look, they should have trouble figuring out at  
12 least what it relates to because there's always a risk  
13 that -- of material falling into the wrong hands. So  
14 what did people do before computers?

15 MS. CRUMP: Well, I think many of the --

16 THE COURT: What did lawyers do? What did  
17 press photographers do? I mean people kept information  
18 in books. And what we're talking about here in terms of  
19 sheer numbers is almost nothing.

20 MS. CRUMP: I think many of the same  
21 concerns --

22 THE COURT: You want 90,000 and then I don't  
23 know how much it comes out to a year in terms of the  
24 number of people that are actually -- this policy  
25 actually impacts. I think I saw an article in the Times.

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1 I forget. It wasn't a year or maybe nine months, where  
2 there were 6,000 searches like this and about 3,000 were  
3 of American citizens. So we're talking -- we're not  
4 talking about the government standing at the airport  
5 going through everybody's computer.

6 MS. CRUMP: I don't think the fact that only a  
7 small number of people has been affected relatively --  
8 you know, 6,000, you know, it's not that small and if you  
9 violate one person's constitutional rights, it's still a  
10 constitutional violation.

11 THE COURT: Well, the constitutional test is  
12 what's reasonable. There's no -- the words reasonable  
13 suspicion don't appear in the constitution. Probable  
14 cause appears in relation to what a warrant is supposed  
15 to be issued on the basis of. It does not necessarily  
16 apply to all searches. Border searches have always been  
17 -- at least I've always looked upon them as coming in  
18 within what's called the administrative search exception,  
19 where the administrative searches in which the goal of  
20 the government is not to search for evidence to prosecute  
21 people for crimes, even though they might come across  
22 such evidence but where the principle goal is  
23 administrative. Custom searches is one. And searches  
24 that are designed to protect and prevent attacks on  
25 national security would be another.

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1           And if they found something and if they used  
2 it, okay, but these were not the principle purposes of  
3 the search. And so you have a whole -- it always struck  
4 me that the Customs searches fell within those kinds of  
5 administrative searches which in depending upon the  
6 cases, have done away with warrant -- traditional warrant  
7 requirement, probable cause, and even sometimes  
8 reasonable suspicion.

9           MS. CRUMP: Well it's certainly true that in  
10 many cases, reasonable suspicion isn't required for a  
11 border search.

12           THE COURT: And for other kinds of searches. I  
13 mean, all I am suggesting is that if I had to put a label  
14 on this, it would be like an administrative search, like  
15 if you were approaching the Verrazano Bridge as I once  
16 was as a passenger in a car, the police were conducting  
17 -- they were asking -- they were stopping every car to  
18 determine whether the driver was driving while  
19 intoxicated. They had no reasonable suspicion. And  
20 certainly no probable cause. And that kind of a search,  
21 that kind of a stop and inquiry is valid without any kind  
22 of evidentiary showing.

23           MS. CRUMP: In the border search context, the  
24 Supreme Court has distinguished between routine and non-  
25 routine searches.

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1 THE COURT: Yeah, well it's one thing to talk  
2 about a body search, a body cavity search and another  
3 thing to talk about other kind of searches that don't  
4 involve that kind of violation of bodily privacy.

5 MS. CRUMP: The Supreme Court has never limited  
6 its routine versus non-routine searches to bodily  
7 searches.

8 THE COURT: Well, they never extended it --

9 MS. CRUMP: And it --

10 THE COURT: -- as far as I know. I mean again,  
11 we're talking about a test of -- you know, a question of  
12 what's reasonable.

13 MS. CRUMP: That's right. And in plaintiff's  
14 view, laptops searches because of the vast quantities of  
15 expressive materials that laptops contain are akin --

16 THE COURT: Well, he -- in terms of -- it's  
17 known that these kinds of searches could be conducted,  
18 even though they're conducted on an extraordinarily  
19 infrequent basis. And there's no necessity to carry  
20 around all of this information on a computer, just  
21 because it happens to be convenient. Again, I would take  
22 precautions. I don't travel with a laptop only because I  
23 live in the -- I'm from an older generation that didn't  
24 become addicted to it but when I carry papers, I never  
25 travel with what I regard to be confidential papers. Not



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1 because I'm afraid the government is going to search, but  
2 I'm afraid I'll lose it. So that I make a decision that  
3 I am not taking this stuff with me. I'll e-mail it to  
4 myself.

