

John Calvin Jones (2014), Analysis of the case *Abidor v. Napolitano* (EDNY 2013), special report for *No Agenda*

5 January 2014

Dear Adam Curry, Producers of and Listeners to the *No Agenda Show*,

I do not think that the *No Agenda Show* (BPITU) has reported on a recent court ruling (31 December 2013) in a case regarding search and seizure at the U.S. border or so-called ports of entry. There are many Gitmo Nation-esque points to detail in the case of *Abidor v. Napolitano* (2013).<sup>1</sup> (The case was held in the Federal District Court for the Eastern District of New York, which is in Brooklyn).

Though the events in question happened in 2010, and Judge Korman heard the government's motion to dismiss on 2 July 2011,<sup>2</sup> media attention was sparse. In April 2012 the *Huffington Post* reported,

“Abidor said that the CBP agents handcuffed him, *took him off the train* and kept him in a holding cell for several hours. He was grilled over his interest in Islam and past trips to the Middle East, before he was let go at the border. He was able to catch a ride on a bus passing through the border and continue to Brooklyn.”<sup>3</sup>

### **Legal Issues Presented in the Order to Dismiss**

Now, to some of the specific legal issues. Federal Judge Korman dismissed the lawsuit by Mr. Pascal Abidor (a non-Muslim, American citizen),<sup>4</sup> because Korman held that Abidor was not likely to suffer the alleged injuries again!<sup>5</sup> (I will explain below). As alleged in the complaint, the injuries were merely the seizure of his computer and extraction and retention of any and all information on Abidor's computer.<sup>6</sup>

Note, Abidor did NOT sue for money on the grounds that agents of the U.S. Customs and Border Patrol violated his 4th Amendment and 5th Amendment rights by seizing his computer (and keeping it for 11 days), handcuffing him, removing him from a train (he was going from Montreal to New York City) and holding him in their custody for five hours of interrogation.<sup>7</sup>

Instead of suing for the wrongful search and seizure, Abidor, who was merely the named plaintiff – perhaps for the National Association of Criminal Defense Lawyers (NACDL) and the National Press Photographers Association, or NPPA) – sued to get a **declaratory injunction**.<sup>8</sup> That is, he

1 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf)

2 [http://www.huffingtonpost.ca/2012/04/08/pascal-abidor-border-search\\_n\\_1410691.html](http://www.huffingtonpost.ca/2012/04/08/pascal-abidor-border-search_n_1410691.html)

3 [http://www.huffingtonpost.ca/2012/04/08/pascal-abidor-border-search\\_n\\_1410691.html](http://www.huffingtonpost.ca/2012/04/08/pascal-abidor-border-search_n_1410691.html)

4 [http://www.huffingtonpost.ca/2012/04/08/pascal-abidor-border-search\\_n\\_1410691.html](http://www.huffingtonpost.ca/2012/04/08/pascal-abidor-border-search_n_1410691.html)

5 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) at pages 19, 21, and 22

6 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) at pages 19 and 20

7 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See pages 8 and 20.

8 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See pages 2 and 19.

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(and or the NACDL and NPPA) wanted the Court to find that the DHS inspection rules, per Directive 3340-049 (written in August 2009)<sup>9</sup> violated the Constitution because, among other things, the Directive calls for Federal agents to scan and kept any or all electronic information taken off computers or other electronic devices.<sup>10</sup>

Given that Abidor did not bring a suit to challenge the illegality of the searches and seizures *per se*, the Court emphasized that there were only three legal issues:

- (1) whether the CBP could perform a *quick look* search (without suspicion of a crime);
- (2) whether the CBP could do a more obtrusive forensic search (without a warrant, yet based on a reasonable suspicion that a crime has occurring or shall occur);<sup>11</sup> and, if such *were* Constitutional
- (3) whether Abidor would be entitled to get an injunction – which could be granted only if he were likely to suffer the injury again.

Inexplicably, Judge Korman starts his opinion by quoting for former head of DHS, Michael Chertoff (Israeli citizen and salesman for *Rapiscan*)<sup>12</sup>

“Since the founding of the republic, the federal government has held broad authority to conduct searches at the border to prevent the entry of dangerous people and goods. In the 21st century, most dangerous contraband is often contained in laptop computers or other electronic devices, not on paper. This includes terrorist materials and despicable images of child pornography.”

