UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID HOUSE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 11-10852-DJC**
	)	
JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security; ALAN BERSIN, in his official capacity as Commissioner, U.S. Customs and Border Protection; JOHN T. MORTON, in his official capacity as Director, U.S. Immigration and Customs Enforcement,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

CASPER, J. March 28, 2012

I. Introduction

Plaintiff David House ("House") has brought this action against Defendants Secretary of the United States Department of Homeland Security Janet Napolitano, Commissioner of United States Customs and Border Protection Alan Bersin, and Director of United States Immigration and Customs Enforcement John T. Morton (collectively, "the Defendants"), alleging that federal agents' search of his electronic devices at the border and prolonged seizure of same for forty-nine days without reasonable suspicion (and retention and dissemination of the information contained therein) violated his rights under the Fourth Amendment to the United States Constitution (First Cause of

such devices violates his "right of associational privacy" under the First Amendment (Third Cause of Action). The Defendants have now moved to dismiss the complaint, or in the alternative, for summary judgment. For the reasons set forth below, the Defendants' motion to dismiss is DENIED.

II. Burden of Proof and Standard of Review

To survive a motion to dismiss, a complaint "must 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,' and allege 'a plausible entitlement to relief.'"

and WikiLeaks were, at the time the complaint was filed, the subjects of ongoing criminal investigations. Id. at ¶ 11.

The Bradley Manning Support Network ("Support Network"), formed by House and others, is an unincorporated association of individuals and organizations. Id. at ¶ 12. The Support Network is an "international grassroots effort to help accused whistle blower Pfc. Bradley Manning." Id. Its purpose is to harness the outrage of viewers of the "Collateral Murder" video into a coordinated

Id. Since September 2010, House contends he has been detained at the border on every occasion he has re-entered the United States after foreign travel and he has been questioned about his work with the Support Network or his political beliefs and activities. Id.

B. The November 3, 2010 Search and Seizure of House's Electronic Devices

On November 3, 2010, following a vacation in Mexico, House arrived at the Chicago O'Hare International Airport, where he was scheduled to catch a connecting flight to Boston. Id. at ¶ 15. At the time, House was carrying his laptop computer, a USB storage device, a video camera containing a memory storage device and a cellular phone. Id. Upon arrival, House passed through a passport control station, collected his baggage, and proceeded to customs, where a Customs and Border Protection ("CBP") officer advised him that his belongings would be searched. Id. The officer examined House's computer and noted that it was warm but did not attempt to open it. Id. House was then told he was free to leave. Id.

House proceeded to the terminal of his connecting flight to Boston. Id. at ¶ 16. After he entered the terminal and as he walked to his gate, two government agents stopped him. Id. The agents, identified by their nametags as Darin Louck and Marcial Santiago, stated that they were with

period of several years, including messages sent to and from family members and friends and concerning employment related matters, records of his personal finances, computer programming works in progress, and passwords allowing access to his bank account, to his workplace computer and to secure communications websites. Id. at ¶ 29. The devices also contained information concerning the Support Network, including the complete Support Network mailing list, confidential communications between members of the Steering Committee about strategy and fund-raising activities, the identity of donors, lists of potential donors and their ability to contribute, and notes from meetings with donors including personal observations about those donors. Id. at ¶ 30.

The agents took the devices and directed House to wait. Id. at ¶ 17. When the agents returned a short time later, they were no longer in possession of the items they had taken. Id. The agents directed House to accompany them to an interrogation room, where he was initially asked a series of questions concerning the security of the computer. Id. at ¶ 18. He advised the agents that the computer's hard disk was not encrypted, but that the computer was password protected. Id. When asked, he declined to give them his password, explaining that providing the password would allow direct and unauthorized access to research on his employer's server. Id.