5 MS. CRUMP: Well, and I think that points out  
6 one of the flaws of this policy.

7 THE COURT: What is that?

8 MS. CRUMP: It's so easy to evade in some  
9 circumstances through things like e-mail.

10 THE COURT: Well, it may be.

11 MS. CRUMP: Which raises a real question about  
12 how effective the policy actually is. But in any event,  
13 not everyone has the choice to leave behind confidential  
14 information when they travel abroad. For example,  
15 criminal defense attorneys conducting mitigation research  
16 overseas need to be able to conduct interviews and to  
17 bring their notes back across the border free from  
18 government scrutiny. The government --

19 THE COURT: Well, I would assume that before  
20 there were computers, they kept their notes somewhere  
21 else. The notes were, you know, they might have been  
22 kept in a notebook. I don't quite understand. I assume  
23 that the notebook was still subject to being examined. I  
24 mean I am not even sure that they're permitted to read  
25 every document. Are they permitted to read every

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1 document under your policy or are they --

2 MS. SOWLES: Well again, you know, they're  
3 required to search and then in some cases that does  
4 require you to read it --

5 THE COURT: Some cases --

6 MS. SOWLES: -- to understand what it is. And  
7 that, you know, it --

8 MS. CRUMP: Plaintiff's view is that that also  
9 requires reasonable suspicion. There's serious First  
10 Amendment concerns with this policy. Individuals have  
11 always had the right to exercise their First Amendment  
12 rights free from government scrutiny. The Supreme Court  
13 has recognized that in the domestic context and its  
14 association jurisprudence in cases such as NAACP v.  
15 Alabama where the court held that Alabama could not force  
16 the NAACP to disclose its membership lists without a  
17 compelling reason because that would chill First  
18 Amendment activity.

19 Lower courts have not had any difficulty  
20 applying that principle in the context of the privacy of  
21 reading records. So, for instance, when the government  
22 has attempted to subpoena reading records from an online  
23 bookseller such as Amazon, the courts have held that that  
24 intrusion into reading privacy implicates the First  
25 Amendment and have struck down those subpoenas as not

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1 meeting heightened scrutiny.

2           The First Amendment does apply in the border.  
3 I think the Debaugh (ph.) case is one example of that but  
4 so is the Supreme Court's decision in Lamont v.  
5 Postmaster General where the Court considered a  
6 regulation that required anyone wanting to receive what  
7 the government dubbed communist propaganda to notify the  
8 government in writing that it wanted to receive that kind  
9 of international mail. And the Court held that that  
10 violated the principles of free speech.

11           I think these -- it's clear that the border  
12 search policy allowing the government to go through  
13 individual's expressive materials at the border without  
14 any reasonable suspicion also exercises a severe chill on  
15 speech and couldn't pass any form of heightened scrutiny.

16           THE COURT: That would apply to any -- it would  
17 go beyond computers, your argument.

18           MS. CRUMP: It would go beyond computers, your  
19 Honor.

20           THE COURT: For any book.

21           MS. CRUMP: That's true.

22           THE COURT: So we're not -- there's nothing  
23 special here about your argument as it relates to  
24 computers.

25           MS. CRUMP: I tink the context that the

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1 computers heightens the concern because of the quantity  
2 and quality of documents there but the argument applies  
3 regardless whether it's in paper or in electronic format.

4 But, you know, in this case, plaintiff Abidor  
5 no longer feels like he can download and carry across the  
6 border certain types of information for fear that that  
7 will be misconstrued by the government. He now self-  
8 censors what he reads on his computer.

