Department of Homeland Security

U.S. Immigration and Customs Enforcement

Homeland Security Investigations

Search and Seizure Handbook

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OFFICIAL USE ONLY

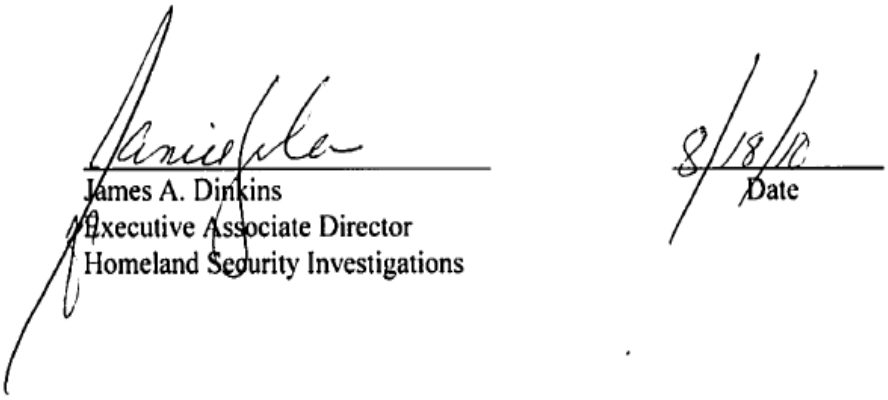
Foreword

The Search and Seizure Handbook provides a single source of national policies, procedures, responsibilities, guidelines, and controls to be followed by U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) Special Agents (SAs) when conducting search and seizure activities within the scope of their authority. This Handbook contains instructions and guidance to help ensure uniformity and operational consistency among all HSI field offices. (Note: On June 9, 2010, the ICE Offices of Investigations (OI), International Affairs, and Intelligence were realigned under HSI. Throughout this Handbook, documents issued prior to the June 9, 2010 realignment are referred to by their original titles, e.g., the OI (instead of "HSI") Case Management Handbook.)

Chapter 42 of the U.S. Customs Service (USCS) OI SA Handbook entitled "Search and Seizure"; Chapter 17 of the Immigration and Naturalization Service (INS) SA Field Manual entitled "Search and Seizure" and its Appendix 17-1, "Seizure Work Sheet"; Chapter 5-1 of the INS Investigator's Handbook entitled "Search and Seizure"; and all other documents on searches and seizures issued by USCS or INS are hereby superseded. The Search and Seizure sections of INS Manual (M-69) entitled, "The Law of Arrest, Search and Seizure," no longer apply to ICE HSI. (Note: The Arrest section of M-69 ceased to apply to HSI when OI Handbook 07-02, "Arrest Procedures Handbook," was issued on October 4, 2007.)

The Search and Seizure Handbook is an internal policy of HSI and is not intended to confer any right or benefit on any private person or party. If disclosure of this Handbook or any portion of it is demanded in any judicial or administrative proceeding, the HSI Information Disclosure Unit, as well as the appropriate ICE Counsel and/or U.S. Attorney, should be consulted so that appropriate measures can be taken to invoke privileges against disclosure. This Handbook contains information which may be exempt from disclosure to the public under the Freedom of Information Act, Title 5, United States Code, Section 552(b), and protected from disclosure in civil discovery pursuant to the law enforcement privilege. Any further request for disclosure of this Handbook or information contained herein should be referred to the HSI Information Disclosure Unit.

The HSI Policy Unit is responsible for coordinating the development and issuance of HSI policy. All recommended revisions to this Handbook should be submitted to the HSI Policy Unit.



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8/18/10
Date

SEARCH AND SEIZURE HANDBOOK

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SEARCH AND SEIZURE HANDBOOK

Chapter 1. PURPOSE AND SCOPE

The U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) Search and Seizure Handbook establishes policy and procedures to be followed by HSI Special Agents (SAs) when conducting search and seizure activities within the scope of their authority.

Chapter 2. INTRODUCTION

Searches and seizures consistent with Fourth Amendment protections are among the most complex subjects for SAs. The search and seizure methods that HSI utilizes to enforce laws must conform to constitutional and statutory limitations as well as Department of Homeland Security (DHS), ICE, and HSI policy. HSI enforcement activities involve border operations and operations conducted in the interior of the United States. Since statutes, regulations, and case law, including Supreme Court decisions, cannot and do not address every factual scenario regarding search and seizure law, SAs must be attentive to decisions by their circuit courts and prosecutorial policies in their particular districts. SAs make many decisions concerning searches and seizures when confronted with immediate and compelling circumstances in the field. Faced with developing situations, SAs do not always have the opportunity to consult reference materials or policy documents, or to seek the advice of their local Office of the Chief Counsel (OCC) or the appropriate U.S. Attorney's Office (USAO).

It is important, therefore, for SAs to understand and apply the principles of search and seizure laws, policies, and procedures. It is also important for SAs to recognize that the law concerning searches and seizures is intricate and continually evolving. This Handbook is intended neither as a substitute for more detailed study of the pertinent laws and regulations, nor as a replacement for prudent consultation with supervisors, ICE attorneys, and prosecutors.

Chapter 3. DEFINITIONS

The following definitions are provided for the purposes of this Handbook:

3.1 Actual Border

On land, the dividing line between the United States and Canada or Mexico. On the sea, 3 nautical miles from the coast of the United States; in Texas and the Gulf coast of Florida, 9 nautical miles from the coast. In the air, the actual border extends directly upward from the land and sea borders.

3.2 Admissibility

The eligibility of an individual to be legally admitted into the United States, as ascertained by an immigration officer.

3.3 Affidavit

A voluntary declaration of facts written down and sworn to by the declarant before a judicial officer authorized to administer oaths, such as a federal judge or magistrate.

3.4 Anticipatory Search Warrant

A search warrant issued based on an affidavit showing probable cause that, at some future time following the occurrence of a specific triggering event, evidence of a certain crime will be located at a specified place.

3.5 Articulable Facts

Clear and distinct facts stating objective observations and reasonable inferences used to justify levels of suspicion on the part of SAs.

3.6 Border Nexus

A situation in which a person or thing either crosses the border or has come in contact with someone or something that crossed the border.

3.7 Border Search

A search for merchandise conducted at the border of the United States, or a search for persons conducted at the border of the United States for the purpose of excluding illegal aliens.

3.8 Consensual Encounter

An encounter between an SA and an individual during which the individual believes he or she is free to terminate the encounter and leave at any time.

3.9 Contraband

Merchandise that is unlawful to import, export, or possess.

3.10 Curtilage

Curtilage is the immediate area surrounding a residence wherein the intimate activity associated with the sanctity of the home and the privacies of life occurs. Curtilage, like a residence, is protected under the Fourth Amendment from unreasonable searches and seizures. Reasonable is determined on a case-by-case basis, considering:

1) The distance from the home to the place claimed to be curtilage (the closer to the home, the more likely it is curtilage);

2) Whether the area claimed to be curtilage is included within an enclosure surrounding the home (the absence of an enclosure alone does not mean that it is not curtilage; however, the presence of an enclosure heightens the probability that the area will be deemed curtilage);

3) The nature of the area's use (if it is the site of domestic activities, it is more likely to be a part of the curtilage); and

4) The steps taken by the resident to protect the area from observation by the public (shielding from public view will favor finding that the portion is curtilage).

3.11 Customs Waters

A body of water wherein U.S. authorities may enforce the laws of the United States. In the absence of a treaty or other arrangement, customs waters extend seaward 12 nautical miles from the mean low water mark of the United States.

3.12 Diplomat

A representative of a foreign government who has been recognized and accredited by the U.S. Department of State to represent that government in the United States or at the United Nations.

3.13 Documents

All papers and other written documentation including, but not limited to, those relating to an alien's identity and/or admissibility; those relating to the import and/or export of merchandise to and from the United States; materials such as books, pamphlets, and printed or manuscript material; monetary instruments; and written materials commonly referred to as "pocket trash" or "pocket litter."

3.14 Electronic Device

Any device that is capable of containing or storing electronic information, such as computers, disks, drives, tapes, mobile phones and other communications devices, cameras, music players, and any other electronic or digital devices.

3.15 Exclusionary Rule

The rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights.

3.16 Extended Border Search

A border search (see Section 3.7) conducted within the United States away from the actual border (see Section 3.1) or functional equivalent of the border (see Section 3.22) under circumstances in which SAs have a reasonable certainty (see Section 3.37) that a person or thing had or will have border nexus (see Section 3.6), reasonable certainty of no material change since or prior to border nexus, and reasonable suspicion (see Section 3.39) that the person or thing is involved in criminal activity.

3.17 Facilitating Property

Property that is used in furtherance of criminal activity. Such property may be subject to forfeiture.

3.18 Forfeitable Evidence

Seized property that is needed as evidence of criminal activity and is subject to forfeiture. (This type of property was historically referred to as "dual-status evidence.")

3.19 Forfeitable Seized Property

Property that has been lawfully seized and for which there is a statutory provision for its forfeiture. Included are facilitating property (see Section 3.17) and proceeds of criminal activity (see Section 3.35).

3.20 Frisk

A pat down search of a person for concealed weapons conducted in conjunction with an investigative detention.

3.21 Fruit of the Poisonous Tree

The rule that evidence derived from an illegal search, arrest, or interrogation is inadmissible because the evidence (the "fruit") was tainted by the illegality (the "poisonous tree").

3.22 Functional Equivalent of the Border

An area of the United States away from the actual border where: (1) an SA has reasonable certainty that a person or thing has crossed the border inbound, will cross the border outbound, or has come in contact with someone or something that crossed the border; (2) the SA has reasonable certainty that there has been or will be no material change in the person or thing between now and the border crossing; and (3) the search occurs at the first practical detention point inbound or the last practical detention point outbound.

3.23 Government

All government employees, whether SAs, other law enforcement officers, or civil authorities, such as building inspectors, health inspectors, or firefighters.

3.24 High Seas

The open waters of an ocean or sea more than 12 nautical miles from the territorial jurisdiction of a country.

3.25 Immediate Patdown

A search of a person, similar in scope and method to a frisk, but conducted at the border, based on reasonable suspicion that an individual is armed.

3.26 Inland Waters

Any natural or artificial body or stream of water within the territorial limits of a country, such as a bay, gulf, river, creek, harbor, port, lake, or canal. The inland waters of the United States are waters that are: (1) inland from the coast of the United States; (2) inland from a line drawn from headland to headland of a river, bay, or inlet with access to the sea; or (3) the U.S. portion of the Great Lakes.

3.27 Investigative Detention

The brief detention of a person or object that does not constitute an arrest, based upon reasonable suspicion that the suspect or object was involved in a crime. The detention may last only long enough to confirm or dispel SAs' suspicions of criminal activity. An investigative detention of a person is often referred to as a "*Terry* Stop."

3.28 Level of Suspicion

The degree of certainty an SA has regarding a person's involvement in criminal activity or the location of evidence in a particular place.

3.29 Merchandise

Goods, chattels, and wares of every description, including merchandise whose importation is prohibited and monetary instruments.

3.30 Non-Forfeitable Evidence

Seized property that is needed as evidence of criminal activity but may be returned to the owner following the conclusion of judicial proceedings. (This type of seized property was historically referred to as "single-status evidence.")

3.31 Plain Touch

The principle that an SA, while conducting a legal pat-down search, may seize any contraband that the SA can immediately and clearly identify, by touch but not by manipulation, as being illegal or incriminating.

3.32 Plain View

An SA who is lawfully and legitimately in a certain location may seize evidence without a warrant provided that the incriminating nature of the object is immediately apparent to the SA and the SA is in a location where he or she can seize the object lawfully.

3.33 Pretextual Search or Seizure

A search or seizure justified by suspicion of one criminal violation, but used to investigate another.

3.34 Probable Cause

Facts and circumstances that would lead a reasonably prudent law enforcement officer to believe that a person has committed or is committing a crime or that a place contains specific items connected with a crime.

3.35 Proceeds

Something received upon selling, exchanging, collecting, or otherwise disposing of collateral. When the exchange is part of criminal activity, the proceeds may be forfeitable.

3.36 Protective Sweep

A brief, limited search of premises, conducted after SAs have lawfully entered the premises, based on a reasonable belief that such a search is necessary to protect the SAs or others from harm.

3.37 Reasonable Certainty

A level of suspicion greater than probable cause but less than "beyond a reasonable doubt." The level of suspicion required to establish border nexus.

3.38 Reasonable Expectation of Privacy

A situation in which: (1) a person expects that a particular place or thing will remain free of government intrusion; and (2) society recognizes the expectation as a reasonable one.

3.39 Reasonable Suspicion

A particularized and objective belief by an SA, supported by specific and articulable facts, that a person or thing is involved in criminal activity.

3.40 Search

A government intrusion that invades a protected interest of an individual.

3.41 Seizure

A person is seized when the government interferes with an individual's freedom of movement, causing a reasonable person to believe that he or she is not free to terminate the encounter. An object is seized when the government meaningfully interferes with an individual's possessory right or interest.

3.42 "Sneak-and-Peek" Search Warrant

A warrant authorizing law enforcement officers to clandestinely enter private premises in the absence of the owner or occupant without prior notice, and to search the premises and collect intangible evidence. Information gathered while executing a sneak-and-peek warrant can later be used to support a search warrant under which physical evidence can be seized.

3.43 Some or Mere Suspicion

A hunch or subjective belief by an SA that a person or thing is involved in criminal activity based only on inconclusive or slight evidence.

3.44 Straw Owner

The titular owner of a property when the titular ownership is used to conceal the real owner. Straw owners may be used to avoid forfeiture or to falsify ownership for tax or other reasons.

3.45 Telephonic Search Warrant

A search warrant obtained, due to special circumstances, by telephonic or electronic communication rather than by a written affidavit presented in person.

3.46 Warrant

A writ directing or authorizing an SA to make an arrest, seize property, or conduct a search.

Chapter 4. RESPONSIBILITIES

4.1 Executive Associate Director, Homeland Security Investigations

The Executive Associate Director of HSI has overall responsibility for the oversight of the policies and procedures set forth in this Handbook.

4.2 Special Agents in Charge

Special Agents in Charge (SACs) are responsible for implementing the policies and procedures set forth in this Handbook within their respective areas of responsibility.

4.3 Special Agents

SAs are responsible for complying with the provisions of this Handbook.

Chapter 5. FOURTH AMENDMENT CONSTITUTIONAL SAFEGUARDS

5.1 Constitutional Requirements

The U.S. Constitution affects SAs' ability to conduct searches and seizures in several ways. First, it gives Congress the authority to enact laws and the Executive Branch the authority to enforce those laws. Congress, for example, has the authority to regulate trade and commerce with foreign nations, collect duties and taxes, and establish rules for citizenship, naturalization, and immigration. The Constitution also places limits on governmental conduct in order to protect the rights of the people.