Michael Chertoff, *USA Today*, 16 July 2008, A10

Ultimately the Court held that the CBP agents had a reasonable suspicion to seize Mr. Abidor's computer and perform the more invasive forensic search, and take information from the computer because:

- (a) Mr. Abidor, a dual U.S.-French national, who was a graduate student at a University in Montreal, had French and American passports, and lived in Canada;<sup>13</sup> and
- (b) Mr. Abidor had pictures of Hezbollah on his computer and Abidor could not give a GOOD reason as to why he had such pictures.<sup>14</sup>

Korman said this:

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<sup>9</sup> [http://www.dhs.gov/xlibrary/assets/cbp\\_directive\\_3340-049.pdf](http://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf)

<sup>10</sup> [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See pages 19 and 20.

<sup>11</sup> [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See pages 11 and 22.

<sup>12</sup> [http://www.huffingtonpost.com/2010/11/23/fear\\_pays\\_chertoff\\_n\\_787711.html](http://www.huffingtonpost.com/2010/11/23/fear_pays_chertoff_n_787711.html)

<sup>13</sup> [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 32.

<sup>14</sup> [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See pages 8, 31 and 32.

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“The officer removed Abidor’s laptop computer from one of his bags, turned it on, and ordered Abidor to enter his password, which he did without objection. The officer inspected the laptop, focusing ... on certain pictures ... that depicted rallies of Hamas and Hezbollah, both of which were designated by the State Department as terrorist organizations. ... When Abidor was asked why he was interested in these images, Abidor explained that his specific area of research for his Ph.D. degree is the modern history of Shiites in Lebanon, in which Hezbollah openly operates. Even if this [answer] explained the pictures of Hezbollah, it did not explain why Abidor saved the pictures of Hamas, a terrorist organization not composed of Shiites and not based in Lebanon.”<sup>15</sup>

### **Korman's Legal Justifications**

In explaining why the government could both investigate and seize both Abidor and his devices, judge Korman talked about the need for security and border integrity, blah, blah, blah.

For example, Korman said: “the Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.”<sup>16</sup> And he added, “The *Border Search doctrine* is an administrative or special needs exception to traditional threshold requirements of probable cause and reasonable suspicion.”<sup>17</sup>

Korman said that border searches are justified when: “there is a strong public interest in effective preventative measures ... which could NOT be dealt with effectively if authorities were required to have probable cause ...”<sup>18</sup> Then Korman concluded that there is both said public interest in seizing computers at the border AND no other effective means to prevent people from **watching videos of people detonating IEDs**.<sup>19</sup> Why does Korman believe this? Because – Michael Chertoff said so in a *USA Today* op-ed from 2008!<sup>20</sup>

“Laptop searches have proven essential to detecting people and materials that should be blocked from entering the United States. **Officers have discovered video clips of improvised explosive devices being detonated**, a martyrdom video and other violent jihadist materials. ...”

Michael Chertoff, Searches Are Legal, Essential, *USA Today*, July 16, 2008, at A10.

After assessing how the procedures of search and seizure by the CBP are Constitutional, Korman emphasized that Abidor is not at risk for suspicionless seizure again because:

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15 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 8.

16 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 24

17 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 26.

18 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 27.

19 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 27.

20 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 27.

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“Abidor, alleges that he plans to undertake additional travel to ... Syria and Lebanon, apparently unconcerned about the searches to which his computer may be subject in those countries. ... he has expended time and money to minimize future searches at the United States border. Thus, “[h]e now travels with less information on his computer, self-censors what photographs he downloads, and backs up onto an external hard drive and then deletes materials he fears that border officials may misconstrue.” ... [h]e now avoids taking notes for his research and gathering materials of the type that might be misconstrued by border officials and warns research subjects that he cannot guarantee them confidentiality.”<sup>21</sup>

Isn't that nice? Judge Korman used the very protests of Abidor (where the grad student explained how he was less free) as justification as to why the CBP rules are all good. Korman held that because Abidor intends to act in a manner that he (Abidor) believes will reduce the probability of his own victimhood by thugs at CBP, Abidor will NOT get raped again. Thus for these legal reasons, Korman granted the Motion to Dismiss brought by the Obama Administration.