9 And NACDL members likewise refrain from taking  
10 notes during certain meetings because they are fearful  
11 that the government will then intrude into their privacy  
12 by reading those notes.

13 And these First Amendment concerns are serious  
14 and a reasonable suspicion requirement would be the best  
15 way to honor the First Amendment at the border.

16 THE COURT: And that would provide comfort to  
17 the defense lawyers? I mean you've got to be kidding.

18 MS. CRUMP: Well, yes.

19 THE COURT: I mean you've got to be kidding  
20 that that would provide -- that would take away their  
21 whole concern if there was simply reasonable suspicion.

22 MS. CRUMP: I think there's a meaningful  
23 difference between having no standard at all to govern  
24 the thousands of agents who are present at our border and  
25 having a reasonable suspicion requirement because that

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1 would at least require them to be able to articulate some  
2 reason why people are being selected.

3           THE COURT: That may be but if -- I don't know  
4 how much comfort it would give anybody. It's the fact  
5 that under some extraordinarily minimal standard, a  
6 defense lawyer could have his note searched or presumably  
7 looked through. I mean the reality is is that I doubt  
8 whether a reasonable suspicion standard would give  
9 anybody comfort. In fact, I don't even think a probable  
10 cause one would. But the reality is is that you're  
11 concerned about presumably the government being able to  
12 look at these papers under any circumstances. You just  
13 want to put a -- you know, a little speed bump is not --  
14 I can't believe a little speed bump is going to give any  
15 defense lawyer comfort.

16           MS. CRUMP: Well, I mean if that's the case,  
17 then the (indiscernible) carry a search requirement and  
18 all of these requirements are meaningless. But I think  
19 one of the things that the plaintiffs are concerned about  
20 is arbitrary action by the government officials. There's  
21 a lot of CBP officers out there. And a requirement that  
22 they have some reason to believe that a search will turn  
23 up evidence of a violation of law by CBP rights would  
24 provide some comfort. That's --

25           THE COURT: Well, there are other ways to deal

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1 with -- I mean in the case that I told you about, the  
2 Supreme Court, for example, in automobile stop cases  
3 where the Court said that in these random stops that I  
4 told you about, that the Supreme Court said well, you  
5 know, you're all concerned that they're going to stop you  
6 because race or sex. So, as long as they had some  
7 neutral standard, they could stop without reasonable  
8 suspicion. You want the letter A or want the -- I mean,  
9 number one, or an odd-numbered license plate and an even  
10 numbered license plate, that's not going to solve your  
11 problem, the National Defense Lawyers, however.

12 MS. CRUMP: Well the National Defense Lawyers  
13 think it will solve their problem, so --

14 THE COURT: I mean, I don't know, is it the  
15 National Defense's -- National Association of Defense  
16 Lawyers.

17 MS. CRUMP: The current electronic search  
18 policies are extremely broad. It's not just the  
19 government asserts that it has the right to search  
20 someone's laptop while they're at the border. And by the  
21 way, the government asserts it has that right regardless  
22 of the type of information being searched, whether it's  
23 attorney client privileged information or a confidential  
24 source for a reporter that, you know, the policies have  
25 some language in them acknowledging that these materials

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1 are sensitive but nothing in the policy requires  
2 reasonable suspicion, even for those types of materials.

3           The policies empower the government not just to  
4 search while someone is at the border but also to take  
5 their laptop from them when they cross the border and to  
6 continue searching that laptop or other electronic device  
7 for as long as the government wants. You know, the  
8 policy does provide as defense counsel pointed out where  
9 there are supervisory approvals, but it doesn't provide  
10 for any ultimate time line in how long a laptop can be  
11 taken.

12           THE COURT: Well it would presumably -- it  
13 couldn't be kept indefinitely.

14           MS. CRUMP: There's nothing in the policy that  
15 says that.

16           THE COURT: Well --

17           MS. CRUMP: And the practice --

18           THE COURT: And first of all, as I understand  
19 it, they can only seize and retain it if they have  
20 probable cause.