As law enforcement officers employed by the Executive Branch, HSI SAs may enforce laws according to the statutory authority granted by Congress, but only in a manner within the limits established by the Constitution.

5.2 Possible Consequences of Improper Searches and Seizures

If SAs exceed their statutory authority or violate constitutional limitations or protections, potential consequences include:

A. Suppression of Evidence. If SAs violate an individual's constitutional rights, the courts may suppress (exclude) evidence obtained as a result of the violation. Such evidence cannot be used in a criminal proceeding against the individual whose rights were violated. This is also referred to as the "Exclusionary Rule." It is designed to prevent law enforcement officers from violating constitutional safeguards by removing the incentive to do so.

B. Exclusion of "Fruit of the Poisonous Tree." The courts may extend the Exclusionary Rule to apply to any evidence derived from a constitutional violation. If, for

example, SAs neglect to read a suspect his or her Miranda warnings prior to a custodial interrogation, and then use statements made during the interrogation to obtain a search warrant for the suspect's home, any evidence discovered during the residential search may be "tainted" by the constitutional violation committed during the interrogation. The evidence will likely be suppressed as "fruit of the poisonous tree."

C. Civil Liability. The individual whose rights have been allegedly violated may file suit against the government, the SAs involved, or both for damages incurred which stem from the violation.

D. Employment Consequences. SAs may be subjected to disciplinary action for exceeding their authority and acting in a manner contrary to law and/or DHS, ICE, or HSI policy.

E. Criminal Prosecution. In some cases, SAs may be prosecuted for criminal misconduct relating to a constitutional or statutory violation.

5.3 The Fourth Amendment

The constitutional limitations on SAs' authority to conduct searches and seizures are found in the Fourth Amendment, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment protects against unreasonable searches and seizures and extends this protection to people and their property. It applies to all persons in the United States, whether citizen or noncitizen, and whether they are legally or illegally in the United States.

The Fourth Amendment also provides that all warrants shall be based on probable cause. The Fourth Amendment does not mandate a warrant for all searches or seizures, and the courts have recognized several exceptions under which a warrantless search is reasonable. (These exceptions, including border search authority, are discussed in subsequent chapters.)

The courts have overwhelmingly expressed a preference for searches and seizures with a warrant. As a result, it is always recommended that SAs obtain a warrant if time permits, if one of the specific exceptions to the warrant requirement does not apply, and especially if SAs have any doubt concerning whether or not a particular search or seizure requires a warrant.

5.4 Concept of Level of Suspicion

Ultimately, when an SA's conduct is challenged, a court will decide whether the SA acted in a reasonable manner. When determining whether the SA's actions were reasonable under the Fourth Amendment, the courts will compare the SA's conduct during the search or seizure to the level of suspicion that the SA had at the time the search or seizure was conducted. The level of suspicion is a label used to describe how certain the SA is that there was a violation of law. Generally, as a seizure or search grows broader in scope or becomes more intrusive, the required level of suspicion increases.

5.5 Articulable Facts

To establish a level of suspicion, the SA combines articulable facts – pieces of information that can be observed and put into words. The SA may use any reliable information to establish a level of suspicion, including, but not limited to:

A. The SA's own observations of people and physical evidence.

B. Information gathered from other SAs or other law enforcement officers. (Statements from law enforcement officers are generally presumed to be reliable.)

C. Information available through law enforcement computer information systems.

D. Information from third parties, such as informants. Some examples of ways in which a third party's credibility may be established are:

1) Past Reliability. A record of having provided accurate information in the past is the most frequently used method of evaluating a third party's information.

2) Amount of Detail. The courts will consider the amount of detail provided by the third party when judging the reliability of his or her information, especially if some of the details are corroborated by the SA's observations.

3) Admissions. If the third party is involved in the crime and makes statements against his or her penal interest, he or she is more likely to be considered credible.

4) Status as an Ordinary Citizen. An ordinary citizen who is providing information to the SA, not out of self-interest but merely to assist the SA in the enforcement of the law, is usually viewed as credible.

5) Status as a Victim or a Witness to a Crime. Statements made by victims and/or witnesses to a crime are generally treated as credible.

6) Corroboration. Whenever possible, information provided by third parties should be supported by firsthand observations by the SA or other law enforcement officers. This is especially important if the information is coming from an

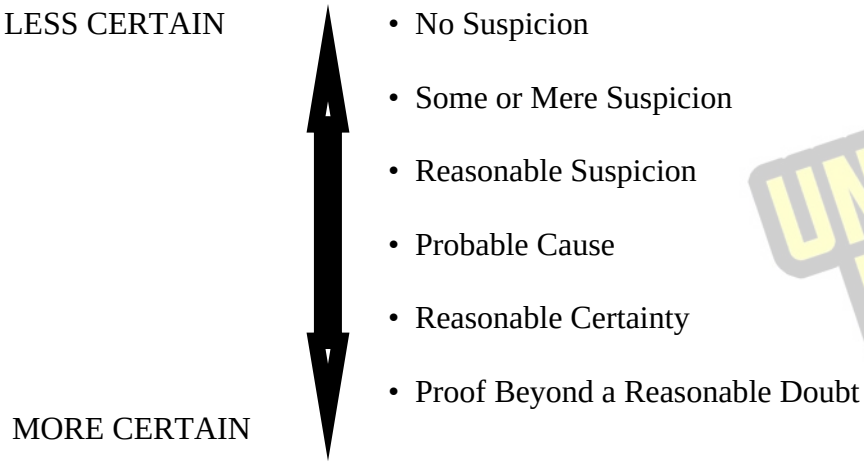
anonymous source, an informant, or from a third party whose reliability cannot be established by any of the criteria listed above.

E. Canine Alert. The courts have ruled that a positive alert by a detector dog is tantamount to probable cause.

5.6 Totality of the Circumstances

When determining whether or not the SA had the necessary articulable facts to establish the requisite level of suspicion, a court will take into account not only the articulable facts, but the "totality of the circumstances" surrounding those facts. SAs' training and experience are an important element of the "totality of the circumstances" and may add value to the articulable facts. In other words, articulable facts that would mean nothing to the average person may mean more to a trained SA and may lead the SA to have a higher level of suspicion.

5.7 Levels of Suspicion



A. No suspicion is required for some searches and seizures. For example, searching luggage for merchandise at the border is defined as a search under the Fourth Amendment, but it is deemed reasonable under the border search exception and requires no suspicion on the part of the SA.

B. Some or mere suspicion is a subjective belief on the part of the SA. An SA does not need any articulable facts to have mere suspicion. He or she may suspect someone simply because of a "hunch." Alternatively, the SA may have articulable facts to support mere suspicion, but not enough to form the basis for reasonable suspicion.

C. Reasonable suspicion is an objective belief by the SA that a person might be engaged in criminal activity. This level of suspicion must be based on one or more articulable facts. The SA must be able to explain his or her reasons for the search or seizure, and those reasons must be enough to make a reasonable person suspect that a particular individual is involved in a crime.

D. Probable cause is a reasonable ground to suspect that a person has committed or is about to commit a crime or that a place contains specific items connected with a crime. Under the Fourth Amendment, probable cause – which amounts to more than a bare suspicion but less than evidence that would justify a conviction – must be shown before an arrest warrant or search warrant may be issued. Probable cause may not be established simply by showing that the law enforcement officer subjectively believed he or she had grounds for his or her action. Rather, the probable cause test is an objective one requiring that the facts would warrant a belief by a reasonable person.

E. Reasonable certainty may also be described as a firm conviction or a high degree of probability. However, it requires more certainty than probable cause.

F. Proof beyond a reasonable doubt exists when there is no legitimate reason to believe that a person did not commit a crime. Proof beyond a reasonable doubt is the level of suspicion needed to convict a defendant in court.

5.8 Elements of a Seizure

Three factors must be present in the seizure of a person: 1) the government; 2) interference with freedom of movement; and 3) a reasonable belief on the part of the person that he or she is not free to terminate the encounter.

Not all interaction between SAs and private individuals constitutes a seizure. SAs, for example, have not seized a person merely by approaching the person in a public place, inquiring about identity, or requesting consent to interview the person or to search luggage or other areas. As long as the SAs do not restrain the freedom of an individual to terminate the encounter and walk away, no seizure has occurred and the Fourth Amendment is inapplicable.

A seizure occurs when, in view of all the circumstances surrounding the incident, a reasonable person would believe that he or she is not free to leave or terminate the encounter. Some encounters may constitute seizures from the outset. At other times, an initially consensual encounter may escalate into a Fourth Amendment seizure.

An object is seized when the government meaningfully interferes with a person's possessory right or interest. If SAs merely move luggage around on a conveyance to facilitate a canine screening, it does not constitute meaningful interference. Likewise, if SAs place a tracking device on a vehicle, but allow the vehicle to proceed on its way, this is not meaningful interference with ownership (although the monitoring of that device may present other Fourth Amendment issues).

5.9 Elements of a Search

Three elements must be present in a Fourth Amendment search: 1) the government; 2) an intrusion; and 3) a protected interest. A "protected interest" is determined by the establishment of a reasonable expectation of privacy (REP) (see Section 5.9.2).

5.9.1 Government vs. Private Intrusion

In defining "the government" for the purposes of searches and seizures, the courts restrict the actions of all government employees, whether SAs, other law enforcement officers, or civil authorities, such as building inspectors, health inspectors, or firemen. A private individual may intrude upon an individual's REP without conducting a search subject to Fourth Amendment limitations. If a private citizen acquires evidence of a crime and voluntarily hands it over to SAs, that evidence may be admissible in criminal proceedings against a defendant even if the private citizen's intrusion was illegal.

Fourth Amendment law does, however, prohibit searches by private citizens if they are acting on behalf of the government. If an informant conducts an illegal search at SAs' direction or with SAs' acquiescence, the search would constitute a violation of Fourth Amendment rights.

5.9.2 Reasonable Expectation of Privacy

For an individual to have a REP, two conditions must be met: 1) the individual has an expectation of privacy; and 2) the individual's expectation is one that society recognizes as reasonable – in other words, a subjective belief that is objectively reasonable.

Examples of factors that may help determine whether or not a person's expectation is objectively reasonable are: 1) whether or not the public has access to the area in question; 2) whether the individual owns or occupies the area or property; and 3) whether or not the person has taken steps to control access or exclude others from the property or area.

A. Generally, there is a REP in the following:

1) A person's body.

2) A person's home.

3) Curtilage. Curtilage is defined as an area in close proximity to a person's home where the activities of the home are conducted (see Section 3.10). A fenced side yard, for example, might be curtilage. Factors to be considered when deciding whether or not an area is part of the curtilage are: (i) its proximity or connection to the home; (ii) if it is enclosed or fenced; (iii) how the area is used; and (iv) whether or not steps have been taken to screen the area from public observation.

4) Vehicles. This means the vehicle's interior. There is no REP in the vehicle's exterior or undercarriage.

5) Containers. This includes purses, briefcases, backpacks, luggage, sealed packages, and letters.

6) Private communications.

B. There is generally no REP, and therefore no Fourth Amendment search protection, for the following:

1) Areas in open view.

2) Open fields. An open field is an area of private property that is adjacent to a dwelling but is not part of the curtilage. SAs may enter open fields without intruding into a REP and without conducting a search under the Fourth Amendment.

3) Public areas. In addition to other public areas, this includes law enforcement vehicles and facilities.

4) Overheard conversations, so long as the conversation is overhead from a position where the law enforcement officer is lawfully present.

5) Abandoned property. The property must be abandoned voluntarily, as opposed to lost or stolen property. If it is discarded in response to an SA's actions (during a pursuit, for example), the SA's actions must be lawful.

6) Trash. The U.S. Supreme Court has ruled that trash placed in public for collection has no REP; as such, Fourth Amendment analysis is inapplicable. When SAs recover and examine trash, this will not normally amount to a "search" in a Fourth Amendment context so long as the SAs have lawful access to the trash without entering onto the curtilage.

7) Odors. A canine sniff of an object does not involve any intrusion and is not a search. Canine sniffs of a person's body (e.g., sniffing a passenger's clothing in an airport terminal) raises additional issues of intrusion and may constitute a search. However, in order to perform a canine sniff, the law enforcement officer and canine must be lawfully present in the area where the sniff occurs.

8) Identification and travel documents. Such documents are designed for use by public officials and are not considered private.

5.9.3 Reasonable Expectation of Privacy and the Use of Technology

Generally, SAs may use technology to aid in their observation of an area that has no REP. For example, if an SA can see into an open, unfenced yard from the adjacent public sidewalk, that yard has no REP. If the SA chooses, for investigative reasons, to view the yard with a pole-mounted camera, there is still no REP and therefore no Fourth Amendment search.

The same applies to any type of technology. If SAs can see, hear, or otherwise observe something from the vantage point of a public place, or a place to which they have been given lawful access, using their unaided senses, they may see, listen to, or observe the same evidence using technological aids in order to observe the evidence more clearly or keep their investigation clandestine. The key point is that the use of the technological aid does not give the SAs the ability to intrude into an area with a REP.

Fourth Amendment issues arise when SAs use binoculars, telescopes, listening devices, thermal imaging, night vision, or other technological tools to enhance or extend SAs' ability to observe an area in which an individual has a REP. In some such cases, the SAs' conduct becomes a search under the Fourth Amendment and generally requires a court order or warrant. Legal and procedural requirements for searches using technological devices and monitoring equipment can be found in HSI policy on technical surveillance.

Chapter 6. SEIZURES

6.1 Seizures of Persons

The three principal levels of encounters between SAs and the public at locations other than the border are: 1) consensual encounters, where the person is free to leave at any time or may refuse to answer any questions; 2) investigative stops, which must be supported by the SAs' reasonable suspicion, and which only permit a brief detention of the individual; and (3) arrests, which must be supported by probable cause to believe that the person has violated a law within the scope of the SA's authority.

This section will focus on questioning and detention not amounting to arrest, as arrests are covered more specifically in the Arrest Procedures Handbook (Office of Investigations (OI) Handbook (HB) 07-02, dated October 4, 2007, or as updated). Seizures under customs border authority and under the Immigration and Nationality Act (INA) will be discussed in Chapters 8 and 9.

6.2 Consensual Encounters

As discussed in Section 5.8, consensual encounters between an SA and the public are not seizures under the Fourth Amendment and require no suspicion on the part of the SA. So long as an individual remains free to terminate the encounter and leave, the SA may approach the individual, request (but not demand) that the person identify himself or herself, and ask questions.

During the course of a consensual encounter, an SA may wish to take some or all of the following actions to avoid turning the contact into a detention or arrest: 1) be courteous; 2) explain the purpose of the encounter; 3) identify himself or herself as an SA; and 4) request cooperation from the individual, but explain that the person is free to leave.

