



ABA POLICY STATEMENT ON WARRANTLESS SEARCHES BY U.S CUSTOMS AND BORDER PATROL

As a means to enforce the U.S. immigration and criminal law, the U.S. Customs and Border Patrol (“CBP”) has a procedure for boarding motorcoaches, questioning passengers and, in some cases, asking for evidence of citizenship. Some state and local governments, as well as the American Civil Liberties Union, have asked American Bus Association members to resist these efforts and to require a warrant before allowing CBP officers to board any coach.

Under 8 U.S.C. § 1357(a)(3), CBP officers may, within a reasonable distance from any external boundary of the United States, board and search for aliens any railway car, aircraft, conveyance, or vehicle. Agency regulations have established that a reasonable distance is no more than 100 air-miles from any external boundary of the United States. 8 C.F.R. § 287.1(a)(2). These provisions give CBP officers the right to conduct warrantless searches of intercity buses operated by ABA members within 100 air-miles of the border.

Based on a January 28, 2020 internal memo from the Chief of the U.S. Border Patrol to all Chief Patrol Agents and Directorate Chiefs, however, the CBP recognizes some constitutional limits on their ability to board a bus without a warrant or the consent of the bus operator. The memo states that “even when a statute authorizes an agent’s enforcement activity, the agent’s actions must always be constitutionally reasonable. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) and *U.S. v. Drayton*, 536 U.S. 194 (2002).”

The CBP memo continues, “When transportation checks occur on a bus at non-checkpoint locations, the agent must demonstrate that he or she gained access to the bus with the consent of the company’s owner or one of the company’s employees. In addition, the [Border Patrol Agent] will have to ensure that his or her actions, while onboard the conveyance would not cause a reasonable person to believe that he or she is unable to terminate the encounter with the agent. *See Florida v. Bostick*, 501 U.S. 429 (1991).”

Additionally, CBP said, “In situations where consent is denied and/or consensual encounters are not possible without reasonable suspicion or probable cause, the agent should terminate the encounter and notify their respective chain of command to report the access denial. Absent reasonable suspicion or probable cause, BPAs do not have legal authority to board a bus without the consent of the transportation company or one of its employees. In the event of a denial, agents should remain professional and courteous.”

Thus, CBP now recognizes that bus companies may lawfully deny consent to board the bus without a warrant for law enforcement purposes.

It is ABA's policy, as recently established by the Executive Committee of our Board of Directors, to allow members to set their own company policies on whether to comply with CBP requests to board buses without a warrant. ABA members may grant or deny consent to board their buses without a warrant. These company policies may vary depending on the operational needs of the bus company and the safety and security of their passengers and drivers.

ABA member companies may communicate their lack of consent for warrantless access to their vehicles via letters to CBP, stickers on their vehicles, note cards to be handed to Border Patrol Agents, or any other reasonable means.

We will not ask our drivers to resist warrantless vehicle searches that are authorized by federal statute, however. Intercity bus drivers do not have the legal training or background to determine when a warrant might or might not be required, or whether the agent has probable cause or reasonable suspicion to enter the vehicle. If government agents insist on entry, even if company consent was not provided, for the safety of passengers and employees, our drivers should not physically prevent BPAs from boarding the bus.

If BPAs are refused access to a bus, they may still engage in suspicionless and consensual encounters in the public areas of bus or train stations. The BPA can attempt to question individuals before they board or after they exit a bus. Law enforcement officers are permitted to ask questions of people in any place where the agent is lawfully present. *See I.N.S. v. Delgado*, 466 U.S. 210 (1984).

Individual passengers, of course, also retain their rights to resist questioning or requests for documents by CBP officers under the Fourth Amendment of the U.S. Constitution and laws of the United States.

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