21           MS. CRUMP: I don't think that's an accurate  
22 reading of the policy.

23           THE COURT: I'm looking at the CPB directive  
24 section 5.4.1.1 --

25           MS. CRUMP: I --

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1 THE COURT: -- which deals with when officers  
2 may seize and retain. It says --

3 MS. CRUMP: I think the -- I'm sorry,  
4 your Honor.

5 THE COURT: Go ahead.

6 MS. CRUMP: I think there's a significant carve  
7 out --

8 THE COURT: It is 5.4.1.1.

9 MS. CRUMP: 5.4.1.1. Yes. Okay. So that's  
10 what that section says. But then there are other carve  
11 outs in later portions of the policy. I'm looking for  
12 the exact section. They're set in our brief if you'll  
13 bear with me, I'll pull up those citations.

14 (Pause.)

15 MS. CRUMP: My co-counsel has just pointed out  
16 to me that if you continue on to read Section 5.4.1.2 the  
17 policies address the circumstances under which the  
18 government can obtain information without probable cause.  
19 And that includes when the information relates to  
20 immigration, customs and other law enforcement matters  
21 which is a fairly broad exception.

22 And then once information is retained, the  
23 policy explicitly provides that the information can be  
24 shared with federal, state, local and foreign law  
25 enforcement agencies.



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1 THE COURT: What information is that again?

2 MS. CRUMP: Information that's retained for  
3 immigration and customs and other law enforcement  
4 matters. So the policy provides the government with  
5 sweeping authority to search people's laptops for as long  
6 as they deem appropriate and then to keep information  
7 from them and to share that information with other  
8 agencies, at least where it pertains to the law  
9 enforcement or an immigration matter.

10 THE COURT: For what --

11 MS. CRUMP: And these -- this imposes a  
12 significant burden on people's exercise of their First  
13 and Fourth Amendment rights because people won't be able  
14 to travel with this information without fear that the  
15 government will not just --

16 THE COURT: I mean normally you would travel --  
17 you want to bring stuff into the country, you're going to  
18 have customs information and there's also going to be  
19 traveling immigration documents.

20 MS. CRUMP: Well, yes, people do travel with  
21 information. But this -- I sense that you -- and this  
22 information is often quite sensitive and there's a lot of  
23 it and that's what people travel with these days. And  
24 it's often necessary for them to travel with that  
25 information and it imposes a burden on people's exercise

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1 of their rights.

2 I think for that reason, these searches under  
3 the Fourth Amendment should be classified as --

4 THE COURT: Well there are lots of burdens that  
5 unfortunately people are subject to when they travel. I  
6 mean it's an unfortunate part of the post-9/11  
7 circumstance that exists. I don't particularly enjoy  
8 traveling on airplanes. I mean it's a burden to me to go  
9 through the security search. They don't recognize my  
10 credentials from the administrative office from the  
11 United States Courts. And I have to travel -- even when  
12 I travel in the United States, I carry a passport. They  
13 should recognize it. They just don't.

14 I mean there are lots of burdens that people  
15 are subject to in order to protect their own security and  
16 the security of other people.

17 MS. CRUMP: That's true but the burdens still  
18 have to be reasonable and there's no evidence that --

19 THE COURT: I know.

20 MS. CRUMP: -- that this suspicion-less search  
21 policy actually helps advance the government's law  
22 enforcement interests.

23 THE COURT: One of the aspects of the  
24 administrative search cases that I have eluded to is that  
25 aside from the fact that the principle purpose of these

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1 searches is not to find evidence of crime, is that if you  
2 imposed the same standards that you do on -- not only  
3 normal searches to look for evidence of crime, then it  
4 would often be impossible to carry out these kinds of  
5 administrative searches.

6           In other words, if the government inspector  
7 wanted to enter my building to inspect the electricity  
8 just to see whether my building is complying with the  
9 law, if there were a requirement of reasonable suspicion  
10 or of probable cause, he might not be able to take action  
11 to enforce the building code.