To avoid transforming the consensual encounter into a seizure, the SA may want to avoid: 1) making demands or giving commands; 2) language or a tone of voice that implies that the individual's compliance is mandatory; 3) displaying (to the extent possible) any weapons; 4) touching the person; 5) retaining the person's identification documents longer than necessary; 6) using any force; and/or 7) issuing Miranda warnings.

6.3 Investigative Detentions

SAs may briefly, forcibly detain a person if there is reasonable suspicion to believe that the person is violating, has violated, or is about to violate any criminal statute which the SAs are authorized to enforce. Investigative detentions (defined in Section 3.27) are considered seizures under the Fourth Amendment and are often referred to as "*Terry* stops," so named because of the Supreme Court decision (*Terry vs. Ohio*) that recognized this type of police-individual encounter.

An investigative detention should be brief and limited in scope. Its purpose is to gather enough information to verify or dispel the SA's suspicions. The person must be released as soon as the SA dispels his or her suspicions. If the SA verifies the suspicions and develops probable cause, the detention may escalate into an arrest.

An investigative detention may unintentionally escalate into an arrest if the SA detains the individual for too long or uses excessive force. In addition to the duration of the stop, the courts will consider a variety of factors in determining if an arrest occurred. These factors include, but are not limited to: 1) the purpose for the detention and the suspected crime; 2) the amount of force used; 3) the number of law enforcement officers involved in the detention; 4) the time, location, and surrounding environment; and 5) whether or not the SA acted to accomplish the purpose of the investigative detention as quickly as possible.

If the SA is concerned with officer safety and decides to wait for backup, the investigative detention may reasonably last for a longer period of time without becoming an arrest. The same applies if the SA needs to wait for a canine officer or other expert assistance in order to resolve his or her suspicions. Even in these and other extenuating circumstances, SAs should move to conclude the investigative detention as expeditiously as possible; the duration of the stop must be reasonable given the totality of the circumstances.

Placing an individual in handcuffs does not, in itself, constitute an arrest. If the SA is able to articulate why handcuffing was objectively necessary for officer safety, the SA may handcuff an individual during an investigative detention.

6.4 Frisks

During the investigative detention, if the SA has reasonable suspicion that the individual is armed and dangerous, the SA may frisk (defined in Section 3.20) the individual. A frisk is a search for weapons. It is to be conducted for officer safety; it is not a search for evidence.

During a frisk, an SA may feel the outside of the individual's clothing for the presence of a weapon. The SA may also feel the outside of any bags or containers the person is carrying. If the individual is wearing heavy clothing, the SA may reach underneath an outer jacket to avoid missing any weapons. If the SA feels a suspected weapon, the SA may reach into the clothing to remove it.

6.5 Plain Touch

While the purpose of a frisk is to search for weapons, the SA may seize contraband discovered during the course of a frisk. This is known as the "plain touch doctrine." To perform a lawful seizure under the plain touch doctrine, the SA must recognize immediately that the perceived item is contraband. The SA may not manipulate a soft item through the clothing in order to identify it. If the item is hard, it may be retrieved as a possible weapon and seized once it has been identified as contraband.

6.6 Investigative Detentions of Vehicles

SAs may conduct investigative detentions of vehicles. SAs may stop a vehicle with reasonable suspicion that a person inside the vehicle is, or is about to be, engaged in criminal activity. SAs may also stop a vehicle with reasonable suspicion that the vehicle contains contraband or that a person in the vehicle is wanted for past criminal conduct.

During an investigative stop of a vehicle, SAs may do any of the following to ensure officer safety: 1) remove the driver and passengers from the vehicle; 2) order the driver and passengers to remain in the vehicle; 3) use a light to illuminate the interior of the vehicle; and 4) conduct license and registration checks.

In addition, SAs may conduct a "frisk" of the vehicle. If the SAs have reasonable suspicion that any occupant of the vehicle is dangerous and may gain access to a weapon, the SAs may frisk the person and search the entire passenger compartment of the vehicle for a weapon. This includes any containers to which the person has immediate access and that might contain a weapon. A frisk may not include the trunk of a vehicle.

6.7 Pretextual Stops

The courts have ruled that pretextual vehicle stops are permitted in certain circumstances. SAs may use reasonable suspicion that another violation has occurred to stop an individual or vehicle. Once the stop has been made, the SA may ask questions pertaining to an unrelated offense. If SAs lack reasonable suspicion to make a stop for an offense within the scope of their authority, the SAs may utilize the assistance of state and local law enforcement. A state or local law

enforcement officer may conduct a pretextual vehicle stop based on a traffic violation or other violation within his or her authority and in accordance with the laws and regulations of that state or local law enforcement officer's jurisdiction.

6.8 Property Seizures

Property seized by SAs falls into two broad categories: 1) property seized as evidence to be used in a criminal or administrative proceeding; and 2) contraband or other property subject to forfeiture.

Some seized property falls into only one of these categories. For example, financial documents or utility bills seized during a search warrant are normally seized only as evidence. They are typically returned to the owner or a designee following any judicial proceedings. Evidence that is not subject to forfeiture is termed "non-forfeitable evidence" (see Section 3.30). Similarly, a vehicle purchased with proceeds from alien smuggling may be seized for forfeiture only, since it was derived from a crime but has no evidentiary value. This type of property is referred to as "forfeitable seized property" (see Section 3.19).

Other seized property falls into both categories. A shipment of cocaine, for example, will be held as evidence of drug smuggling throughout a criminal proceeding, after which it will be forfeited and destroyed as contraband. A mobile telephone used to facilitate human trafficking may be forfeitable, but may first be held as evidence due to call history or address book information stored in its memory. Seized property of this type is termed "forfeitable evidence" (see Section 3.18).

The following sections provide a general overview of legal guidelines, policies, and procedures for seizures of property. For more detailed information and policies regarding property seizures, evidence processing, and asset forfeiture, SAs should refer to the U.S. Customs Service (USCS) Seized Asset Management and Enforcement Procedures Handbook (SAMEPH) (HB 4400-01A, dated January 2002, or as updated), the HSI Asset Forfeiture Handbook (HSI HB 10-04, dated June 30, 2010, or as updated), and other HSI policies on evidence and asset forfeiture.

6.9 Investigative Detentions of Property

As with people, SAs may conduct an investigative detention of property. Based on reasonable suspicion, SAs may detain something long enough to determine whether or not it is evidence of a crime, subject to forfeiture, or both. For example, if SAs reasonably suspect that luggage at a domestic airport terminal contains narcotics, they may detain the luggage long enough to request a canine screening. If, however, an object is seized for more than a brief, investigative purpose, the seizure requires probable cause.

Note: The reasonable suspicion requirement described above applies to non-border circumstances. SAs' border search authority will be discussed in Chapters 8 and 9.

6.10 Seizure of Property as Evidence

Any kind of property is subject to lawful search and seizure if the item or property to be seized appears to be reasonably necessary to aid in a particular apprehension or conviction. The most important considerations when seizing evidence are: 1) that the SAs are in a lawful position to observe the incriminating item, and 2) that they have a lawful right of access to the incriminating item. For example, if SAs can see contraband through the window of a residence from the public street, they are in a lawful position to observe the evidence and have probable cause to seize it. To conduct a lawful seizure, however, SAs must also have access to the home by means of a search warrant or some other justification for a warrantless search (see Chapter 8).

The following are the most typical situations in which SAs may seize property as evidence:

A. Pursuant to a Search Warrant. According to Rule 41 of the Federal Rules of Criminal Procedure (FRCrP), a search warrant may be issued to search for and seize any:

1) property that constitutes evidence of the commission of a criminal offense;

2) contraband, the fruits of crime, or things otherwise criminally possessed; or

3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

The warrant must describe the items to be seized. This description may be specific (e.g., a particular kind of counterfeit merchandise or military hardware) or general (e.g., controlled substances).

B. Evidence in Plain View. When executing a search warrant, the general rule is that SAs may seize only those items described in the warrant. The "plain view doctrine" provides an exception to that rule, allowing SAs to seize other items of an incriminating nature if they come across them during the course of a lawful search. For example, SAs executing a search warrant for narcotics in the home of a known felon may discover and seize any firearms. To seize property under the "plain view doctrine," SAs' search must be within the scope of the warrant and SAs must immediately recognize the incriminating nature of the item(s).

C. Pursuant to a Lawful Warrantless Search. If SAs encounter evidence or contraband during the course of a warrantless search (for example, a border search, consent search, or search incident to arrest), they may seize the items as evidence. (Exceptions to the Fourth Amendment warrant requirement are discussed in Chapter 8.)

6.11 Seizure of Property for Forfeiture

The purpose of forfeiture is to deny criminals the instruments or profits of their criminal activity. Unlike non-forfeitable evidence, property seized for forfeiture or forfeitable evidence must

undergo a two-stage process. First, SAs seize the property based on probable cause. Second, the property will undergo forfeiture proceedings to determine whether title to the property will be vested in the U.S. Government.

6.11.1 Contraband

Contraband (see Section 3.9) is defined as an item that is illegal to possess, import, or export. Illegal narcotics or child pornography are two examples of contraband. SAs may seize contraband with the presumption that it will be administratively forfeited and destroyed once it is no longer needed as evidence.

6.11.2 Determining What May Be Seized for Forfeiture

When planning to seize property for forfeiture, SAs should take the following steps:

A. SAs should determine what, if any, connection exists between the owner of the property and the criminal activity. One of the more common defenses against the forfeiture of property is the "innocent owner" defense. An "innocent owner" is one who has no participation in or knowledge of the criminal activity associated with the seizure of his or her property. An example is a property owner who leases a house to someone who, unbeknownst to the owner, is using the property as a stash location for smuggled drugs. In such cases, the SAs' first priority should be to determine whether the owner has participated in or is complicit in the criminal activity. The SA should keep in mind that the "innocent owner" defense is a defense to forfeiture, not to seizure.

   A second means to defeat the "innocent owner" defense is by demonstrating that the titular owner of the property is a "straw owner" (see Section 3.44). In a case of "straw ownership," the criminal defendant is the actual owner of the property and has placed the property in someone else's name (e.g., a friend or family member) for tax purposes, to conceal the true owner's identity, to disguise the source of income, or to shelter the property from anticipated forfeiture proceedings.

B. SAs should determine whether or not the forfeiture of the property is in the best interest of the government. Although the purpose of forfeiture is to deny criminals the profits or tools of their crimes, seizures of property for forfeiture should also be financially viable for the government. Due to the costs of processing, storage, maintenance, and disposition, forfeitable seized property must meet certain guidelines in terms of net equity:

   1) Real property must have a minimum net equity of $20,000 or 20% of the value of the property, whichever is greater.

   2) Vessels and aircraft must have a minimum net equity of $10,000.

   3) Vehicles must have a minimum net equity of $5,000.

4) Bank or other financial accounts must contain at least $5,000.

5) All other personal property, including jewelry and other valuables, must have a minimum net equity of $5,000.

An exception may be made to these thresholds if there is an overriding law enforcement purpose for the seizure of the property or if the person from whom the property was taken is being prosecuted for criminal activities involving the property. For example, if SAs seize a vehicle with a smuggling compartment, it may be in the best interest of the government to forfeit the vehicle, regardless of its value, to ensure that the vehicle is removed from service as a load vehicle.

C. SAs should determine if the property is forfeitable as proceeds or for facilitation. Once SAs have determined that the owner of the property is involved in the criminal activity and that forfeiture of the property is financially viable, they should begin to consider how to proceed with the seizure. At a base level, there are two ways to justify seizure for forfeiture. In the first, the SAs have probable cause to believe that a criminal used the property in the commission of the crime. This is facilitation. Examples of such property are houses used to store narcotics and vehicles used to smuggle illegal aliens. The second justification for forfeiture would be to demonstrate that the property is proceeds of criminal activity or that the criminal acquired the property with proceeds from his or her illegal activity. An example would be a luxury vehicle purchased using money acquired from illegal arms exports. Some property may be used to facilitate crime and represent proceeds of illegal activity, but only one justification is necessary to proceed with the seizure and forfeiture.

D. SAs should consider by which process the property is to be forfeited. Forfeiture of property may occur in one of three ways:

1) Administrative Forfeiture. Administrative forfeiture is a forfeiture carried out by an agency without judicial involvement. It is limited to certain types and values of property. Real property may not be seized or forfeited administratively. All contraband and conveyances used to transport controlled substances may be forfeited administratively regardless of value. Cash may be administratively forfeited. Other property is limited to a value of $500,000 to be eligible for administrative forfeiture. Property seized administratively by ICE HSI is turned over to the U.S. Customs and Border Protection (CBP) Office of Fines, Penalties, and Forfeitures (FP&F) for processing. FP&F will provide notice to owners and lien holders and ensure that the forfeiture conforms with other requirements established by the Civil Asset Forfeiture Reform Act of 2000. The owner of property subject to administrative forfeiture proceedings has the option of skipping the administrative process and of having the case heard by a federal judge. If this option is chosen, the administrative proceedings are terminated and

the matter is referred to the USAO for institution of judicial forfeiture proceedings.

2) Civil Forfeiture. Civil forfeiture proceedings commence when the USAO files a complaint for forfeiture *in rem* in federal district court. Civil forfeitures are actions against the property itself; essentially, they hold the property civilly liable for its involvement in criminal activity. They are conducted independently of any criminal proceedings and do not rely on a criminal conviction for their success or failure.

   Civil forfeitures are particularly advantageous in cases in which the defendant in the criminal case has become a fugitive, is deceased, or is beyond the reach of the court for some other reason. They are disadvantageous in cases in which a seized asset is transferred, damaged, or destroyed between the time of the criminal activity and the time of the forfeiture. No substitution of assets is allowed in civil forfeiture cases if the asset is lost or devalued.

3) Criminal Forfeiture. Criminal forfeiture is initiated when the USAO includes a forfeiture allegation in a grand jury indictment or criminal complaint filed against a defendant. The fate of items seized under criminal forfeiture proceedings is tied to the fate of the criminal defendants. For the item to be forfeited, the defendant must be convicted of the underlying criminal violation, and either a trial jury or the defendant's plea agreement must agree with the grounds for the proposed forfeiture.

   Criminal forfeitures are disadvantageous in cases in which the defendant is beyond the reach of the court, as in the case of a fugitive. They are also disadvantageous in criminal cases which take a great deal of time to reach a disposition, since the government must pay storage/maintenance costs and there is a risk that the asset may depreciate in value over time. Criminal forfeitures are advantageous, however, in cases in which a forfeitable property is destroyed, damaged, or transferred to another party, because they allow for substitution of assets. SAs, through the Assistant U.S. Attorney (AUSA) and the court, may seek the forfeiture of another, equivalent asset owned by the defendant, even if the other asset was not involved in the criminal activity.