House alleges that Agents Louck and Santiago detained him for questioning for an extended period of time. Id. at ¶ 19. They questioned him about his association with Manning, his work for the Support Network, whether he had any connection to WikiLeaks, and whether he had been in contact with anyone from WikiLeaks during his trip to Mexico. Id. The agents did not ask House any questions related to border control, customs, trade, immigration or terrorism, and at no point did the agents suggest that House had engaged in any illegal activity or that his computer contained any illegal material. Id.

When House was allowed to leave, only his cell phone was returned to him. Id. at ¶ 20. The other items that had been taken–his computer, USB device and camera–were not returned. Id. The agents gave House a receipt listing the items that had been seized, indicating that "R. Hart, SAC CHI ICE" had taken custody of them, and the agents told him that his other items would be returned by FedEx within a week. Id.

On December 21, 2010, forty-eight days after the agents seized House's electronic devices, they remained in government custody. Id. at ¶ 21. On that date, House, through counsel, sent a letter by facsimile to DHS, CBP and Immigration and Customs Enforcement ("ICE") requesting that his electronic devices be returned to him immediately. Id. He also requested documentation of the chain of custody of any copies made of the information contained on his devices and documentation of their destruction. Id.

On December 22, 2010, House's electronic devices were returned to him by mail from the "DHS CIS New York District Office." Id. at ¶ 22. In a letter to House's counsel dated December 30, 2010, general counsel for ICE noted that the devices had been returned but did not indicate whether any information derived from those devices had been copied, what mon Decem at ¶ 22n Des7He dn of the

protecting, its territorial integrity." United States v. Flores-Montano, 541 U.S. 149, 153 (2004); see also Carroll v. United States, 267 U.S. 132, 154 (1925) (concluding that "[t]ravelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in"). Because searches at the border are conducted pursuant to the government's longstanding right to protect itself, the Supreme Court has stated that such searches are "reasonable simply by virtue of the fact that they occur at the border." Flores-Montano, 541 U.S. at 152-53 (quoting Ramsey, 431 U.S. at 616). That is, "[r]outine searches of the persons and effects of entrants [into the United States] are not subject to any requirement of reasonable suspicion, probable cause, or warrant . . . . " Montoya de Hernandez, 473 U.S. at 538; see also United States v. Barrow, 448 F.3d 37, 41 (1st Cir. 2006).

The Supreme Court, however has recognized certain limitations to the border search power to conduct routine searches without some level of suspicion. First, customs officials may need some level of suspicion to conduct "highly intrusive searches" implicating the "dignity and privacy interests" of a person such as body cavity or strip searches. See Flores-Montano, 541 U.S. at 152 (holding that the removal, disassembly and reassembly of a vehicle's fuel tank at the border did not require particularized suspicion). The Supreme Court has described strip, body cavity, or involuntary x-ray searches as "nonroutine border searches" but expressly declined to suggest "what level of suspicion, if any, is required" for these searches. Montoya de Hernandez, 473 U.S. at 541 n. 4. Second, other than "highly intrusive searches of the person," Flores-Montano, 541 U.S. at 152, the Supreme Court has left open the question "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it was

[2]The Defendants do not argue that the agents had reasonable suspicion or any reason to conduct the search and seizure but rather rely on the argument that none was required.

at the border, in Flores-Montano, the Supreme Court explained that the "dignity and privacy interests" of "highly intrusive searches of a pe

[3]In Flores-Montano in 2004, the Supreme Court rejected the Ninth Circuit's approach in fashioning a balancing test to determine whether a border search is "routine" - a test the Ninth

stores information, even personal information, does not invade one's dignity and privacy in the same way as an involuntary x-ray, body cavity or strip search of person's body or the type of search that have been held to be non-routine and require the government to assert some level of suspicion.