12           So I mean basically the what you have in the  
13 administrative search context is part of the protection  
14 at least as it reviewed by the Court is that when they're  
15 not -- when police are not searching for evidence, when  
16 officers of the government are not searching for evidence  
17 they might be much more restrained in what they do. You  
18 could compare for example, the number of frisks -- stop  
19 and frisks in Brooklyn with the number of searches of  
20 computers in Kennedy Airport. And you'll see the  
21 difference.

22           And the other half of it is that it's also  
23 impossible to conduct such searches if you're going to  
24 set up evidentiary (indiscernible) that have to be met  
25 because it also can't be met. And that's why I can -- I

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1 have a choice when I go to the airport of submitting  
2 myself to a search which has become arguably more  
3 intrusive with this fancy little equipment, or I can not  
4 fly.

5           So I've put to this (indiscernible) choice.  
6 And the government's position is in this administrative  
7 search context. And this is that they knew we couldn't  
8 properly provide the security that's necessary if they  
9 had, let's say -- have reasonable suspicion or probable  
10 cause.

11           MS. CRUMP: I don't think the analogy to the  
12 administrative search doctrine works because the  
13 government is also enforcing criminal laws at the border  
14 and --

15           THE COURT: Well, they always have but in the  
16 administrative search context, the question focuses on  
17 what's defined by the purpose of the search. It's  
18 entirely possible that you might also find evidence of  
19 crime, and that's not the purpose of the search. It's  
20 not to find evidence of crime. If you do, you do. It's  
21 sort of like if you search somebody's suitcase and you  
22 find narcotics, well they're going to be subject to  
23 prosecution; bring drugs into the country, but the  
24 purpose of the search is prevent drugs from coming into  
25 the country. In fact, you may find evidence does not

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1 move that out of the category of administrative searches.

2 This is part of my own theory. I mean if you  
3 look under administrative searches, you might not find  
4 depending on the book, as to searches, searches of the  
5 border but that's how I -- that's how it fits into my  
6 understanding of how the Fourth Amendment operates.

7 MS. CRUMP: In the plaintiff's perspective,  
8 these searches are quite intrusive and different because  
9 of the nature of the expressive materials involved.

10 THE COURT: Well how do you answer the argument  
11 that I've just made? I make a choice when I fly. The  
12 choice is, I fly. I take a bus or I take a train. And  
13 if I choose to fly, I have to go through this intrusive,  
14 annoying, time consuming procedure. You don't have to  
15 carry all of this stuff on the laptop. You could have a  
16 special -- a laptop when you travel that carries  
17 materials that don't contain the picture of your whole  
18 life.

19 MS. CRUMP: Even if the domestic travel context  
20 though, there are limits on what the government can do  
21 into reasonable --

22 THE COURT: Well now I'm talking about  
23 domestic. There is a difference between domestic travel  
24 and travel across international borders and the powers  
25 that the government has had, going back to the earliest

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1 days of (indiscernible).

2 MS. CRUMP: The --

3 THE COURT: In fact, the border searches was  
4 recognized and codified by the same congress that enacted  
5 the Fourth Amendment.

6 MS. CRUMP: To be sure, the government has  
7 always had the right to conduct border searches.

8 THE COURT: Right.

9 MS. CRUMP: But those border searches have  
10 always been limited by the requirements of reasonableness  
11 and there have always been certain searches that have  
12 been considered non-routine. That the elementary canal  
13 search is one example.

14 THE COURT: Right. Right.

15 MS. CRUMP: And in plaintiff's view, this is  
16 another because people have very sensitive information  
17 that they now travel with.