In cases where seized property meets the criteria for administrative forfeiture, administrative forfeiture proceedings should be commenced and run parallel with the criminal forfeiture proceedings. This ensures a forfeiture of seized property may be effected in the event that the property is not forfeited, for whatever reason, in the criminal case. The important point to remember in such cases is that the SAs, FP&F, and the USAO must be fully informed of the progress of all forfeiture proceedings and the status of the investigation. In such cases, SAs should enlist the aid and expertise of their local Asset Identification and Removal Group (AIRG) (see Section 6.11.5).

E. SAs should determine the statutory basis for the forfeiture. Logic seems to suggest that this would be the first step in evaluating a potential forfeiture. It is often difficult, however, to determine which statute to use until SAs have determined feasibility, resolved the question of facilitation vs. proceeds, and decided between administrative, civil, or criminal forfeiture. Once the SAs have taken these steps, they should carefully review the provisions of the underlying criminal offense with special attention to any forfeiture provisions.

Some statutes contain their own "built-in" forfeiture provisions. For example, Title 19, United States Code (U.S.C.), Section 1595a(a) provides for forfeiture for a variety of customs violations; 8 U.S.C. § 1324(b) provides for forfeiture for many alien smuggling offenses; and 21 U.S.C. §§ 853 and 881 are the statutory bases for many controlled substance-related forfeitures. Whatever the underlying statute, SAs should examine what the statute specifically allows or does not allow in terms of forfeiture. Some statutes contain no forfeiture provisions. Others provide for forfeitures based on proceeds, but not facilitation, or *vice versa*. Some, as in Title 21, make a clear distinction between procedures to be followed in criminal forfeiture proceedings and those to be followed in civil forfeiture proceedings.

If the underlying criminal offense does not contain its own forfeiture provision or if the investigation involves money laundering offenses, SAs should review the provisions of the general forfeiture statutes: 18 U.S.C. § 981 for civil forfeitures and 18 U.S.C. § 982 for criminal forfeitures.

6.11.3 Proportionality and the Eighth Amendment

Seizures of property for forfeiture purposes should not only be "reasonable" within the meaning of the Fourth Amendment, but also be proportionate in terms of the Eighth Amendment, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Defendants often attempt to avoid forfeiture by arguing that it is "excessive." In considering a defendant's arguments, the court will weigh the extent of the criminal activity against the value of the forfeited property. For example, if a defendant's house is to be forfeited as a narcotics stash house, the court will consider the quantity of drugs stored in the house and how frequently the house was used for this purpose. SAs should be mindful of this potential defense against forfeiture and should document as much evidence as possible of criminal misuse, particularly in the case of facilitating properties.

6.11.4 Seizure Warrants

As with seizures of property for evidence, seizures of property for forfeiture may or may not require a warrant. If SAs have probable cause that an item is forfeitable as proceeds or for facilitation and if the SAs have lawful access to the property, SAs may make some seizures without a warrant. For example, SAs may conduct a warrantless seizure of a vehicle used to smuggle drugs if the vehicle is located on the public street. Likewise, if SAs are executing a search warrant at a house and observe money or other high value items that they have probable

cause to believe are proceeds of the crime, they may seize the items for forfeiture without obtaining a seizure warrant.

However, if time allows, it is always recommended that the SAs obtain a seizure warrant. The use of a warrant, even if one is not required, will help to prevent legal challenges to the SAs' conduct later in the forfeiture proceedings.

With the assistance of the USAO, SAs may obtain a seizure warrant for any seizure, whether the intended forfeiture proceedings will be administrative, civil, or criminal. When applying for a seizure warrant, an SA should prepare an affidavit establishing probable cause, which should contain the following:

A. A section identifying the SA and describing the SA's training and experience;

B. A section specifically identifying the property to be seized;

C. A section explaining the legal basis for seizure and forfeiture and citing the applicable laws;

D. A section providing the background of the investigation leading up to the discovery of probable cause for the seizure of the property; and

E. A section that establishes the SA's probable cause for the seizure.

The SA will submit the seizure warrant, the supporting affidavit, and any sealing or other orders to a federal magistrate or district judge, swearing before the judge to the veracity of the affidavit. When issued, the warrant will command the SA or any authorized officer to execute the seizure within a 10-day period. Once executed, the SA must leave a copy of the warrant with the owner of the property or at the location where the property was seized. The SA must then return the warrant to the issuing judge or magistrate in a timely manner, specifying what property, if any, was located and seized pursuant to the warrant.

6.11.5 Asset Identification and Removal Groups

AIRGs are located in the SAC offices to assist criminal case agents with seizures of property for forfeiture. If SAs need additional expertise or assistance with forfeiture questions that arise during an investigation, they may contact the local AIRG. If an investigation holds the potential for significant seizures and forfeitures of property, the SAs should enlist the aid of the local AIRG as early in the investigation as possible.

Forfeitures of real property or businesses involve additional pre-seizure planning and forfeiture considerations. Only SAs assigned to an AIRG may seize real property. If a case holds the potential for forfeiture of real property or a business entity, the criminal case agent must request assistance from the local AIRG. The criminal case agent also should contact the local AIRG if the investigation involves any asset valued at more than $100,000.

Chapter 7. SEARCHES WITH A WARRANT

A search conducted with a warrant is presumed to be lawful; in seeking to suppress evidence, the defendant has the burden of proving that it is not. For that reason, SAs operating in a non-border environment should make every effort to obtain a warrant prior to searching, even if an exception to the warrant requirement appears to exist.

Warrant requirements vary depending on whether the suspected violation is civil or criminal. The warrant requirements for criminal violations are governed by Rule 41 of the FRCrP. In certain cases, SAs may also obtain civil or administrative warrants under the authority of Title 19 of the U.S. Code or under the INA. (Civil search warrants are discussed in Section 7.11.)

Search warrants are often issued for premises, which include houses, apartments, storage spaces, offices, and warehouses, among others. As an investigative tool, a search warrant may also be obtained to search other property or items, including, but not limited to, financial or other records, safe deposit boxes, post office boxes, stored electronic communications, mail, vehicles, or persons, including body cavity or bodily fluid searches. This Chapter focuses on search warrants for premises, not only because they are one of the types of search warrants most frequently executed by SAs, but also because of the degree of preparation required to execute a search warrant at a residence or business.

7.1 Obtaining a Criminal Search Warrant

Rule 41(c) of the FRCrP states that a warrant may be issued at the request of a federal law enforcement officer or an attorney for the government. As federal law enforcement officers within the meaning of the FRCrP, HSI SAs must present an affidavit to a federal magistrate or judge. In rare, exigent circumstances, the SAs may present the affidavit to a judge of a state court of record when a federal judge is unavailable. In all but certain terrorism-related investigations, the judge must have jurisdiction in the district where the property to be searched is located. The judge will issue the warrant if he or she is satisfied that the affidavit reflects probable cause.

Title 28, Section 60.1 of the Code of Federal Regulations (C.F.R.) requires that, in all but the rarest and most exigent cases, SAs must seek the concurrence of the USAO before applying for search warrants. In most cases, therefore, SAs will obtain a search warrant by preparing and submitting a written affidavit to the USAO. Either the SA or the USAO will also prepare an unsigned copy of the search warrant itself and, if applicable, any other orders the SA or AUSA may believe are appropriate (e.g., an order to seal the affidavit from disclosure). Once an AUSA has approved the affidavit and prepared the appropriate accompanying documents, the SA will present the affidavit to a federal magistrate or judge, affirm its contents under oath, and sign the affidavit in the presence of the judge or magistrate.

7.2 Contents of a Search Warrant Affidavit

While the precise format may vary depending on the nature of the property or item to be searched and the district in which the SA is operating, an SA's search warrant affidavit should include the following:

A. An introductory section identifying the SA and describing the SA's background, training, and experience.

B. A section describing the purpose of the affidavit, including the specific statutory violations and legal authorities for requesting the warrant.

C. An identification of the property or item to be searched. This should consist of as complete a description of the property or item as possible, including not only an overall description of the property or item, but also any identifying marks or numbers (e.g., addresses, license plate numbers, vehicle identification numbers, serial numbers, etc.). The description of the property or item to be searched is often incorporated into an attachment to the affidavit.

D. A detailed description of the evidence sought and the items to be seized. This also may be included as an attachment to the affidavit. The list should be as detailed and inclusive as possible.

   Note: If SAs have probable cause to search for evidence that may be stored in electronic form, they should enlist the aid of their local computer forensics group. Likewise, if they have probable cause to search for and seize financial documents, SAs should consult their local AIRG or financial investigative group. These subject matter experts can assist in providing the appropriate language to be included in this section of the affidavit.

E. A section providing background information about the investigation. This may include an overview of the investigation leading up to the discovery of probable cause for the search warrant. For investigations dealing with complex violations or technical issues, this section may also provide definitions or explanations necessary for an understanding of the probable cause.

F. A statement of probable cause. It is not necessary to relate every fact of the investigation to the judge or magistrate, but it is important to be thorough and include enough detailed information for the judge to make a finding of probable cause based solely on the affidavit. Information establishing probable cause should be timely, i.e., it should be recent enough to convince the judge that the evidence and items to be seized are still located in the place to be searched.

   Probable cause may be established by means of any of the articulable facts described in Section 5.5. It may include both the SA's firsthand observations and hearsay. If the SA uses hearsay from non-law enforcement third parties, such as informants, the

SA should include the reasons why he or she believes that the information is reliable. If the SA used his or her training and experience to add value to certain facts in the investigation, this should be stated and explained in the affidavit.

G. In applicable cases, the SA will include a statement justifying nighttime execution or a "no knock" entry. Primarily, justification for a "no knock" entry or nighttime execution are based on either officer safety or preventing the destruction of evidence. The list of factors that could fall under these general categories are numerous and should be articulated to the judge or magistrate in the affidavit when a "no knock" entry or nighttime execution is sought.

H. A search warrant may include additional attachments that provide documentary evidence for some of the assertions made in the statement of probable cause. Most search warrants will not include such attachments, but they are useful in cases where references to documentary evidence are so frequent that it is easier and clearer to attach the document itself.

7.3 Issuance of a Search Warrant

Upon a finding of probable cause, the judge or magistrate will issue a search warrant to be served within 10 calendar days from issuance. If, for some reason, SAs are unable to execute the warrant within the 10-day period, the warrant will become invalid and the SAs must apply for a new warrant based on whatever probable cause may still be timely.

Although a specific SA may be named as the affiant to a search warrant affidavit, it is recommended that the search warrant itself be directed to "any Special Agent of the U.S. Immigration and Customs Enforcement." If the affiant becomes unavailable, or if multiple warrants are to be served simultaneously at different locations, this wording will allow another SA to execute the search warrant.

7.4 Telephonic Search Warrants

In some critical circumstances, a federal judge or magistrate may issue a search warrant based on sworn testimony communicated by an SA from a remote location. In the past, these warrants were obtained by reading a warrant and probable cause statement over the telephone. Rule 41 of the FRCrP was modified to allow for the submission of search warrants by facsimile or other "reliable electronic means."

When seeking a telephonic warrant, the SAs should be prepared to show that: 1) they could not reach the magistrate in his or her office during regular business hours; 2) the SAs seeking to make the search are at a significant distance from the magistrate; 3) because of the particular factual situation, it would be unreasonable for a substitute SA who is near the magistrate to prepare a written affidavit and appear before the magistrate in person; and 4) the need for a search is such that, absent the telephonic or electronic procedure, there is a significant risk that evidence would be destroyed.

To obtain a telephonic search warrant, the SA will prepare a document known as a "proposed duplicate original warrant." The contents of a telephonic search warrant shall meet the same standards as the contents of a search warrant upon written affidavit. While applying for the warrant, an SA most often will transmit a copy of the proposed warrant to the magistrate by fax or email. The judge will read the warrant, sign it, and transmit it back to the SA. The magistrate may direct that the SA make modifications to the warrant.

Procedures for obtaining a telephonic search warrant may vary from district to district. SAs must first contact an AUSA for concurrence and guidance. Prior to contacting the AUSA, an SA should:

A. Have a prepared search warrant, including an affidavit and the return receipt and inventory. If possible, this search warrant should be in electronic as well as written format so that it can be submitted according to the preferences of the magistrate.

B. Have a telephone number and fax number or e-mail address at which the requesting SA can be reached.

C. Have, in written form, a list of circumstances which demonstrate that it is necessary to apply telephonically or electronically rather than present a written affidavit.

D. Be prepared, if a nighttime service is warranted, to make a showing as to why other than daytime service should be authorized.

The AUSA either will set up a conference call (AUSA, affiant, and magistrate) or will have the SA call the magistrate, who will provide the SA with specific instructions, including the preferred method for the submission of the warrant and affidavit. The SA must follow the specific instructions that the magistrate provides.

Upon issuing a warrant by telephonic or electronic means, the magistrate will enter the exact date and time of issuance on the face of the warrant. When executing the warrant, the SA will write the precise date and time of execution on the face of the warrant.

7.5 Anticipatory Search Warrants

An anticipatory search warrant is based upon probable cause that, at some future time, certain evidence of a crime will be located at a specified place. When judges issue an anticipatory search warrant, they are not deciding that there is probable cause at the time they sign the warrant, but that probable cause will exist upon the occurrence of an identifiable "triggering event." In many cases, the triggering event occurs when SAs conduct a controlled delivery of contraband to a house or other premises. SAs must specifically describe the triggering event in the affidavit, and it must be something other than the mere passage of time. SAs may not execute the search warrant until the triggering event occurs.

7.6 "Sneak and Peek" Search Warrants

SAs may obtain a "sneak and peek" warrant in cases in which they wish to confirm the existence of incriminating evidence without jeopardizing the overall investigation by alerting the suspects. For example, while utilizing a Title III wire intercept during a drug smuggling investigation, SAs learn that a suspect is storing a load of cocaine in his or her home. The SAs wish to document the existence of the cocaine without revealing the ongoing investigation or jeopardizing the wire intercept. The SAs may apply for a "sneak and peak" warrant to enter the home without providing notice to the suspect.

In addition to the requirements of a normal search warrant affidavit, an affidavit for a "sneak and peek" warrant must provide the reasons why it is necessary to delay notice. Notice of a "sneak and peek" warrant may be delayed for up to 30 days if specified in the warrant. The court may grant additional delays if justified by the facts of the case.

7.7 Preparing for the Execution of a Search Warrant

If time permits prior to executing a search warrant at a home, business, or other premises, SAs should prepare by taking the following steps (some of these steps may have been taken in preparation for the search warrant affidavit):

A. The SAs should query all available law enforcement databases to determine:

   1) Who resides at or is associated with the location;

   2) If there are any firearms registered to anyone at the location;

   3) If anyone at the location has a prior criminal history or a prior history as a violator of any immigration or customs laws; and

   4) If any vehicles are registered to the location or to people associated with the location.

B. The SAs may also wish to query law enforcement databases for neighbors in the immediate vicinity of the location to be searched. This may alert SAs of potential officer safety problems in advance of the warrant execution.