Rather, the search of House's laptop and electronic devices is more akin to the search of a suitcase and other closed containers holding personal information travelers carry with them when they cross the border which may be routinely inspected by customs and require no particularized suspicion. The search of a laptop computer at the border is not vastly distinct from "suspicionless border searches of travelers' luggage that the Supreme Court [has] allowed." United States v. Arnold, 533 F.3d 1003, 1009 (9th Cir. 2008). In the Ninth Circuit's decision in Arnold, the court concluded that customs officials did not need reasonable suspicion to search a laptop or other personal electronic storage devices at the border. Id. at 1008. In so concluding, Arnold reasoned that the search of a piece of property like a laptop or other electronic device "does not implicate the same 'dignity and privacy' concerns as a 'highly intrusive search of a person.'" Id. (quoting Flores-Montano, 541 U.S. at 152). In the Fourth Circuit's decision in United States v. Ickes, 393 F.3d 501, 504-506 (4th Cir. 2005), the court rejected the constitutional challenge to a border search of a computer and required no reasonable suspicion to be searched at the border given the government's broad authority under the border search doctrine to search the belongings of all entrants without

*3 (D.P.R. Aug. 30, 2010) (noting that the search of a traveler's cell phone did not require any particularized suspicion and therefore concluding that it was not deficient performance by the petitioner's counsel for not having pursued a motion to suppress this evidence). The other cases cited by House, Pl. Opp. at 16, do not undermine the soundness of the reasoning in Arnold and Ickes as the courts in those cases either declined to decide whether reasonable suspicion existed for the search, United States v. Irving, 452 F.3d 110, 123-24 (2d Cir. 2006) (involving border search of a person's luggage or personal belongings the Court found to be a categorically routine search), concluded that the government needed no reasonable suspicion to conduct the search and even if reasonable suspicion was required, such suspicion existed for the search, United States v. Hampe, 2007 WL 1192365, at *4 (D. Me. Apr. 18, 2007), report and recommendation adopted by, 2007 WL 1806671 (D. Me. June 19, 2007) (involving a border search of files located on a computer's desktop); United States v. Bunty, 617 F. Supp. 2d 359, 364-65 (E.D. Pa. 2008) (involving a border search of defendant's computer equipment); United States v. Furukawa, 2006 WL 3330726, at *1 (D. Minn. Nov. 16, 2006) (concluding that it "need not determine whether a border search of a laptop is 'routine' for purposes of the Fourth Amendment because, regardless, the magistrate judge correctly found the customs official had a reasonable suspicion in this case"), or assumed the search to be non-routine, but nonetheless affirmed the district court's holding on reasonable suspicion grounds, United States v. Roberts, 274 F.3d 1007, 1012 (5th Cir. 2001).

It is the level of intrusiveness of the search that determines whether the search is routine, not the nature of the device or container to be searched. See, e.g., United States v. Giberson, 527 F.3d 882, 888 (9th Cir. 2008) (stating that "neither the quantity of information, nor the form in which it is stored, is legally relevant in the Fourth Amendment context"). Carving out an exception for

as true House's allegations concerning the officials' subjective motivations for searching his electronic devices, the Court nonetheless may not consider the underlying intent or motivation of the officers when analyzing the viability of a Fourth Amendment claim, see Whren v. United States, 517 U.S. 806, 813 (1996) (stating that "we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"); Irving, 452 F.3d at 123 (noting that "[a]s pretext should not determine the validity of a border search, it also should not determine whether a border search is routine"), which House appears to acknowledge. (Pl. Sur-reply at 11). The Court declines to do otherwise here at least in regard to House's Fourth Amendment claim.

B. Fourth Amendment Challenge to the Duration of the Seizure of House's Devices

House argues that even if this Court rejects its argument that reasonable suspicion was required for the search on November 3, 2010, the Defendants still violated his Fourth Amendment right to be free from unreasonable searches and seizures because of their prolonged detention of his electronic devices for forty-nine days. (Pl. Opp. at 19). The Defendants disagree, arguing that they have the authority to detain electronic devices seized at the border for as long as it takes to adequately inspect those devices. (Def. Mem. at 19-21).