18 THE COURT: That they've chosen to travel with.

19 MS. CRUMP: The --

20 THE COURT: They've chosen to travel with; that  
21 fifteen years ago, they might not have traveled with.

22 MS. CRUMP: It's true that people have chosen  
23 to travel with this information but often that's required  
24 by the necessity of their jobs. For instance, we've  
25 talked about the situation with --

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1           THE COURT: I know but you've -- it's true that  
2 a lawyer may have certain notes that he put on a computer  
3 or that he may have written down on a yellow pad, but  
4 what I am saying is you are -- you know, part of your  
5 argument about all of this -- the reason why it's so  
6 unreasonable is people have all sorts of -- they have  
7 their whole life on the computer, is it's a question of  
8 their own choice to travel that way.

9           MS. CRUMP: But I think even if people have  
10 limited information, they're still a First Amendment --

11           THE COURT: I mean I wouldn't do it. I  
12 wouldn't travel that way. I would be afraid, what if I  
13 lost the computer? What if somebody could, you know,  
14 (indiscernible). You know, people have (indiscernible)  
15 codes of hacking into computers. I mean it's risky  
16 business traveling with truly confidential materials,  
17 regardless of how you travel.

18           Did you retain any of this person's --

19           MS. SOWLES: Mr. Abidor's?

20           THE COURT: Yes. Did you retain the --

21           MS. SOWLES: They're -- a copy was made and to  
22 the extent that the defendants are still retaining it,  
23 it's been retained because the suit has been filed, so  
24 that it's being retained for litigation purposes.

25           THE COURT: By you?

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1 MS. SOWLES: Right.

2 THE COURT: But if not for that, you would give  
3 it -- you would have destroyed it?

4 MS. SOWLES: Otherwise, that would have been  
5 destroyed but for the fact that cases had been filed.  
6 But it's being retained pursuant to your rule 26 of your  
7 things that are related to the case and since that's  
8 potentially, you know, you could be considered relevant,  
9 it's being retained for that purpose.

10 THE COURT: All right. Do you have anything  
11 further?

12 MS. CRUMP: No, your Honor.

13 MS. SOWLES: No, your Honor, again, just as,  
14 you know, the computers can be convenient but at the same  
15 time just because you can carry something on it, doesn't  
16 mean you have to. And to the extent that there's issues  
17 with regard to, you know, attorneys notes or whatever,  
18 those are -- the fact that you would be carrying them on  
19 a hard copy and carrying them, is -- shouldn't make any  
20 difference.

21 THE COURT: Are there any restrictions on what  
22 can be read? I mean --

23 MS. SOWLES: To the extent that there's -- if  
24 the -- in doing a search, if they come across something  
25 that they believe is attorney/client or could be for some



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1 other reason, protected material, they are -- they  
2 contact the -- someone in the general counsel's office  
3 with regard to proper advice on that.

4 THE COURT: And where is that?

5 MS. SOWLES: That's -- it's in 5.2 of the CPT  
6 (ph.) that if officer suspects that the contents that the  
7 journal's made constitute evidence of a crime or  
8 otherwise pertain to a determination and (indiscernible)  
9 not seek advice, this is legal matters, that says -- it  
10 says that the legal matters are not exempt from a border  
11 search but they are subject to special handling. If an  
12 officer suspects that the content of such materials may  
13 constitute an evidence of the kind or otherwise retained  
14 for determination within the jurisdiction of CBP, the  
15 officer must seek advice from the CBP's associate or  
16 assistant chief counsel before conducting the search and  
17 the consultation of -- CBP counsel will also coordinate  
18 with the United States Attorney's Office, if appropriate.

19 THE COURT: Does suspect mean reasonable  
20 suspicion?

21 MS. SOWLES: Well it says if they suspect that  
22 there's a content -- may constitute evidence of a crime,  
23 so it does suggest that in those cases that there's --  
24 you know, they're looking at it more closely and that in  
25 those cases, they should be -- that they want to make

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1 sure that they're protecting and doing what's  
2 appropriate.