C. Time permitting, the SAs may verify the above information by requesting subscriber information for the location from the appropriate utility companies.

D. In addition to the above records checks, the SAs should query, if available, the appropriate law enforcement data clearinghouses to ascertain whether or not the location is or has been involved in an investigation by another law enforcement agency.

E. The SAs should conduct periodic surveillance of the location to determine:

1) Who resides at or is associated with the location, and when they are present.

2) If there are any children at the location and, if so, their approximate ages.

3) If there are any pets at the location, and, if so, whether or not they will pose a threat to the SAs during the warrant execution.

4) Vehicles associated with the location.

5) The layout of the location, including entry and exit points and any obstacles that will need to be overcome (e.g., a locked gate or security screen door, reinforced doors or windows, or human or electronic countersurveillance). Whenever possible, the SAs should take photographs of the location.

6) The nature of the neighborhood and any criminal activity or potential risks in the surrounding area.

7.7.1 Operational Plan

Prior to executing a search warrant upon premises, SAs will prepare and submit an Operational Plan to the first-line supervisor. In addition to completing the required fields for the Operational Plan, the SAs may wish to attach photographs of the key suspects, photographs of the location, and maps showing the location, staging location, route of approach, the location of a rally point where SAs can meet if they need to leave the warrant location for safety or other reasons, and the location of any emergency facilities such as hospitals.

In some offices, SAs may be required to submit the Operational Plan to the supervisor of the local HSI Special Response Team (SRT) so that the supervisor may assess the need for SRT assistance. Even if not required to do so, SAs may wish to request the assistance of the SRT if the search warrant involves violent offenders or other significant risks to officer safety. For detailed guidance on procedures for requesting the use of SRT and circumstances that may warrant the use of the SRT, SAs should refer to the Special Response Team Handbook (OI HB 06-001, dated November 20, 2005, or as updated).

7.7.2 Personnel Assignments

In preparing the Operational Plan, SAs should give advance consideration to personnel assignments. The case agent should assign a team leader to coordinate the entire search warrant execution. Ideally, the team leader should be an SA other than the criminal case agent and/or affiant, since the criminal case agent may be occupied with other issues, such as communicating with the AUSA, responding to questions concerning evidence, or interviewing suspects found at the location.

In conjunction with the team leader, the case agent should assign personnel for both of the two main phases of the search warrant execution: 1) making entry and securing the premises; and

2) conducting a search for evidence. Making entry will require a group of SAs for the entry team (the number will vary depending on the size of the premises), an SA to knock and announce, an SA to breach any locked doors or windows (if necessary), and a team of SAs to secure the perimeter.

Typically, the phase involving the search for evidence will require an SA to take photographs and make a photographic log, an SA to make a video recording, an SA to make a diagram or sketch of the premises, an evidence recorder and custodian, SAs to conduct the search itself, and any necessary experts (e.g., a Computer Forensics Agent (CFA) or a CBP Canine Enforcement Officer). If necessary, one SA may assume multiple responsibilities. At a minimum, however, it is recommended that the SA who acts as the evidence recorder and custodian not be assigned to search for evidence.

7.7.3 State and Local Law Enforcement Notification/Participation

Prior to executing the search warrant, SAs may wish to consider enlisting the aid of state or local police. Because neighbors are familiar with the uniform and authority of the local police, the addition of a police "marked unit" can enhance perimeter security and help to avoid potential officer safety issues. Unless there is some compelling reason not to do so, SAs should, at a minimum, advise the appropriate local police commander in advance of the warrant. If children or pets will be present at a residence, the case agent may also wish to give advance notice to the appropriate child welfare services agency or to the local animal control agency.

7.7.4 Pre-Execution Briefing

Prior to executing a search warrant, the criminal case agent and team leader should conduct a briefing of all personnel who will be involved in the execution of the search warrant. The briefing should provide a brief background of the investigation, the purpose for the search warrant, personnel assignments and responsibilities, and any risks or special circumstances that might be encountered during the warrant's execution. SAs taking part in the briefing should take note of the SAs and other law enforcement personnel who are present. For reasons of officer safety, anyone who is not present at the briefing should not participate in the execution of the warrant. A copy of the Operational Plan should be made available to each participating SA and other law enforcement personnel. Each participating SA or other law enforcement officer should also read a copy of the search warrant to ensure that none of the SAs exceed the scope of the search authorized by the warrant.

7.7.5 Notification of the National Law Enforcement Communications Center

The criminal case agent should notify the National Law Enforcement Communications Center (NLECC) of the planned warrant execution and should send a copy of the Operational Plan to the NLECC via fax or email.

7.8 Executing a Search Warrant

Unless the warrant specifically authorizes nighttime service, SAs must initiate the execution of a search warrant between the hours of 6:00 A.M. and 10:00 P.M. local time. The team leader must note the exact date and time when the warrant is executed. This date and time must be entered on the warrant prior to return and receipt (see Section 7.9).

Unless an exception is specifically granted in the warrant, SAs must knock and announce prior to entering the premises. In announcing, the SAs must state their identity and purpose (e.g., "Federal agents with a search warrant! Open the door!"). According to 18 U.S.C. § 3109, SAs may force entry into the premises if they are "refused admittance." While there is no precise definition of "refused admittance," SAs should wait a reasonable amount of time for an occupant to open the door voluntarily. The amount of time depends, among other things, on the size of the building, the ease with which the suspected evidence may be destroyed, the time of day, and the age or physical condition of the occupant.

No one has the right to resist the execution of a search warrant. Challenges to the validity of the warrant – even by an occupant's legal counsel – should take place after the execution of the search warrant and should be directed to the appropriate AUSA.

In accordance with their training, SAs will conduct a sweep of the premises during which they will secure any persons or weapons that they encounter. Prior to the execution of the warrant, the case agent, team leader, and appropriate Group Supervisor should determine how the occupants of the premises will be secured in light of the criminal violations and circumstances of the particular search warrant. In cases where the SAs have reasonable suspicion to believe that occupants of the premises may pose a threat to officer safety, it is recommended that the occupants be searched for weapons, handcuffed, and directed to a central location in the house or building, where they will be placed under guard while the SAs conduct the search.

Once they have been secured, the team leader should ensure that the premises are photographed. It is recommended that SAs also make a video recording of the premises both before and after the search for evidence. This serves two purposes: 1) to record the state of the property for evidentiary purposes; and 2) to defend the SAs against allegations of property damage or misconduct.

It is recommended that SAs physically label each room by letter or number and note the labels on a corresponding sketch or diagram. This will make it easier to record the location where each piece of evidence was discovered.

Since court proceedings may take place months or even years after the search warrant, SAs may wish to make a written record of which SAs searched which rooms or areas. An easy method is to have each SA sign the label of any room he or she helped search. As they discover evidence or contraband within the scope of the search warrant, SAs should ensure that it is photographed in place prior to its processing by the evidence handler/custodian. To avoid courtroom challenges or allegations of wrongdoing, SAs assigned to search for evidence should not search a room or area by themselves.

7.8.1 What May Be Searched

A search warrant restricts the search to the places described in the warrant. It also restricts the search based on the types of items authorized for seizure. SAs may search only those areas where the items described in the warrant could reasonably be concealed. The following areas may be included in the execution of a search warrant:

A. The Premises, Outbuildings, and Curtilage. The SAs may search all buildings and objects within the curtilage, even if they are not mentioned specifically in the search warrant. The best practice, however, is to mention all known buildings or items in the warrant.

B. Vehicles Located on the Curtilage. SAs may search any vehicles parked on the curtilage of the premises if they appear to be owned by or under the control and dominion of the premises' owner or occupier(s), even if they are not specifically listed in the warrant. SAs may not search vehicles belonging to others. The best practice is to list anticipated vehicles in the search warrant.

C. Containers. Generally, SAs may search any container that might hold evidence specified in the search warrant. The exception to this rule is that SAs may not search an item in the personal possession of a casual visitor to the premises.

D. Incoming Telephone Calls. SAs may answer a ringing telephone if they are lawfully on the premises executing a search warrant. They need not identify themselves as law enforcement officers to the caller. Any evidence acquired from the phone call will be admissible against the defendant.

E. Electronic Media/Computers. If specified in the warrant, SAs may search computers or other electronic media for evidence. SAs should contact their local computer forensics group in advance of the warrant execution and enlist the aid of a CFA when conducting a search of any computers or electronic media.

While the execution of a search warrant must be initiated during the hours specified in the warrant (ordinarily between 6:00 A.M. and 10:00 P.M. local time), there is no set time limit for the duration of a search warrant execution. SAs may remain on the premises for as long as necessary to conduct their search. SAs must stop searching, however, once they have conducted a thorough search for all the items described in the search warrant.

7.8.2 Inventory and Receipt

Once the search has been conducted, the evidence custodian/handler should complete an inventory of any property seized from the premises. According to Rule 41(f)(1)(B) of the FRCrP, this inventory must be completed in the presence of another SA and the person from whom the property is seized. If another SA or the person whose property is being seized is not present, the SA may prepare the inventory in the presence of at least one other law enforcement

officer. When possible, SAs should notify their local Seized Property Specialist (SPS) in advance of the search warrant execution and enlist the aid of the SPS in the proper collection, documentation, transport, and storage of all property seized from the premises.

SAs need not show a copy of the warrant to the occupants of the premises prior to or during the execution of the search warrant. Once the search has been completed, however, the SAs must leave a copy of the warrant and the inventory of seized property with the owner or occupier of the premises. In the absence of any responsible party, the SAs may simply leave a copy at the premises.

If the owner or occupier of the premises is not present or is arrested during the execution of the search warrant, SAs should take steps to secure the premises before leaving, especially if the execution of the warrant required a forced entry.

7.9 Return of the Search Warrant

The search warrant will designate the judge or magistrate to whom it should be returned. Usually, this will be the issuing magistrate. The FRCrP requires that the executed warrant and inventory of seized property be returned "promptly" to the issuing judge or magistrate. While the rules provide no definition of "promptly," SAs should return the search warrant as soon as possible.

Following the execution of the search warrant, the criminal case agent or team leader must document the warrant in a detailed Report of Investigation (ROI). Evidence and contraband seized during the execution of the search warrant shall be handled in accordance with policies and procedures outlined in the SAMEPH and HSI policies on evidence.

7.10 Post-Execution Debriefing

When possible, the team leader or criminal case agent should conduct a debriefing of all personnel involved in the execution of the search warrant. Purposes for a search warrant debriefing include, but are not limited to: (1) providing a recapitulation of the warrant entry and search to ensure that the warrant was properly executed; (2) bringing to the criminal case SA's attention any witness or suspect statements, leads, or other observations by team members that may have an impact on the investigation; and (3) reviewing the positive and negative aspects of the warrant execution with an eye toward future improvement.

7.11 Civil Search Warrants

In some cases where no criminal violation exists or where the criminal violation fails to meet local prosecution guidelines, SAs may pursue their investigations through civil search warrants.

7.11.1 Customs Search Warrants

19 U.S.C. § 1595 provides that SAs who have probable cause to believe that merchandise upon which duties have not been paid or merchandise that has been brought into the United States

contrary to law, or evidence of a violation involving customs fraud or any other law enforced or administered by CBP and/or ICE is located in any dwelling, store, or other building, may obtain a customs civil search warrant by applying, under oath, to any justice of the peace; to any municipal, county, state, or federal judge; or to any federal magistrate. Prior to submitting the affidavit to a judge or magistrate, SAs should consult with the local OCC.

It is important to note the distinction between a search warrant issued pursuant to 19 U.S.C. § 1595 and a search warrant issued pursuant to Rule 41 of the FRCrP. A customs search warrant is directed toward imported merchandise upon which no duty was paid or merchandise that has been imported contrary to law; the violation of a specific criminal law need not be cited to obtain the civil search warrant.

Some examples of situations where the 19 U.S.C. § 1595 warrant might be used are:

A. During the initial stages of an investigation where sufficient facts are not available to obtain a criminal search warrant under Rule 41 of the FRCrP, but where it can be shown that the merchandise was imported without the payment of applicable duty or was introduced in violation of some other law or regulation pertaining to importations.

B. Whenever the U.S. Attorney declines criminal prosecution because the infraction does not meet local intake criteria and the incident involves a violation of some import law or regulation. In this case, the investigating SA uses the warrant to pursue a civil penalty.

C. In a case where it is necessary to protect the revenue. For example, a consignee paid estimated duties to a customhouse broker who subsequently filed for bankruptcy before the entry paperwork was submitted to CBP. Thereafter, the consignee refused to pay the estimated duties to CBP even though the merchandise had been released to him under the immediate delivery procedure. In this example, SAs obtained a search warrant and seized the merchandise.

7.11.2 Civil/Administrative Search Warrants Under the Immigration and Nationality Act

In those immigration-related enforcement operations where consent is not an option and no criminal prosecution is contemplated, SAs may use civil warrants to effect entry. An administrative warrant may not be used, however, as a pretext to gather evidence for a criminal prosecution. Since such administrative search warrants were sanctioned in the court cases *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981) and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), immigration civil warrants are often referred to as "*Blackie's* Warrants" and "*Barlow's* Warrants."

7.11.3 *Blackie's* Warrants

The right for SAs to enter commercial premises, pursuant to a *Blackie's* warrant, for the purposes of searching out a suspected violation of the immigration laws derives from the agency's general

statutory power to seek out and question suspected illegal aliens. The major advantage of the *Blackie's* warrant is that there is no need to specifically name the aliens being sought. Rather, the *Blackie's* warrant and accompanying affidavit need only set forth a plausible basis for believing that there are unnamed illegal aliens present at the location to be searched. Even though there is a relaxed requirement to name or provide a particularized description of the individuals being sought, the *Blackie's* warrant must describe with specificity the places to be searched and time and scope of the search.

For a magistrate to issue a *Blackie's* type warrant, the SA should submit an affidavit specifying the places to be entered and the date, time, and scope of the inspection. The affidavit should conform to the same general standards as a criminal search warrant except that it need not particularly describe the evidence to be seized (the specific names of the illegal aliens believed to be present). Instead, the affidavit should contain sufficient information to permit a magistrate to find probable cause to believe that aliens who are illegally in the United States will be found on the premises.

SAs should be cautioned that *Blackie's* warrants may not be used to enter residential premises. (See *Illinois Migrant Council v. Pilliod*, 531 F. Supp. 1011 (N.D. Ill. 1982).)

7.11.4 *Barlow's* Warrants

Barlow's warrants are not specific to immigration violations. The Supreme Court case from which *Barlow's* warrants take their name involved an inspection under the Occupational Safety and Health Act, not the INA. They are designed for use by a federal agency which seeks entry onto premises to aid in the performance of the agency's regulatory functions.

