

US Immigration and Customs Enforcement Homeland Security Investigations Training

HSI Academy



UNDERCOVER OPERATIONS

2108103

Student Guide

HSI Academy Courses

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Undercover Operations

Motivation

An undercover operation is a sensitive investigative technique utilized to gather the necessary evidence for prosecution purposes, concealing the true identity of a government operative in order to gain the trust of individuals who are involved in criminal activities. By using the undercover approach, the investigator is able to obtain information and evidence that normally would not be obtainable through an open investigation.

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

Objectives

Terminal Performance Objective (TPO)

- Conditions:** Given a situation where you are conducting a criminal investigation and planning to develop an undercover operation,
- Behavior:** determine the viability, objectives, and level of authorization needed to conduct the operation
- Criterion:** following the guidelines as specified in the Undercover Operations Handbook and associated HSI Directives.

Enabling Performance Objectives (EPOs)

- EPO #1:** Identify HSI authority to conduct undercover operations and (b)(7)(E)
- EPO #2:** Identify the primary concerns, function, advantages, and objectives of an undercover operation.
- EPO #3:** Describe the roles and responsibilities associated with those individuals involved in/with certified undercover operations.
- EPO #4:** Identify the policies and procedures relating to the issuance and control of undercover identification and backstopping.

Review of the Past

You have covered many topics within this training thus far, including investigative planning, confidential informants, and surveillance. Now you will take a look at an investigative technique HSI can opt to use to conduct an investigation: undercover operations.



Advance Organizer of Main Ideas

What does an undercover operation mean to you? An undercover operation is a sensitive investigative technique utilized to gather the necessary evidence for prosecution purposes, concealing the true identity of a government operative in order to gain the trust of individuals who are involved in criminal activities.

Agenda

- HSI's authority to conduct undercover operations and (b)(7)(E)
- Primary concerns, functions, advantages, and objectives of an undercover operation
- Roles and responsibilities associated with those individuals involved (b)(7)(E)
- (b)(7)(E)
- Policies and procedures relating to issuance and control of undercover identification.
- Case examples focused on determining if an undercover operation is viable, and if so, what investigative actions to take

INSTRUCTION

Explanation

A. **EPO #1: Identify HSI authority to conduct undercover operations and the**

(b)(7)(E)

1. With the enactment of the Homeland Security Act of 2002, Congress authorized ICE to conduct undercover investigative operations to obtain evidence or information concerning violations of laws enforced by ICE and stemming from the authorities of its legacy agencies, the U.S. Customs Service (USCS) and the Immigration and Naturalization Service (INS).

2. (b)(7)(E)



(b)(7)(E)

Notes:



B. EPO #2: Identify the primary concerns, function, advantages, and objectives of an undercover operation.

1. Definitions

- a. **Undercover Activity** – any investigative activity involving the use of undercover resources and techniques, including the use of an undercover operative of ICE or other federal, state, or local law enforcement organization working with ICE. An undercover investigation typically involves numerous separate contacts by an undercover operative with the individuals (s) under investigation.
- b. **Undercover Investigation** – any investigation involving any undercover activity. This can take place over a period of time. Undercover activity involving any DHS or ICE sensitive circumstances requires that the investigation be place under a certified undercover operation regardless of the number of undercover contacts involved.

c. (b)(7)(E)

- 1) (b)(7)(E)
 - 2)
-

- 2. The *primary concern* in an undercover operation is the safety and protection of undercover operative and the operation.
- 3. The *function* of an undercover operation is to gather the necessary evidence for prosecution purposes, concealing the true identity of the government operative in order to gain the confidence of individuals involved in illegal activities.
- 4. Undercover Operations Advantages

- a) (b)(7)(E)
- b)
- c)
- d)
- e)



5. Objectives of an undercover operation

- a.
- b.
- c.
- d.
- e.
- f.
- g.
- h.
- i.
- j.
- k.

(b)(7)(E)

6. Key Programmatic Areas

- a.
- b.
- c.
- d.
- e.
- f.
- g.

(b)(7)(E)



- h. (b)(7)(E)
- i.

Notes:

C. EPO #3: Describe the roles and responsibilities associated with those individuals involved in/with certified undercover operations.