House relies on United States v. Place, 462 U.S. 696, 708-710 (1983) to support his argument that the Court here should require reasonable suspicion for the forty-nine-day detention of his electronic devices. There, the Court held that probable cause was the appropriate standard for the ninety-minute detention of luggage and noted that seizing luggage in a person's immediate possession "intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." Id. at 708. However, Place involved a domestic search and seizure, not one conducted at the international border where an individual's expectation of

privacy is diminished, Montoya de Hernandez, 473 U.S. at 539 and where the "Government's

inspection of House's electronic devices for more than thirty days was reasonable under the circumstances. Specifically, they argue that because House did not provide his password for the laptop, ICE spent additional time reviewing his devices. (Def. Mem. at 22). The Defendants further argue that ICE agents were not familiar with the software and operating system on House's laptop and as a result, they needed to take additional steps to ensure that the images of plaintiff's devices were made correctly. (Def. Mem. at 22-23). The Defendants also contend that there are a limited number of ICE agents certified in computer forensics, thus requiring more time for those agents to review House's devices. (Def. Mem. at 23).

House disputes the reasonableness of the prolonged seizure of House's electronic devices and has produced a declaration from Alexander Stamos, a forensic investigator, to support House's argument that a forty-nine-day seizure to review and analyze his electronic devices was not a reasonable amount of time. (Pl. Opp., Declaration of Alexander Stamos ("Stamos Decl.")). Stamos attests that the process of imaging and verification described in the Declaration of ICE agent Robert Marten (attached as Exhibit 4 to Def. Statement of Facts) should not have taken more than eighteen hours, did not require the one-week period that the devices were retained by ICE in Chicago and did not require the period of nearly six weeks that the devices were retained in New York. (Stamos Decl. at ¶ 6). The Defendants do not explain the extent to which the limited number of ICE agents certified in computer forensics and their current workload prolonged the detention of House's electronic devices or how the transferring of the devices affected that delay and the factual record remains undeveloped as to these issues material to the reasonableness of the duration of the seizure and House disputes the rationale proffered by the Defendants for the forty-nine-day delay. The Court concludes that House has asserted a plausible Fourth Amendment claim in this respect and

it declines to convert the Defendants' motion and grant summary judgment in their favor at this juncture and on the record currently before the Court. Accordingly, the Defendants' motion to dismiss House's Fourth Amendment Claim is DENIED.

C. First Amendment Challenge to the Search and Seizure

House alleges that the agents' search and prolonged detention of his electronic devices and the retention and dissemination of the data therein violated the First Amendment (Second Cause of

stopped House while he was en route to his connecting flight, they directed him to surrender the electronic devices he was carrying. Id. at ¶¶ 16-17. They questioned him for an extended period of time only after seizing his devices. Id. at ¶¶ 17, 19. When the agents questioned House, they did not ask him any questions related to border control, customs, trade, immigration, or terrorism and did not suggest that House had broken the law or that his computer may contain illegal material or contraband. Id. at ¶ 19. Rather, their questions focused solely on his association with Manning, his work for the Support Network, whether he had any connections to WikiLeaks, and whether he had contact with anyone from WikiLeaks during his trip to Mexico. Id. Thus, the complaint alleges that House was not randomly stopped at the border; it alleges that he was stopped and questioned solely to examine the contents of his laptop that contained expressive material and investigate his association with the Support Network and Manning.[5] Although the Defendants' motivation to search and retain House's devices for their material concerning the Support Network and Manning, as alleged in the complaint, is not relevant to the Court's analysis of his Fourth Amendment claim, it is pertinent to House's First Amendment claim. See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870-71 (1982) (finding motivation of school board in its decision to remove certain books from the school library relevant in determining whether removal was unconstitutional under the First Amendment).

[5]The complaint alleges that the search and seizure that occurred on November 3, 2010 at the border occurred against a backdrop of federal agencies targeting House's associational activity with the Support Network. House alleges that federal agencies first took an interest in him after his role in the creation of the Support Network and have questioned him in his home and at work about his political activities, beliefs and have monitored his activities. Id. at ¶ 14. House further alleges that his name has been placed on a watch list, which has resulted in the tracking of his travel and in being subjected to detention and to different searches at the border by government agencies. Id.