Barlow's warrants are not based upon specific evidence of an existing violation. They may be issued on the basis of a general administrative plan and specific criteria that explain how the premises of a business fall into this general enforcement plan. A *Barlow's* warrant may be issued upon a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to the establishment to be searched.

In applying for a *Barlow's* warrant, SAs must present an affidavit demonstrating: 1) that the plan was derived from a neutral source that identified the group of businesses to be inspected under the plan; 2) that the plan is consistent with the agency's mission; 3) the specific criteria used in the plan and the fact that they are neutral to the business to be inspected; and 4) that the particular business falls within the plan. A *Barlow's* warrant may be useful in the investigation of an employer (worksite enforcement investigation) under Section 274A of the INA.

Chapter 8. SEARCHES WITHOUT A WARRANT

The courts have repeatedly emphasized that a search without prior judicial approval is always unreasonable unless it falls within a select group of special circumstances. This Chapter discusses those circumstances, with the exception of the border search, which will be covered in Chapter 9.

Although the following sets of circumstances may excuse SAs from the warrant requirement of the Fourth Amendment, it is important to note that there is no exception to the reasonableness requirement of the Fourth Amendment. In all searches, the courts will judge whether the intrusion, both at its inception and in its scope, was justified by a legitimate law enforcement interest.

8.1 Search Incident to Arrest

The purpose of a search incident to arrest is to protect the arresting SAs, prevent the destruction of evidence, and find specific evidence relating to the crime for which the arrest was made.

An SA may conduct a warrantless search incident to a lawful physical arrest when the following two requirements have been met. First, there must be a lawful arrest, with or without an arrest warrant. Second, the search must take place at substantially the same time as the arrest. In judging whether or not a search and arrest took place contemporaneously, the court will consider the totality of the circumstances, including: 1) where the search was conducted; 2) when the search was conducted in relation to the arrest; and 3) whether the defendant was present during the search of a vehicle or other container within his or her control at the time of the arrest.

During a search incident to arrest, SAs may search the arrestee's person, including anything worn by the arrestee. The search may be conducted at the place of the arrest or as part of booking procedures at the SAs' office, a Port of Entry (POE), or a detention facility.

To go beyond a standard personal search and perform a strip search, SAs must have reasonable suspicion that a weapon or evidence is concealed on the body. Only medical personnel may perform a body cavity search; in order to request such a search, SAs must have a reasonable basis to believe that the arrestee is concealing contraband inside his or her body.

SAs may also search anything within the immediate control of the arrestee. This includes the arrestee's wallet, purse, briefcase, and any other property carried by the arrestee at the time of the arrest, whether locked or unlocked. It also includes any property within lunging distance of the arrestee in which the arrestee could have hidden a weapon or other destructible evidence at the time of the arrest.

In *Arizona v. Gant*, 556 U.S. _____ (2009)], the Supreme Court held that SAs may justify a search incident to arrest of a vehicle's passenger compartment under two conditions: (1) it was reasonable to believe that the arrestee might have been able to access the vehicle during a search incident to arrest; or (2) there was a reasonable belief that evidence of the underlying crime might be found in the passenger compartment at the time of the search. Since SAs should restrain all arrestees so that they cannot interfere with a search incident to arrest, it is unlikely that the first condition will ever be satisfied. The practical effect of this decision, therefore, is that SAs must be prepared to articulate how and why their search of a vehicle incident to an arrest was intended to retrieve evidence of the related criminal violation. SAs may not search a vehicle's trunk as part of a search incident to arrest.

SAs should take care not to violate the lawful parameters of a search incident to arrest. Once an arrestee is removed from the arrest area, SAs may not return to the scene to conduct the search. SAs may not move an arrestee or allow an arrestee to roam from area to area in order to broaden the scope of the search incident to arrest.

8.2 Protective Sweep

A protective sweep is a quick, limited search of premises, most often incident to an arrest, that is conducted to protect the safety of SAs or others. SAs may conduct a protective sweep if 1) they have reasonable suspicion that a third party is present and may pose a threat to the SAs; 2) the SAs search only those areas large enough to harbor a person; and 3) the protective sweep lasts no longer than necessary to dispel the danger. Although a protective sweep's intent is to search for people, SAs may encounter evidence or contraband during a protective sweep and seize it under the plain view doctrine. Once SAs have neutralized the real or perceived danger or threat, however, they must end the sweep.

Under certain circumstances, SAs may conduct a protective sweep of premises even though the arrest occurred outside. For example, if SAs arrest an individual immediately outside a home and hear noises or see movements from within the home, they may have justification for a protective sweep of the home, particularly if the SAs have knowledge of accomplices who are still at large.

8.3 Exigent Circumstances

SAs may make warrantless searches in some cases in which emergency conditions make prior judicial approval impractical. Under these exigent circumstances, probable cause exists for the search, and SAs must act immediately to pursue a fleeing felon, prevent the imminent removal or destruction of evidence, or prevent injury or loss of life. If SAs conduct a warrantless search under an exigent circumstance, the burden is on the SAs to show that the exigency existed. As with any other type of lawful warrantless search, SAs entering premises under exigent circumstances may seize any evidence or contraband in plain view.

8.3.1 Hot Pursuit

The courts have ruled that a suspect may not defeat an arrest that has been set in motion in a public place by escaping to a private place. In order for SAs to enter a dwelling without a warrant under the hot pursuit exception: 1) the SAs must have probable cause to arrest the suspect; 2) the SAs' pursuit of the suspect must be immediate and continuous; and 3) the SAs must have probable cause to believe that the suspect is in the residence.

8.3.2 Destruction or Removal of Evidence

SAs may make a warrantless search of an area or item if they have probable cause to search and probable cause to believe that evidence is being, or will be, destroyed or removed in the time it would take the SAs to obtain a search warrant. For this exception to be valid, the SAs must have specific articulable facts relating to the imminent destruction of evidence in the given situation.

A generalized fear based on the nature of the crime or the SAs' training and experience is not enough. SAs may not deliberately cause the exigent circumstance by alerting suspects to their presence.

8.3.3 Protection or Preservation of Life

The need to protect or preserve life typically justifies actions that would otherwise violate the Fourth Amendment. To enter premises under the exigency of an emergency situation, SAs must have reasonable grounds to believe that there is an immediate need for the SAs to assist in the protection of life or property. SAs must also have a reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. Examples of emergency situations in which the courts have permitted a warrantless search include reports of gunshots from inside a residence, a report that children had open access to controlled substances inside a residence, and a report of a woman and child in danger inside a crack house.

8.4 Consent

Consent searches may be conducted without a warrant or any level of suspicion. In cases where SAs have some evidence of illegal activity, but lack probable cause to arrest or search, a consent search may be the only means of obtaining important and reliable evidence. For a consent search to be lawful: 1) the consent must be voluntary; 2) it must be given by someone with authority over the place to be searched; and 3) the search must be limited to the scope of the consent.

8.4.1 Voluntariness of Consent

When deciding whether or not SAs obtained consent voluntarily, the courts will look at the totality of the circumstances. They will take into account the age, education, intelligence, psychological stability, and sobriety of the consenting individual. They will consider the length of any detention preceding the consent. They will examine the SAs' actions when requesting consent. For example, did the SAs make the person aware that he or she could refuse? Were weapons displayed or was force used during the events leading up to the granting of consent?

Consent may be granted verbally. In some cases, it may even be granted non-verbally. For example, SAs may knock on the door of a suspected narcotics stash house and ask the owner if they may enter. An individual who steps away from the door and gives the SAs a welcoming gesture is implicitly granting consent. However, it is a best practice in this instance to confirm the implicit gesture with (at least) verbal consent. Further, whenever possible, SAs should obtain written consent using ICE Form 73-005, "Consent to Search."

The individual granting the consent must not be coerced by explicit or implicit means. SAs may attempt to persuade an individual to consent by laying out the facts of a given situation, but the persuasion must be truthful. If SAs do not believe that they could obtain a search warrant for a property, they must not use the threat of a search warrant to induce a person to grant consent.

8.4.2 Authority to Grant Consent

SAs must obtain consent from someone with actual or apparent authority over the place to be searched. The person granting consent may be the actual owner of the property or, in the owner's absence, a co-owner or co-inhabitant who has common use of the area to be searched. Spouses may generally consent to a search of all of a couple's property. Similarly, a business partner may consent to the search of any part of a business. A minor child, given sufficient age and maturity, may consent to the search of a home in the parents' absence. Roommates may grant consent to search a mutual residence, but this consent does not apply to the personal property or exclusive spaces (e.g., bedroom) of the other roommate. Landlords may not consent to the search of a tenant's premises unless the tenant has vacated or abandoned the property.

Even if SAs obtain the consent of one person with authority over a place to be searched, they may not proceed if another person with authority objects to the search. The only exception to this rule involves minor children. A parent may grant consent for the search of an entire home, regardless of the objections of minor children.

8.4.3 The Scope of Consent

An individual who grants consent for SAs to search his or her property may limit the scope of the consent to certain areas. The individual may also exempt certain areas or items from the scope of the consent, making some areas "off-limits" to SAs. Individuals may revoke consent at any time.

In seeking written consent, SAs should use the appropriate space on ICE Form 73-005, "Consent to Search," to describe the property to be searched and any limitations placed on the search. SAs should also seek the reasonable assistance of the person granting consent before opening any locked containers or risking damage to any property.

8.5 Mobile Conveyance Search

First recognized by the Supreme Court in the 1925 case, *Carroll v. United States*, the "*Carroll* Doctrine" permits SAs to conduct a warrantless search of a vehicle located in a public place. Under the "*Carroll* Doctrine," SAs may perform a warrantless search of a vehicle under two conditions: 1) the SAs must have probable cause to believe that evidence of a crime or contraband is located within the vehicle; and 2) the vehicle must be "readily mobile." Readily mobile means that it must be operational at the time of the search. It need not be in motion or even occupied at the time of the search.

If the two necessary conditions are met, SAs may search the vehicle in its entirety. This includes the trunk and any locked or unlocked containers. The scope of the search must correspond, however, to the object of the search. In other words, if SAs have probable cause to believe that the vehicle contains an illegal shotgun, they may not look inside the glove compartment. SAs may search the possessions of a passenger in the vehicle even if the probable cause relates only to the driver.

The rationale behind the "*Carroll* Doctrine" is that the inherent mobility of vehicles makes it impractical to obtain a warrant, since, while the SAs obtained a warrant, the vehicle could be moved to another location unknown to the SAs or outside the jurisdiction of the court. However, if SAs develop probable cause sufficiently in advance of the search, the best practice is to seek a warrant, despite the applicability of this exception.

8.6 Inventories

Case law recognizes the right of SAs to conduct routine non-investigative inventories of vehicles and other property lawfully within government custody. SAs, therefore, may conduct warrantless inventory searches of vehicles or other property when the purpose is to protect SAs and others from potential danger or hazardous materials, to protect the owner's property while it is in government custody, or to protect SAs against claims or disputes over lost or stolen property.

SAs may conduct inventory searches under three basic conditions: 1) SAs have a lawful basis for taking custody of the property; 2) the inventory is based on standard non-investigative criteria, *i.e.*, in adherence to agency policy (see Section 8.6.1); and 3) the search is limited to locating valuables for storage or to secure dangerous items.

An inventory search should not be used as a pretext for another type of search. The mere fact, however, that a legitimate inventory search may also benefit an investigation does not invalidate the inventory search. Furthermore, if SAs discover contraband during the course of an inventory search, the discovery may provide a probable cause rationale to continue searching the vehicle.

8.6.1 Procedures for Inventory Searches

The following guidelines form the criteria for a non-investigative inventory search by HSI SAs:

A. SAs should conduct an inventory soon after a seizure or impoundment, although it need not be contemporaneous with an arrest, seizure, or other event resulting in lawful government possession.

B. The inventory search must be limited to locating valuables or harmful items for storage. An inventory is not an intensive search for evidence.

C. The conveyance or property lawfully within the SAs' possession must be thoroughly searched, as follows:

    1) The interior areas of a vehicle or other conveyance, including all compartments, such as a glove compartment or trunk, must be searched; and

    2) Containers located within an impounded conveyance, or other property, including locked containers, must be opened and the contents inventoried.

D. All articles not part of a conveyance and not having evidentiary value or not subject to separate forfeiture action should be removed and returned to the owner without delay. Accessories, jacks, and standard maintenance tools are considered part of the conveyance. Installed radios, stereo equipment, etc. are also part of the conveyance. The appropriate AUSA or local OCC may be consulted for advice on the status of specific items found during an inventory search.

E. All property subject to inventory and not otherwise subject to forfeiture or other independent basis for seizure will be itemized and receipted with the notation, "taken for safekeeping subject to return to the lawful owner." If the lawful owner is not present, a copy of this receipt will be left on the premises. SAs will take appropriate measures to return such property to the lawful owner or his or her designee as soon as possible.

F. Where property found in the inventory search belongs to a person who has been placed under arrest, the SAs should request that the arrestee designate someone to take possession. SAs should not release any property in this manner without the written consent of the arrestee. A routine inventory search of an arrestee can also be lawfully made at the time the arrestee is booked.

8.7 Detector Dog Screenings

SAs may enlist the aid of other law enforcement agency canine enforcement officers, including CBP's, to use dogs to sniff the outside of vehicles or other property in a public place. Generally, such a canine search is not a "search" under the Fourth Amendment and requires no warrant or probable cause. Furthermore, a positive alert by the qualified canine constitutes sufficient probable cause to support an additional search or seizure.

If SAs need to detain people or property, such as a vehicle or luggage, in order to request a canine screening, they may do so by means of an investigative detention. Such a detention requires reasonable suspicion, as discussed in Section 6.3.

SAs may not use canines in areas where an individual has a heightened expectation of privacy without reasonable suspicion or an applicable exception to the warrant requirement. Such areas include the body, clothing worn by a person, or personal property while it is being worn or held in the physical possession of a person. SAs may not use canines to sniff dwellings or the curtilage of a dwelling without a search warrant or consent.

8.8 Regulatory Searches

A regulatory search is the warrantless inspection of licensees, businesses, or other activities where the government has a regulatory authority and is conducting the inspection based on a general regulatory scheme. The inspection of foreign trade zones by CBP officers is one example of a regulatory search. Vessel document checks by CBP officers or SAs assigned to a marine smuggling group are another example.

Airport security checks by the Transportation Security Administration (TSA) are regulatory searches. They are permissible without a warrant or probable cause, because the purpose of the checks is to ensure the safety of air traffic by finding weapons or other dangerous materials. Only TSA officials can conduct the checks.

The important thing that SAs must be aware of when dealing with regulatory searches is that they may not use a regulatory search as a pretext to conduct a criminal investigative search. SAs may, however, use any evidence discovered independently by TSA or another government agency during a routine regulatory search.