3 THE COURT: Well, suppose we were here and the  
4 computer had been taken, what would they actually be  
5 doing?

6 MS. SOWLES: Well again, you know, it depends  
7 on the circumstances but that what the officers usually,  
8 because they're -- first of all, the agencies don't want  
9 to -- if they're conducting a search of a computer, they  
10 don't want to sort of damage the files or you can  
11 inadvertently delete the files, so that they usually as  
12 the recent Cotterman decision recognized, that sometimes  
13 they take it to -- they believe that they're -- if  
14 appropriate, they may take it to a -- you know, people  
15 that are specialists in looking at it and that part of  
16 that, you know, specialization is again because they  
17 don't want to -- there's a danger that they could  
18 inadvertently, you know, change the file or delete it by  
19 looking at it, they do make image copies of that and that  
20 -- and then they review it.

21 You know, again, just as you review a suitcase  
22 or in looking through it on various things or you're  
23 looking through hard copies, again that's -- you know,  
24 that same sort of level of standing, reading it, or you  
25 know to the extent it's considered (indiscernible) that

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1 you have to look at it to determine what it is, that  
2 would be the same whether it's a hard copy or a computer  
3 copy.

4 THE COURT: Have you won any of these cases?

5 MS. CRUMP: This is our first one, your Honor.

6 THE COURT: What do you mean it's your first --  
7 oh, it's your first one.

8 MS. CRUMP: It's the -- maybe I misunderstood  
9 your question. I thought you were asking whether the  
10 ACLU had been previously involved in any of these cases.

11 THE COURT: No, no, no. I mean has your view  
12 prevailed in any of these case?

13 MS. CRUMP: To some extent yes, and to some  
14 extent no. To be sure, the weight of the authority is  
15 against us. Some district courts addressing the specific  
16 question of whether or not the government can keep  
17 someone's laptop for a prolonged period of time to  
18 continue to search it have concluded that the government  
19 must have reasonable suspicion in that case. And those  
20 cases are cited in our briefs. And one of them was the  
21 Cotterman decision which has now been reversed before the  
22 Ninth Circuit, although there's (indiscernible) petition  
23 that will be pending in that case.

24 But it's true, we're asking your Honor to do  
25 something that other courts haven't done and to hold that

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1 there's a reasonable suspicion requirement for searches  
2 of electronic devices at the border. I think there is  
3 room in the Second Circuit and Supreme Court case law to  
4 reach that conclusion.

5           In the Irving case, in the Second Circuit, the  
6 Court did not reach the question of whether or not  
7 reasonable suspicion was required in that case. It found  
8 that reasonable suspicion was present in any event,  
9 signifying that the Court obviously thought that whether  
10 the reasonable suspicion requirement was necessary was a  
11 hard question.

12           The Supreme Court in its Ramsey (ph.) decision  
13 was dealing with whether -- was dealing with the search  
14 of international first class letter mail. In that case,  
15 the court specifically noted that it didn't need to reach  
16 the question of whether reasonable suspicion was  
17 necessary to look through the content of mail and because  
18 there was a reasonable suspicion requirement in place for  
19 that postal regulation, and instead it had a footnote  
20 explaining that whether or not the full panoply of Fourth  
21 Amendment rights would need to apply because of the  
22 sensitivity of the First Amendment material at stake was  
23 not a question it needed to reach.

24           So your Honor certainly has a clear path if you  
25 decide that you want to rule in plaintiff's favor and

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1 because of the gravity of the First and Fourth Amendment  
2 interests at stake, a reasonable suspicion requirement is  
3 necessary to safeguard people's rights at the border.

4 THE COURT: Have any of your members' computers  
5 been subject to a border search?

6 MR. PRICE: Yes. We discuss one of them at  
7 the --

8 THE CLERK: Microphone, counsel.

9 MR. PRICE: Yes, your Honor. And one of them  
10 was discussed in detail in the complaint.

11 THE COURT: Only one?

12 MR. PRICE: That is what we felt we needed to  
13 do at this point.

14 THE COURT: Okay. Thank you.

15 THE CLERK: Counsel, may I get your appearance  
16 again for the record.

17 MR. PRICE: Michael Price.

18 THE CLERK: Thank you.

19 (Matter concluded)

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## C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 7th day of August, 2011.



Linda Ferrara

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