Defendant had failed to state a First Amendment claim, the Fourth Circuit noted that "[a]s a practical matter, computer searches are most likely to occur where-as here-the traveler's conduct or the presence of other items in his possession suggest the need to search further." Id. In contrast to the

variety of political, social, economic, educational, religious, and cultural ends." Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (citing cases). That is, "[t]he First Amendment protects political association as well as political expression." Buckley v. Valeo, 424 U.S. 1, 15t]he TT6

Manning and so that the agents could search the information on his laptop and other electronic devices.

Because of the seizure of his laptop and other devices, House alleges that the Defendants are now in possession of the complete, confidential list of the Support Network members and supporters, as well as email and documents detailing the Support Network's inner workings. Id. at ¶¶ 27, 28, 30, 33. The complaint also alleges that the information was copied and retained by ICE and that it has been disseminated to other government agencies. Id. at ¶ 27. And, as House has alleged, because there are supporters and donors to Manning'

harassment or intimidation by the government, (Def. Mem. at 27), but each case the Government cites concerned whether the evidence was sufficient to support a First Amendment claim at the summary judgment stage. See, e.g., Lyng, 485 U.S. at 367 n.5 (noting that the "facts . . . do not

The Defendants' assertion that concluding that House has alleged a plausible First Amendment claim would be somehow inconsistent with the Court's finding that the initial search and seizure was routine under the Fourth Amendment analysis ignores the difference in legal standards that apply to Fourth Amendment and First Amendment claims. See Tabbaa, 509 F.3d at 102 n. 4 (noting that "distinguishing between incidental and substantial burdens under the First Amendment requires a different analysis, applying different legal standards, than distinguishing what is and is not routine in the Fourth Amendment border context"). That the initial search and seizure occurred at the border does not strip House of his First Amendment rights, particularly given the allegations in the complaint that he was targeted specifically because of his association with the Support Network and the search of his laptop resulted in the disclosure of the organizations, members, supporters donors as well as internal organization communications that House alleges will deter further participation in and support of the organization. Accordingly, the Defendants' motion to dismiss House's First Amendment claim is DENIED.

D. House's Request for Injunctive Relief Regarding the Dissemination and Retention of the Information on his Electronic Devices

House seeks, among other forms of relief, an injunction requiring the Defendants to reveal to whom they disclosed or disseminated information contained on his electronic devices, (Compl., Prayer for Relief, C), and an injunction requiring them to return all information obtained from House's electronic devices and if the information cannot be returned, to expunge or otherwise destroy it. (Compl., Prayer for Relief, B). The Defendants argue that even if House is ultimately successful on his Constitutional claims, he is nonetheless not entitled to this form of injunctive relief. The Court need not reach this issue, as it is premature at this stage in the proceedings. "An injunction is an

exercise of a court's equitable authority, to be ordered only after taking into account all of the circumstances that bear on the need for prospective relief." Salazar v. Buono, ___ U.S. ___, 130 S.Ct. 1803, 1816 (2010). The Supreme Court has instructed courts to be "particularly cautious when contemplating relief that implicates public interests." Id. (and cases cited). The Court proceeds in such manner here particularly in light of the Defendants' argument that granting the type of relief requested here would compromise law enforcement functions ICE performs for the Government as it could inhibit (or interfere with) appropriate information sharing between agencies that would identify threats to the United States. (Def. Reply at 16). Because the Court does not have before it all of the discovered facts as it would at a later stage at summary judgment or trial, the Court is unable to adequately assess all of the circumstances that would bear on the issuance for an injunction in the particular form requested by House at this time.

VI. Conclusion

For the foregoing reasons, the Defendants' motion to dismiss is DENIED.

So ordered.

/s/ Denise J. Casper
United States District Judge