8.9 Administrative Searches

Certain types of administrative searches are allowed as exceptions to the warrant requirement under the Fourth Amendment. The one that is most relevant to SAs is an administrative search of a government employee's workspace. Although employees have a limited REP in their personal workspaces, such as a file cabinet or desk drawer, a warrantless search of an employee's workspace is authorized under two conditions: 1) the search is for a routine, work-related purpose, such as retrieving a file in an employee's absence; or 2) the search is conducted by a supervisor with reasonable suspicion that the search will reveal evidence of employee misconduct. In the second case, the misconduct must be of an administrative nature. An investigation into criminal misconduct requires probable cause and a search warrant.

Chapter 9. CUSTOMS BORDER SEARCH AUTHORITY

The Supreme Court has long recognized the right of the government to conduct searches and seizures at the borders of the United States without probable cause or a warrant. The reasons given for this authority are protection of the revenue through the collection of duty, reduced expectation of privacy at the border, and national self-protection against the introduction of prohibited, hazardous, or dangerous merchandise.

Note: The terms "customs officer" and "customs border search" predate the creation of DHS and ICE and are codified in Title 19 of the U.S. Code. Although the USCS no longer exists, "customs" is used in this chapter to draw a distinction between the ICE SA's customs authority under Title 19 and the SA's border authority under the INA, which is discussed in Chapter 10.

9.1 Customs Border Search

A customs border search is 1) performed by a customs officer 2) searching for merchandise 3) at the border.

9.2 Customs Officer

A customs officer is:

A. An ICE SA.

B. A CBP officer.

C. A U.S. Coast Guard petty officer (grade E4 and above).

D. Other law enforcement officers who have been formally cross-designated by the Secretary of Homeland Security or designee.

Pursuant to 19 U.S.C. § 507, SAs may demand assistance from any person when necessary to effect an arrest, search, or seizure. This would include border searches. The person providing assistance, however, has no independent authority to perform border searches.

9.3 Merchandise

Under 19 U.S.C. § 1401(c), merchandise is defined as "goods, wares, and chattels of every description" (see Section 3.29). (A chattel is any movable item of property, as opposed to real property.) This includes contraband and monetary instruments. Merchandise includes almost any material good, even beasts of burden and corpses.

9.4 Actual Border

As stated in Section 3.1, the actual border is defined as:

A. The Land Border – the dividing line between the United States and Canada or Mexico.

B. The Sea Border – 3 nautical miles from the coast of the United States; in Texas and the Gulf coast of Florida, 9 nautical miles from the coast.

C. The Air Border – extends directly upward from the land and sea borders.

9.5 Functional Equivalent of the Border

Since in most cases it is impractical, if not impossible, for an SA to perform a search or seizure at the actual border, the law allows for border searches to be conducted at the functional equivalent of the border (FEB). For an FEB to exist in an inbound customs border search situation, all of the following circumstances must exist:

A. The SA has reasonable certainty of a border nexus. Border nexus (see Section 3.6) is defined as a situation in which:

1) Either the person or thing to be searched crossed the border, or

2) The person or thing to be searched had meaningful contact with someone or something that crossed the border.

B. The SA has reasonable certainty that no material change occurred since the border nexus. This means that any merchandise present at the time of the search was present at the time of the border nexus (i.e., there has been no opportunity to acquire domestic merchandise since the border crossing).

C. The search occurs at the first practical detention point after the border nexus. This is not necessarily the first possible detention point. Although FEB searches usually take place at designated locations, such searches may occur anywhere in the United States where all the conditions establishing the FEB are met. The important thing that SAs must remember is that the FEB search must occur before the conveyance, cargo, or travelers enter into the general commerce of the United States.

Examples of the FEB are seaport POEs, international airport POEs, U.S. Postal Service international mail facilities, the importing hubs of express package carrier facilities, CBP bonded warehouses, and international cargo being transported in-bond.

FEB searches are not strictly limited to persons or items coming from outside the United States. If a person enters a secure customs area, such as a bonded warehouse or the Federal Inspectional Services area at an international airport; comes in contact with a person or object that has just crossed the border; or comes in contact with a conveyance that has just crossed the border, such as an arriving international aircraft, that person is subject to a border search.

9.6 Functional Equivalent of the Border Outbound

SAs may conduct searches for merchandise that is traveling from the United States to a point outside the United States. SAs use these "outbound" searches most frequently in cases involving currency reporting violations or the illegal export of arms or other sensitive technologies. For outbound customs border searches, an FEB exists under the following circumstances:

A. The SA has reasonable certainty that there will be a border nexus.

B. The SA has reasonable certainty that there will be no material change before a border nexus occurs (i.e., any merchandise present now will be present at the time of crossing).

C. The search occurs at the last practical detention point before the border nexus is to occur.

When conducting an outbound border search involving travelers, SAs should attempt to establish, through questioning, the person's intention of leaving the United States. In those outbound searches involving potential currency reporting violations, SAs should also advise the traveler of the reporting requirements prior to conducting the border search. Legal requirements pertaining to currency reporting violations are discussed in greater detail in HSI policy on financial investigations.

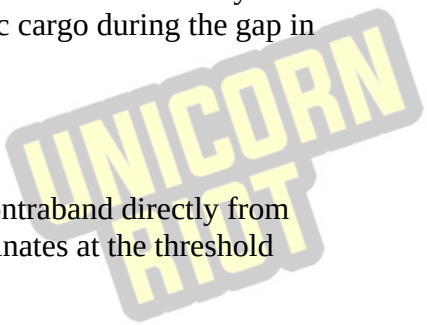
9.7 Extended Border

Under some circumstances, border searches may be conducted away from the actual border or the FEB. This situation is known as the "extended border search" (see Section 3.16). For SAs, the most common situations involving an extended border search are controlled deliveries or cold convoys. In these situations, SAs deliberately allow contraband or other evidence of a criminal violation to pass further into the United States for investigative purposes. SAs retain their authority to conduct an extended border search of the merchandise if the following conditions apply:

A. The SAs have reasonable certainty that there has been a border nexus.

B. The SAs have reasonable certainty that there has been no material change since the border nexus. SAs can establish this certainty either through continuous surveillance or through surveillance accompanied by a logical argument. For example, suppose that a group of SAs loses sight of a vehicle during a cold convoy. When they regain sight of the vehicle, 10 minutes have passed and the vehicle is 12 miles further along the highway. Under all but the most extreme circumstances, SAs can reasonably infer that the vehicle had no time to stop and acquire domestic cargo during the gap in the surveillance.

C. The SAs have reasonable suspicion of criminal activity.



A dwelling is never subject to a border search. Even if SAs follow contraband directly from the border to a residence, their authority to conduct a border search terminates at the threshold and Fourth Amendment safeguards apply.

9.8 Scope of a Customs Border Search

Although they are well recognized exceptions to the probable cause and warrant requirements of the Fourth Amendment, border searches must still be reasonable. Courts differentiate between "routine" and "non-routine" border searches. Routine border searches may be conducted without probable cause and a warrant. Non-routine border searches, such as a destructive search, require reasonable suspicion.

9.9 Personal Border Searches

When conducting a routine search of a person at the border, SAs may require that the individual remove an outer garment, such as a hat or jacket. They may also ask an individual to empty his or her pockets. SAs may search any personal effects or luggage carried by the person.

If SAs working in a border environment believe that an individual may be armed, they may conduct an immediate patdown of the individual. It may be conducted when there is reasonable suspicion that the person is armed. An immediate patdown is not a border search for merchandise, but rather a search conducted for the safety of the SAs and others. SAs should limit the immediate patdown to areas where they believe a weapon may be concealed.

Any border search beyond the scope of a routine personal search or an immediate patdown for weapons should be conducted by an SA of the same sex as the individual being searched. SAs should take care to conduct these more intensive personal searches in a private area away from the eyes of the public.

With some or mere suspicion, SAs may move a person to a private area and conduct a patdown search of an individual. As opposed to an immediate patdown for weapons, a patdown search is a search for merchandise and requires no suspicion. It may consist of one or more of the following actions:

A. Patting the hands over the person's body.

B. Removing the person's shoes.

C. Lifting the pant leg or hem of a skirt a few inches.

D. Removing a belt.

E. Examining or reaching into pockets.

F. Rolling up shirt sleeves.

G. Removing a wig or hairpiece.

If, during the course of the patdown search, SAs develop reasonable suspicion that the person has merchandise concealed beneath the clothing, the SAs may conduct a partial body search. A partial body search is the removal of some of the clothing to recover an item hidden underneath. The removal of clothing should be limited to the area where the SAs believe the merchandise is hidden. The SAs should conduct a partial body search in a private area out of the public view. Unless the person refuses to cooperate, SAs should conduct the search by directing the person to remove his or her own clothing.

Any personal search related to the suspected concealment of merchandise within a person's body, i.e., x-ray or body cavity search, must be conducted by medical personnel and requires reasonable suspicion that the individual is concealing material evidence inside his or her body. In the absence of consent for an x-ray, monitored bowel movements may be conducted. All decisions regarding appropriate medical procedures for a patient are to be made by medical personnel only. CBP officers and SAs neither suggest nor concur in any medical procedure.

These types of searches are performed most frequently at a POE by CBP officers, with ICE HSI SAs assisting as part of the criminal investigation. CBP must adhere to its own set of procedures and approval processes when conducting these types of personal searches. SAs should cooperate in these procedures. For more information on these types of searches, SAs should consult the CBP Personal Search Handbook (HB 3300-04B), dated July 2004, or as updated.

SAs should be aware that, in any personal search involving a detention lasting more than 8 hours, SAs are required to contact the local USAO and obtain the concurrence of an AUSA in continuing the detention.

9.10 Customs Border Searches of Conveyances

SAs may search any vehicle in its entirety as part of a border search. This includes the interior, exterior, trunk, and any locked or unlocked containers. So long as the search is routine, it requires no suspicion on the part of the SAs. In the context of a border search, SAs may even dismantle parts of a vehicle to search for concealed merchandise with no suspicion. Any search that is destructive, however, requires reasonable suspicion on the part of the SAs that merchandise is concealed in the vehicle. Drilling holes in the bed of a truck, for example, would require reasonable suspicion on the part of the SAs.

SAs should not perform destructive searches or searches that involve the dismantling of vessels or vehicles without the assistance of a qualified mechanic. Due to safety considerations, SAs must request the assistance of a certified aviation mechanic when conducting more than a routine search of an aircraft.

9.11 Border Searches of Documents, Electronic Devices, and Electronic Media

On July 16, 2008, ICE issued ICE Directive 7-6.0 entitled, "Border Searches of Documents and Electronic Media." On August 18, 2009, ICE issued ICE Directive 7-6.1 entitled, "Border Searches of Electronic Devices," which superseded the portions of the earlier directive pertaining to electronic devices. The following is a summary of the issues addressed in these directives.

9.11.1 Policy

SAs may detain, for the purpose of further review, any documents, electronic media, or electronic devices at any point during a border search. Such a detention does not require individualized suspicion. The review may occur at the location where the detention takes place or at an off-site location, including a location associated with a demand for assistance from an outside agency or entity.

If, after reviewing the documents and electronic media, SAs do not develop probable cause to seize the documents or electronic media, all detained copies of the information must be destroyed. Any originals must be returned to the traveler, importer, or exporter as expeditiously as possible.

9.11.2 Timeliness of Review

When determining the amount of time deemed to be reasonable for detaining documents, electronic media, or electronic devices, SAs should consider:

A. The nature of the documents or electronic media;

B. The amount of information needing review;

C. Whether the traveler was deprived of his or her property and, if so, whether the traveler was given the option of continuing his or her journey with the understanding that HSI would return the property once its border search was complete or a copy of the documents or media could be made;

D. The elapsed time between the detention, the initial border search, and the continued border search, including any demand for assistance;

E. Whether assistance was sought and the type of assistance;

F. Whether and when ICE followed up with the agency or entity providing assistance to ensure a timely review;

G. Whether the traveler has taken affirmative steps to prevent the search of his or her property in a timely fashion; and

H. Any unanticipated exigency that may have arisen.

For detained documents or electronic media, SAs are to complete reviews within a reasonable amount of time.

Generally, searches of electronic devices should be completed within 30 calendar days of the date of detention, unless circumstances exist that warrant more time. Such circumstances must be documented in an ROI and approved by a Group Supervisor after the first 30 days, and again every 15 calendar days thereafter.

Whenever an SA detains originals or copies of documents or electronic media, or electronic devices, the SA will initiate a chain of custody form (CBP Form 6051D) or other appropriate documentation. Additionally, all detentions must be accounted for in accordance with recordkeeping procedures outlined in the OI memorandum entitled, "Recordkeeping Procedures Regarding Detentions of Documents and Electronic Media," dated December 12, 2008, or as updated. If it is determined that the detained documents or electronic media are to be seized, the SA must also enter the seizure into the Seized Asset and Case Tracking System (SEACATS) via the completion of a SEACATS Incident Report.

When SAs receive electronic devices, or copies of information therefrom, from CBP for analysis and investigation, SAs are responsible for advising CBP of the status of any such analysis within 10 calendar days.

9.11.3 Requesting Assistance with a Documentary Search

During a border search, SAs may encounter information in documents, electronic media, or electronic devices that is in a foreign language, presents technical difficulties, or is encrypted. To determine the meaning of such information, SAs may demand translation, technical, or

decryption assistance from other federal agencies or non-federal entities. SAs may seek such assistance absent individualized suspicion.

SAs may also encounter specialized information in documents or electronic media that require referral to subject matter experts to determine whether the information is relevant to the laws enforced and administered by HSI. SAs may demand such assistance when they have reasonable suspicion of activities in violation of the laws enforced by HSI.

For the purpose of obtaining subject matter expertise, SAs may create and transmit copies of information to other federal agencies or non-federal entities. Any original documents and media should be transmitted only when necessary to render the demanded assistance. If it is not necessary to transmit original documents and media, SAs should return the originals to the traveler immediately, barring continuing reasonable suspicion to detain.

It is the responsibility of the SAs demanding the assistance to ensure timely responses from assisting agencies or entities. If a demand for assistance is made outside of DHS, within the first 30 days after demanding the assistance, the SA demanding the assistance shall contact the assisting agency or entity for a status report on the request. If the assisting agency or entity anticipates needing more than 30 days to complete its review and analysis, the SAs shall continue to communicate with the assisting agency or entity on a regular basis until the review is complete and the results have been received. The SAs demanding the assistance shall document each communication with the assisting agency or entity. If assisting agencies or entities are not acting in a reasonable time, the SAs shall consult with a supervisor on what action is appropriate.

9.11.4 Sharing with Outside Agencies

When SAs determine that there is probable cause of unlawful activity, based on a review of information in documents or electronic media or on other facts and circumstances, they may seize and retain the originals and/or copies of the relevant documents or electronic media or relevant portions thereof, as authorized by law. Copies of documents or electronic media, or portions thereof, that are retained in accordance with this section, may be shared by SAs with federal, state, local, and foreign law enforcement agencies in accordance with applicable law and policy.