1. The **Assistant Special Agent in Charge (ASAC)** is the Administrative Overseer for the (b)(7)(E) appointed by the Special Agent in Charge (SAC). The Administrative Overseers shall be second-line supervisors (ASACs or high-graded officials) with undercover investigative/operational management experience. This position is mandatory in SAC Offices that maintain (b)(7)(E)
2. The **Investigative GS** is a first-line supervisor responsible for managing, coordinating, and directing investigations within his or her supervisory control that are using (b)(7)(E) authorization of a (b)(7)(E). The Investigative GS is responsible for:
 - a. Providing supervision relating to day-to-day operational and strategic decisions and on-site guidance relating to undercover policies and procedures for undercover activities conducted under his or her supervisory control
 - b. Ensuring that full and complete operational plans are generated and approved for conducting complete operation briefings prior to any undercover activity



- c. Ensuring that sufficient resources are in place to provide necessary safety and security measures prior to undercover activities, including making sure that (b)(7)(E)
- d. Ensuring that the operation has the authorization to conduct investigations involving (b)(7)(E) that are involved or are reasonably likely to be involved within investigations under his or her authority; immediately advising the undercover operation's Lead/Administrative GS of any anticipated additional (b)(7)(E) that are not included in the operation's authorization
- e. Ensuring that all investigations under his or her control involve undercover activity or a direct nexus to undercover activity prior to being placed under the (b)(7)(E)
- f. Monitoring the overall health of the undercover operatives, in consultation with the Primary Field ULC, to ensure that investigative objectives do not take precedence over the well-being of the operative
- g. Ensuring proper coordination of undercover operational activities with Headquarters, foreign offices, and other agencies
- h. Ensuring that information under his or her control needed for reports, budget requests, and recertification proposals are provided to the operational (b)(7)(E) Lead/Administrative GS in a timely manner
- i. Ensuring that all expenditures under his or her control are properly approved, documented, and transmitted to the (b)(7)(E) Lead/Administrative GS (all operational expenses should be coordinated with the (b)(7)(E) Lead/Administrative GS prior to the expense)

3. The (b)(7)(E) Program Manager is a Special Agent (GS 1811-13) selected by the (b)(7)(E) Lead/Administrative GS and/or the (b)(7)(E) Administrative Overseer(s) and approved by the SAC. The (b)(7)(E) Program Manager will be in the (b)(7)(E) Lead/Administrative GS's chain of command. The (b)(7)(E) Program Manager will have the responsibility and authority (through the (b)(7)(E) Lead/Administrative GS) to coordinate all administrative aspects of a particular (b)(7)(E) if the individual holding this position does not have approval authority within an operation, he or she will coordinate approvals with the appropriate supervisor.

4. Case Agent (including any assigned Task Force Officer) is responsible for:

- a. Making the day-to-day operational and strategic decisions involving undercover investigations and activities in conjunction with the undercover operation's management
- b. Ensuring that full and complete operational plans are generated and approved, and complete operation briefings take place prior to any undercover activity
- c. Preparing and presenting investigative findings to the U.S. Attorney's Office for prosecution

d. (b)(7)(E)



- e. Keeping his or her Investigative GS apprised of all case-related activities
- f. Continually directing case activities towards a successful conclusion
- g. Reporting all case activities and statistics in ICM Case Management in a timely manner
- h. Providing target telephone numbers to the (b)(7)(E) as appropriate
- i. (b)(7)(E)
- j. Immediately advising his or her Investigative GS of any anticipated additional (b)(7)(E) that are not included in the operation's authorization
- k. Providing a written case summary to his or her Investigative GS for inclusion in the operation's reauthorization proposal

5. The Undercover Operative (b)(7)(E)

(b)(7)(E)

- a. (b)(7)(E)
- b.
- c.
- d.
- e.
- f.
- g.
- h.



(b)(7)(E)

- 6. The **Cover Agent** is a SA or TFO whose primary purpose during an undercover meeting is to ensure the security of the undercover operative.

- 7. (b)(7)(E)

- 8. **Undercover Liaison Coordinator (ULC)**

- a. (b)(7)(E)

- b. The National ULC is the Program Manager in the Undercover Operations Unit with the responsibility to ensure proper implementation, usage, and coordination of the ULC Program.

