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September 15, 2022

The Honorable Chris Magnus
Commissioner
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, NW
Washington D.C. 20004

Dear Commissioner Magnus:

I urge you to update Customs and Border Protection's practices regarding searches of Americans' phones and electronic devices at the border to focus on suspected criminals and security threats, rather than allowing indiscriminate rifling through Americans' private records without suspicion of a crime. Such changes will better protect national security and respect the rights of Americans who travel overseas for business and leisure.

Modernized search guidelines must end CBP's existing practice of searching Americans' electronic devices without warrants based on probable cause of a crime. Two egregious violations of Americans' rights that my office recently became aware of in the course of briefings from your agency include: 1) pressuring travelers to unlock their electronic devices without adequately informing them of their rights, and 2) downloading the contents of Americans' phones into a central database, where this data is saved and searchable for 15 years by thousands of Department of Homeland Security (DHS) employees, with minimal protections against abuse.

The Supreme Court requires other law enforcement agencies to demonstrate probable cause to a neutral judge prior to obtaining a search warrant for Americans' phones. In contrast, CBP exploits the so-called "border search" exception to the Fourth Amendment and allows its officers to conduct "basic search" of any international traveler's phone or laptop, without suspicion that the traveler has committed a crime. A basic search occurs when an officer examines a phone by hand, including review of a traveler's text messages and photos.

Citing the same interpretation of the Fourth Amendment, CBP also permits its officers to download data from a traveler's phone using advanced digital forensics tools, with a supervisor's approval, if they have a "reasonable suspicion" that laws enforced by CBP are being violated or that there is "a national security concern." While CBP keeps and has provided to Congress statistics on the number of electronic device searches it conducts every year, CBP does not keep statistics on the number of basic vs. advanced searches, the number of times CBP downloads data into its central database, nor the number of times it searches this database for "national security" purposes.

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In a June 20, 2022 briefing to my office, CBP estimated that it forensically examines and then saves data from “less than 10,000” phones per year — which typically includes text messages, call logs, contact lists, and in some cases, photos and other sensitive data — in a central database. CBP confirmed during this briefing that it stores this deeply personal data taken, without a warrant signed by a judge, from Americans’ phones for 15 years and permits approximately 2,700 DHS personnel to search this data at any time, for any reason. CBP officials also revealed that government personnel querying the data are not prompted to record the purpose of the search, even though auditable records of this sort are an important safeguard against abuse. CBP has yet to provide my office with statistics on the total number of Americans whose data has been stored in this database or how frequently the database is searched by government personnel.

CBP’s ability to conduct warrantless border searches of Americans’ electronic devices has been strictly limited by the United States Court of Appeals for the Ninth Circuit. As such, in my home state of Oregon as well as Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Washington, Guam and the Northern Mariana Islands, CBP must follow rules that offer significantly more protections for Americans’ rights. In these states and territories, CBP may only conduct warrantless searches for digital contraband, such as child abuse material.

While CBP routinely conducts warrantless searches of Americans’ devices, in practice most Americans still have the ability to protect their privacy. This is because most cell phones have for years included the capability to encrypt data stored on them, making it hard, if not practically impossible for border agents to download Americans’ data, if Americans protect their phone with a strong password or passphrase. If travelers do not protect their phone at all, or if they only use a PIN number or unlock pattern, CBP can easily extract their data.

While strong passwords and passphrases provide a digital self-defense tool against warrantless government surveillance, CBP directives assert Americans are required to cooperate with a border search of their devices and that CBP can “pursue available legal remedies” against travelers who refuse. But the statute that CBP has cited, which enables CBP to issue fines of up to \$1,000, dates back to 1986, before the ubiquity of cell phones and encryption technology. Moreover, CBP appears to recognize the limits to its authority to force cooperation, and seems to be relying on vague language to obtain compliance from travelers who may not fully understand their legal rights. CBP officials informed my office by email on April 4, 2022 that CBP has never attempted to issue a fine against anyone for refusing to disclose their password or to unlock their phone or laptop. Indeed, the agency has not even issued a written policy or procedure guidance related to the assessment of fines in this situation. It is true that CBP can temporarily seize a traveler’s phone, particularly if they refuse to provide their password, but CBP acknowledged to my office that doing so will not result in an American being denied entry. Americans have a right to return home.

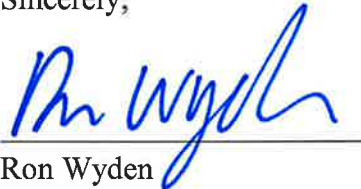
CBP told my office that it provides travelers a “tear sheet” explaining their rights when it seizes a traveler’s device and copies their data. However, CBP confirmed to my office during a June 20, 2022 briefing that its officers are only required to provide the tear sheet at some time during the search, not at the beginning. Thus, travelers might not see it until after they are coerced into unlocking their devices. Moreover, the tear sheet provides misleading information regarding

their rights and CBP's authority to search their devices. The tear sheet does not tell travelers that CBP will retain their data for 15 years and that thousands of DHS employees will be able to search through it. In fact, the tear sheet misleadingly suggests that CBP will not retain a copy of travelers' data absent probable cause. The tear sheet also states that collection of travelers' information is "mandatory," but fails to convey that CBP may not arrest an American or prevent them from entering the country if they refuse to tell CBP their password.

As I stressed when we spoke before your confirmation, Americans' privacy rights should not depend on whether they enter the country by flying into Portland's PDX airport or Washington Dulles — CBP should adopt the 9th Circuit's stronger protections nationwide. Innocent Americans should not be tricked into unlocking their phones and laptops. CBP should not dump data obtained through thousands of warrantless phone searches into a central database, retain the data for fifteen years, and allow thousands of DHS employees to search through Americans' personal data whenever they want. To that end, please provide me, no later than October 31, 2022, with a written plan detailing the steps that CBP will take to address the issues raised in this letter.

Thank you for your attention to this important matter. If you have any questions about this request, please contact Chris Soghoian in my office.

Sincerely,



Ron Wyden
United States Senator