### **Moving Beyond *Abidor*, What Are the Larger Issues?**

This case is an open declaration, by at least one judge and the Obama administration, that given various statutes, mainly under Title 19 of the U.S. Code (on Customs and Duties), any federal agent can seize and detain anyone or any ship, plain, train, car, bus, motorcycle, bicycle, skateboard, donkey, etc., at any time or place – except inside a home. On the one hand, the Courts are unwilling to consider that any of the provisions of federal law, or those of DHS Directive 3340-049<sup>22</sup> are unconstitutional – in as much as those statutes and rules declare that persons and things may be seized without warrant, without evidence of a crime, and without reasonable suspicion of a crime. Secondly, Korman made repeated references to the idea that people should not complain, and should expect these invasions because other governments spy on people and will seize electronic devices at their whim. He added that some travelers lose computers (but he made no mention of TSA thefts).<sup>23</sup> Korman ends by saying that people should just avoid traveling with computers altogether. If any of us would protest, Korman has an answer – a polite, judicial version of the proverbial, “Shut up! Slave!”<sup>24</sup>

### **Federal Law Allows the Rape**

The NACDL sued, I believe rightfully, because under the current rules of the CBP and DHS, just about any traveler can be searched and their electronic devices can be seized and downloaded at any time.<sup>25</sup> Note, this all happened to Abidor while riding on a train, when the train stopped in the U.S. at Champlain, New York. (Recall Obama: *No taking off your shoes ...*)<sup>26</sup>

21 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 21.

22 [http://www.dhs.gov/xlibrary/assets/cbp\\_directive\\_3340-049.pdf](http://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf)

23 <http://rt.com/usa/tsa-stealing-from-travelers-358/>

24 <http://www.youtube.com/watch?v=HANo7z118mg>

25 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 20.

26 <http://www.youtube.com/watch?v=V2PwHE1YJkw> (Obama: No security needed on trains?)

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Mr. Abidor was searched pursuant to a CBP Directive 3400-049 (from August 2009), wherein section 5.1.2. says that a search of any electronic device may be done with or WITHOUT individualized suspicion (of criminal activity).<sup>27</sup>

The Directive notes 19 U.S.C. § 507 as authorizing their power to search.<sup>28</sup> But more significantly the subsection (a)(2) of 19 U.S.C. § 507 makes it a crime for ANY person, to resist or to refuse to assist a customs agent make an arrest, seizure, or search.<sup>29</sup>

The Directive also purports to be legal in relation to other sections from Title 19, which deals with Customs and Duties – things like tariffs (e.g., 19 U.S.C. § 482(a) allows for searches only of merchandise, which is subject to a duty).<sup>30</sup> Yet Title 19 generally talks about inspections *at ports* – places where goods, for import, can be purchased<sup>31</sup> and as we know, Mr. Abidor was on a train, there was no *port*.

Further though the Customs agents wanted to and demanded that Abidor assist them to search his computer, one section of Title 19 would seem to preclude such an inspection. Title 19 U.S.C. §1461 reads as follows:

All merchandise and baggage imported or brought in from any contiguous country ... shall be unladen in the presence of and be inspected by a customs officer, at the first port of entry ... and such officer may require the owner, or his agent, or other person having charge or possession of any trunk, traveling bag, sack, valise, or *other container* ... to open the same for inspection, or to furnish a key or other means for opening the same.

A personal computer – not for sale, is neither merchandise nor baggage, nor any type of container, as implied by the meaning of the passage in § 1461. Unfortunately, the lawyers for Abidor *neither* challenged the *premise* of the search, i.e., Title 19 *per se* which is specifically designed to create procedures for inspection of goods and merchandise in order to prevent importers from skirting duties owed to the government, *nor* the specifics of §1461, which only declares that the owner of the property to be searched may be compelled to open a *container*.

If, however, a Court would contend that a computer is an information *container*, then failure of the owner to provide log-in information or other passwords or encryption keys could be judged as

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27 [http://www.dhs.gov/xlibrary/assets/cbp\\_directive\\_3340-049.pdf](http://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf)

28 <http://www.law.cornell.edu/uscode/text/19/507>

29 <http://www.law.cornell.edu/uscode/text/19/507>

30 <http://www.law.cornell.edu/uscode/text/19/482>. Directive 3340-049 notes other pertinent sections of the United States Code. It mentions Title 8 U.S.C. § 1225, which details the process for removing aliens.

<http://www.law.cornell.edu/uscode/text/8/1225> As well, there is language that incorporates 8 U.S.C. §1357.

<http://www.law.cornell.edu/uscode/text/8/1357> That section authorizes searches and seizures of aliens or persons *believed to be aliens*. Combining the two, any Customs agent can seize an American, declare that they believe the person is an alien, and then detain and or deport that person.