9.11.5 Travel and Identification Documents

Even without any suspicion of illegality, for legitimate government purposes, SAs may copy, retain, and share (1) identification documents such as U.S. or foreign certificates of naturalization, seaman's papers, airman certificates, driver's licenses, state identification cards, and similar government identification documents; and (2) travel documents that relate to the person's mode and date of travel into or out of the United States.

9.11.6 Attorney-Client Privilege

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 SAs suspect that the content of such a document may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of ICE, the SAs must seek advice from the local OCC or the appropriate USAO before conducting a search of the document.

9.11.7 Border Searches of Foreign Mail

Letters and packages carried in the possession of a traveler are not mail, whether or not they are stamped. Letters or packages carried by private delivery services, such as Federal Express or the United Parcel Service, also are not mail. If they are packages, they may be opened and searched pursuant to a routine border search. If they are documents, SAs may open them and use the procedures for documentary searches outlined in the preceding subsections of Section 9.11.

To be considered mail for border search purposes, an item must be entering or leaving the mail stream of the U.S. Postal Service from or to a foreign country. For the purposes of this Handbook, there are two categories of mail: 1) a mail article, which includes packages or other items mailed at less than first class rate of postage; or 2) letter class mail, which includes letters, cards, packages, or other items mailed at a first class or higher rate of postage.

International mail must pass through a CBP international mail facility before entering the general mail delivery stream of the U.S. Postal Service. SAs should coordinate any search of foreign mail with CBP officers working at an international mail facility. Any possible border search of letter class mail shall be coordinated with CBP officers assigned to such international mail facility and conform to guidelines set forth in the USCS International Mail Operations and Enforcement Handbook (HB 3200-06A, dated August 2001, or as updated). Additionally, the U.S. Postal Service requires that it be notified and present at any border search of letter class mail. SAs should also consult with the local OCC or the local USAO when considering a border search of any article that may be considered mail.

Chapter 10. IMMIGRATION BORDER AUTHORITY

The INA grants SAs the statutory authority to conduct certain types of border searches and seizures. While the purpose of a customs border search is to look for merchandise, the purpose of a border search under the INA is to examine aliens regarding their admissibility, search for aliens who are being transported into the United States, and search for documentary or other evidence of the alienage and admissibility of persons seeking entry into the United States.

10.1 Questioning and Routine Searches at the Functional Equivalent of the Border

Persons seeking admission to the United States must present themselves to an immigration officer at a U.S. POE. POEs are defined as FEBs, as discussed in Section 9.5, and may be land POEs, seaport POEs, or airport POEs. While inspections at POEs to determine admissibility are generally carried out by CBP officers, the INA also grants this authority to ICE HSI SAs.

An applicant for admission who claims to be a U.S. citizen must establish that fact to the SA's satisfaction. If U.S. citizenship is established, the person is not subject to any further examination under the INA and must be allowed to proceed (although he or she may still be detained and searched for merchandise under the SAs' customs border authority). If U.S. citizenship is not established, the person may be detained and examined as an alien. For additional guidance on claims of U.S. citizenship, refer to ICE Memorandum 16001.1, "Superseding Guidance on Reporting and Investigating Claims to United States Citizenship," dated November 19, 2009, or as updated.

An alien applicant for admission must answer any questions posed by SAs regarding whether or not the applicant is admissible, his or her purpose for seeking admission, the intended length of stay, and whether or not the applicant intends to establish permanent residence or become a U.S. citizen. The applicant must also present any documentation required to establish, to the SA's satisfaction, that the individual is entitled to enter the United States and is not subject to exclusion under the provisions of the INA.

In addition to the authority to detain and question, the INA grants SAs the authority to conduct routine searches at the FEB. The purpose of these searches is to look for documents or other evidence which might substantiate grounds for denial of admission. With mere suspicion that a person is inadmissible, an SA may search the person's outer clothing, luggage, and other personal effects. At the FEB, SAs may also search, with mere suspicion, any conveyance suspected of containing aliens or of containing documents relating to a person's admissibility.

To conduct a more intensive personal search – a partial body search or a destructive search of a vehicle, for example – SAs must have reasonable suspicion that the search will reveal evidence of a person's inadmissibility.

10.2 Access to Lands Within 25 Miles of the Border

Under Section 287(a)(3) of the INA [8 U.S.C. §1357(a)(3)], SAs are authorized to enter private lands located within 25 miles of the border for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States. If SAs must enter onto private lands under this authority, they should make every attempt to notify the owner or occupant in advance. If the owner or occupant challenges the SAs' authority to enter the lands, SAs should notify their first-line supervisor.

The authority to enter private lands applies to the land only. SAs may search dwellings or other private buildings only with a warrant or an exception to the Fourth Amendment warrant requirement.

10.3 Vehicle Stops and Searches

Pursuant to Section 287(a)(3) of the INA [8 U.S.C. § 1357(a)(3)], immigration officers may also board and search any conveyance within a reasonable distance of the border to search for aliens. Federal regulations (8 C.F.R. § 287.1(b)) state that a distance of 100 air miles is considered "within a reasonable distance of the border."

While this provision statutorily grants SAs the ability to conduct warrantless searches of conveyances, this is one case in which the courts have determined that constitutional limitations restrict the authorities granted by the statute. In effect, to stop and search a vehicle within 100 air miles of the border for the purposes of the INA, Fourth Amendment safeguards apply, and SAs must have reasonable suspicion that the vehicle contains illegal aliens.

Circumstances which may lead to reasonable suspicion on the part of SAs for an immigration-related vehicle stop include, but are not limited to:

A. The characteristics of the area where a vehicle is encountered, such as its proximity to the border, the usual patterns of traffic on the particular road, previous experience with alien traffic, and information about recent illegal border crossings;

B. The driver's or passenger's behavior, including erratic driving or obvious attempts to evade officers;

C. Aspects of the vehicle, e.g., the appearance of being overcrowded or weighed down;

D. The appearance of the occupants, including whether their mode of dress appears to be foreign;

E. Information from outside sources, such as reports of illegal border crossings, police reports, or informant information; and

F. The SAs' training and experience, including previous experience with alien smuggling.

Chapter 11. CUSTOMS MARITIME AUTHORITY AND AVIATION SMUGGLING

As customs officers, SAs have the statutory authority under Title 19 of the U.S. Code to stop and board vessels within the customs waters of the United States, on inland waterways of the United States with access to the open sea, and, in certain cases, on the high seas.

Under Federal Aviations Regulations, 49 U.S.C. § 44103(d), and the Aviation Smuggling Act (19 U.S.C. § 1590), SAs also have certain authorities to interact with aircraft and pilots and request identification and registration documents.

It should be noted that these authorities are distinct from SAs' customs border search authority. If SAs have reasonable certainty that the conditions for a border search exist with respect to a vessel or aircraft, they may search the vessel in its entirety under their border search authority.

11.1 Customs Waters

As discussed in Section 9.4, the actual sea border of the United States extends 3 nautical miles from the shore of all states except Texas and the Gulf coast of Florida, from which it extends 9 nautical miles. Waters between the shore and the 3 or 9 mile limit are defined as U.S. territorial waters.

The customs waters of the United States (see Section 3.11) extend 12 nautical miles from the mean low water mark of all coastal states.

11.2 Inland Waters

Inland waters of the United States (see Section 3.26) are those waters that are inland of the coasts or inland of an imaginary line drawn from headland to headland of a river, bay, or inlet with access to the sea. The United States' portions of the Great Lakes are also considered inland waters.

11.3 High Seas

The high seas (see Section 3.24) are the international waters beyond the customs waters of the United States.

11.4 Authority to Hail, Board, and Check Documents

Under the authority granted by 19 U.S.C. §1581(a), HSI SAs may hail, stop, and board any vessel within customs waters or within inland waters with ready access to the open sea. During the boarding, they may examine the master of the vessel and examine the vessel's documents. The scope of the verification of the vessel's documentation will depend on the size of the vessel and the nature of the documentation to be verified. For example, verification of a large vessel's Hull Identification Number may require accessing the vessel's engine room bilge.

The vessel to be examined does not need to be underway at the time of the boarding. Thus, a vessel docked at a marina in inland waters is subject to this type of boarding, provided that the marina has ready access to the open sea.

During the course of the document check, SAs may seize any evidence or contraband that they encounter in plain view. By checking the documents and speaking with the master and crew, they may also ascertain whether or not the vessel has a nexus to the border and is subject to a border search. SAs may also develop probable cause of a criminal violation, which would allow them to search the vessel under the mobile conveyance exception.

11.5 Protective Sweeps of Vessels

If, while conducting a document check on a vessel, SAs have reasonable suspicion that someone aboard a vessel may pose a threat, they may conduct a protective sweep of the vessel. The sweep is limited to areas where people or weapons may be hidden. It may last only long enough to dispel the threat. SAs may seize criminal evidence or contraband discovered during the protective sweep under the plain view doctrine.

11.6 Hovering Vessels, Vessels Failing to Display Lights, and Vessels Subject to Pursuit

According to 19 U.S.C. § 1401(k), a hovering vessel is a vessel found or kept off the coast of the United States which SAs have reason to believe is being used to introduce merchandise into the United States contrary to law. The SAs' suspicions may stem from the history, conduct, character, or location of the vessel. The term also extends to vessels that visit a hovering vessel. A vessel subject to pursuit is one that was subject to a lawful border search or customs document check, but which failed to stop on command.

Under the provisions of 19 U.S.C. § 1587, even though a hovering vessel may be on the high seas, SAs may board the vessel, examine the master under oath, and conduct a document check. They may also bring the vessel to the nearest U.S. port for an examination of its cargo. SAs may do the same with any vessel within the customs waters that is subject to pursuit or fails to display lights as required by law.

11.7 Aviation Smuggling

19 U.S.C. § 1590, "Aviation Smuggling," makes it unlawful for any pilot or person on any aircraft to possess merchandise knowing, or intending, that the merchandise will be introduced into the United States contrary to law. Included in this statute are several acts which, if committed within 250 miles of the territorial sea of the United States, constitute *prima facie* evidence of a violation:

A. Operating without required navigation lights;

B. The presence on the aircraft of an auxiliary fuel tank that is not installed in accordance with applicable law;

C. The external display of false tail numbers;

D. The presence of any compartment or equipment that is built or fitted out for smuggling; and/or

E. The failure to identify the aircraft by registration number or country of registration when requested to do so by a customs officer.

If an aircraft is located at a fixed base of operations or international airport and is located within 250 miles of the territorial sea of the United States, SAs may interact with the aircraft to

determine if any aviation smuggling violations are present. SAs may ask for the aircraft registration documents so that the tail number can be verified. Without border nexus, however, access to those areas of the aircraft in which a person has a REP must comport with general Fourth Amendment principles, such as plain view, open view, or consent. SAs should exercise caution to ensure that any encounters with pilots or aircraft under these circumstances remain brief, so that the pilot or aircraft is not unreasonably detained.

11.8 Authority to Request Documents Under Federal Aviation Regulations

Under 14 C.F.R. § 61.3(1), any federal or state law enforcement officer may direct a pilot who is or has been in operation of an aircraft to produce any airman certificate, medical certificate, authorization, or license required by Federal Aviation Regulations to operate the aircraft, as well as their photo identification.

Chapter 12. DIPLOMATIC IMMUNITY

Diplomats are representatives of foreign countries who work in the United States on behalf of the government of that foreign country. There are over 100,000 foreign government representatives in the United States who enjoy some level of immunity. Those with full immunity are not subject to the jurisdiction of U.S. courts or law enforcement, either in their official or, to a large extent, personal activities. They are immune from any type of search or seizure.

12.1 Diplomatic Identification

In order to enjoy status as a diplomat, a foreign government representative must be officially recognized and accredited by the U.S. Government. While an individual's visa status (e.g., A-1, A-2, G-1, G-2, or G-3) may provide some indication of diplomatic status, the only authoritative documentation of immunity is the Diplomatic Identification Card issued by the U.S. Department of State.

The front of the Diplomatic Identification Card has a photograph of the official, identifying information, and either a blue, green, or red border. Blue-bordered cards are issued to diplomats and United Nations diplomatic officers and their families. Green-bordered cards are issued to embassy administrative, technical, and service staff and their families. Consular staff and their families are provided with red-bordered cards. On the back of the Diplomatic Identification Card, SAs will find the bearer's signature and a statement describing his or her level of immunity.

12.2 Treatment of Diplomats

SAs may detain diplomats only long enough to determine their identity and status. If SAs encounter someone claiming diplomatic immunity during an enforcement action or investigation, they should verify the individual's immunity status by contacting the U.S. Department of State, Office of Protocol at (202) 577-6205. If the encounter occurs outside business hours, SAs may contact the Diplomatic Security Command Center at (571) 345-3146 (open 24 hours a day).

If, after reviewing a diplomat's Diplomatic Identification Card and verifying his or her status, SAs determine that the diplomat is accredited and not subject to any form of search or seizure, the SAs must release him or her immediately.

12.3 Foreign Embassies and Diplomatic Missions

By law, a foreign embassy or diplomatic mission must be treated as foreign soil. Even with a search warrant, arrest warrant, or exceptional circumstance, SAs may never conduct searches or seizures within the grounds of a foreign embassy or mission. SAs may enter these premises only with the permission of the foreign nation.

12.4 Diplomats Employed by the U.S. Government

SAs should not misconstrue any of these immunities as applying to U.S. Department of State or other U.S. Government employees. Regardless of their status overseas, U.S. citizens never enjoy diplomatic immunity within the United States or in the context of a border search.

ACRONYMS

A

AIRG	Asset Identification and Removal Group
AUSA	Assistant U.S. Attorney

B

C

CBP	U.S. Customs and Border Protection
CFA	Computer Forensics Agent
CFR	Code of Federal Regulations

D

DHS	Department of Homeland Security

E

F

FEB	Functional Equivalent of the Border
FP&F	Fines, Penalties, and Forfeitures
FRCrP	Federal Rules of Criminal Procedure

G

H

HB	Handbook
HSI	Homeland Security Investigations

I

ICE	U.S. Immigration and Customs Enforcement
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service

J-M

N

NLECC	National Law Enforcement Communications Center

O

OCC	Office of the Chief Counsel
OI	Office of Investigations

P

POE	Port of Entry

Q

R

REP	Reasonable Expectation of Privacy
ROI	Report of Investigation

S

SA	Special Agent
SAC	Special Agent in Charge
SAMEPH	Seized Asset Management and Enforcement Procedures Handbook
SEACATS	Seized Asset and Case Tracking System
SPS	Seized Property Specialist
SRT	Special Response Team

T

TSA	Transportation Security Administration

U

USAO	U.S. Attorney's Office
USC	U.S. Code
USCS	U.S. Customs Service

V-Z