31 See 19 U.S.C. § 232 which defines ports. <http://www.law.cornell.edu/uscode/text/19/232>

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a violation of 19 U.S.C. §1461 or 19 U.S.C. §507(a)(2). Under that scenario, failure to provide Bitcoin encryption keys or Cayman Island bank account numbers might also be a crime!

But we probably cannot put any stock in section 1461 to protect our electronic data. Sadly, 19 U.S.C. §§ 1581(a) and 1582 can be read so expansively as to declare that Customs agents can board any car or train or boat and seize and search every person and every thing – anywhere in the United States!

#### §1581. Boarding vessels

##### (a) Customs officers

“Any officer of the customs may, at any time, go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized ... or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers, and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.”

#### §1582. Search of persons and baggage; regulations

The Secretary of the Treasury may prescribe regulations for the search of persons and baggage ... all persons coming into the United States, from foreign countries, shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

Despite the language of 1581(a) and 1582, we should keep in mind, originally the laws in Title 19 were about mere customs duties, i.e. tax-evasion and then were later amended in the name of the drug war. Though Congress has not yet passed a law to permit absolute *cyber* invasions at the virtual borders, DHS and the Customs Border Protection agency are acting as though they have *carte blanche* to apply the inspection rules to what it determines is contraband – e.g., mere pictures of people playing dress up in the name of Hamas or Hezbollah.<sup>32</sup> Perhaps this lack of explicit Congressional direction to date, means that there is one hurdle (or small Army Corps of Engineers' levy) still protecting us.

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<sup>32</sup> [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See pages 8, 31 and 32.

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## Shut Up, Slave!

Putting aside the legal arguments and references to legislation, case law, and administrative rules, judge Korman found the seizure of Abidor's computer and information justified – and hence in line with the Constitution because ... well, it just was not that big a deal.

On the one hand, Korman said that such searches are rare. According to Judge Korman, in the world of U.S. Customs, an electronic device will be searched rarely, at a clip ranging from 1 to 5 in a million.<sup>33</sup>

Then Korman also insisted that that other governments (e.g. the UK) are likely to seize and search computers and other electronic devices any way. And given this fact, Korman reasoned that the would-be plaintiffs, NACDL and NPPA, and any other organization that travels outside the U.S., cannot protect absolutely, the confidentiality of their clients or work-product. Therefore Korman held that these organizations have no standing to bring a suit to stop the U.S. government from this type of suspicionless surveillance – because the information would be extracted by some other government.<sup>34</sup>

Commenting on the notion that client anonymity could ever be maintained by those who travel around the world, Korman said: “Plaintiffs must be drinking the Kool-Aid ...”<sup>35</sup> In reviewing the story of the seizure and detention of David Michael Miranda (husband of *Gren Gleenwald – no Raff*), at Heathrow, judge Korman writes:

“it would be foolish, if not irresponsible ... to store truly private or confidential information on electronic devices that are carried and used overseas.”<sup>36</sup>

Heck, Korman finds that because close to a million laptops per year are lost by travelers, the sensible advice to all travelers is to think twice about the information you carry on your laptop; and he asks, “Is it really necessary to have so much information accessible to you on your computer?”<sup>37</sup>

## Conclusion

If Korman had been a defense attorney, for a person accused of rape, his summation would have sounded like this:

My client cannot be found guilty of rape because, he almost never rapes anyone – even though he has plenty of chances; the rape victim has cleaned up her act, now wears a

33 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See pages 13 and 14.

34 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See pages 22 and 23.

35 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 22.

36 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 23.

37 [https://www.aclu.org/sites/default/files/assets/abidor\\_decision.pdf](https://www.aclu.org/sites/default/files/assets/abidor_decision.pdf) See page 28.

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chastity belt and works as the coat check girl instead of a stripper at the club where my client has a tab; other people are raping women too; and the best way to avoid getting raped, or getting some venereal disease, is to stay home.

I figure that sometime in 2014 we will hear about roving check-points, cavity searches and more. But at least Hillary will be prepared to run the empire.

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Short bio: John Calvin Jones, PhD, JD, lives in Gaziantep, Turkey, where he teaches law. He is a regular listener and donor to the *No Agenda Show* (BPITU). This article may be reposted, with attribution. Contact the author at: [biko97jcj@hotmail.com](mailto:biko97jcj@hotmail.com)