- c. Primary/Secondary Field ULC

- 1) SACs will nominate Field ULCs within their AOR. The selection and nomination shall be documented via memorandum from the SAC to the Unit Chief, Undercover Operations Unit. The Unit Chief, Undercover Operations Unit, will ensure that each nominee is vetted and has the requisite experience prior to attending the ULCS. The SAC, in consultation with the Primary Field ULC, will nominate Secondary Field ULCs to assist the Primary Field ULC in performing the ULC duties. Primary and Secondary Field ULC positions are considered collateral duties.

- d. ULC Responsibilities:

- 1) (b)(7)(E)
- 2)



(b)(7)(E)

9. Legal and Liability Issues

a. Consult ICE Counsel (OPLA)

1) Issues relating to HSI, such as:

- a) Legal issues) National policy issues
- b) Personal Assistance Agreements (PAA)

b. Assistant United States Attorney

1) Assigned to a (b)(7)(E)



- 2) Issues relating to the direction and prosecution of the investigations.

10. Otherwise Illegal Activities

- a. General Rule an undercover operative may not participate in any activity that would constitute a crime under federal, state, or local law if engaged in by a private person.
- b. Malum in Se – an act that is wrong in itself
 - 1) Examples of prohibited actions
 - a) Participation in any act of violence – An act such as murder that is inherently evil or immoral
 - b) Initiation of any plan to commit a criminal act
 - c) Participation in conduct that would constitute unlawful investigative techniques.
 - c. Malum Prohibitum – An act that is a crime merely because it is prohibited by law, although the act itself is not necessarily immoral
 - 1) Examples of actions that may be permitted even though they may be against the law
 - a) Purchase and possession of stolen goods or contraband
 - b) Payment of bribes
 - c) Obtaining false documents
 - d) Consensual monitoring

11. Legal and Liability issues (for UC operative)

- a. (b)(7)(E)
- b.
- c.
- d.
- e.



12. Restrictions and Guidelines for Undercover Operative

- a. (b)(7)(E)
- b.
- c.
- d.
- e.
- f.
- g.

13. Selection of Undercover Operatives

- a. (b)(7)(E)
- b.
- c.
- d.
- e.
- f.

14. Levels of Undercover Operative Certification:

- a. Primary undercover role without supervision
- b. Secondary undercover role with supervision
- c. Not recommended for undercover assignments



15. Exempt from Training Waiver for Undercover Candidates

- a. Under exigent circumstances, in which the prospective undercover operative/candidate is required to conduct undercover activities prior to attending UCOS, the SAC can request an Exempt form Training Waiver from the Deputy Assistant Director (DAD).
- b. Types of Undercover Investigations/Operations and Approval Levels

1) Special Agent in Charge (SAC) and Group Supervisor (GS) Authorized Operations:

- a) Operations that are anticipated to last less than six months and
- b) Do not involve (b)(7)(E) and
- c) Do not require (b)(7)(E)

Note: The SAC must notify HQ Undercover Operations in writing and request authorization to continue the Investigation/operation, when it becomes apparent that ongoing activities or (b)(7)(E) arise and exceed the approval authority of the SAC.

2) Executive Associate Director of HSI Authorized Operations

- a) Executive Assistant Director, HSI may approve undercover activities and operations without review by the URC when the activities:

- (1) Do not involve (b)(7)(E)
- (2) Do not require (b)(7)(E)
- (3) Are anticipated to last more than 6 months but less than 12 months.

3) Executive Associate Director of HSI may also:

(b)(7)(E)

4) Undercover Review Committee (URC)



- a) Considers proposals for undercover operations involving (b)(7)(E)
- b) Considers formal approval for validation of any undercover operation that has been approved under exigent circumstances
- c) Determines whether an operation that has had a significant change in direction or objectives requires a new authorization.

16. Purpose of HSI Policy

- a. Provides the greatest degree of flexibility to conduct undercover operations within the limits of the law
- b. Establishes uniform and effective standards of oversight and accountability
- c. Promotes the innovation and creativity that has been the standard in developing our most effective and successful undercover investigations and operations

17. Major HSI Policy Issuances

- a. HSI Directive 05-003, Disposition of Excess Proceeds from Certified Undercover Operations
- b. HSI Directive 05-004, Use of Proceeds to Fund Undercover Training
- c. HSI Directive 06-004, Undercover Liaison Coordinator Program
- d. HSI Directive, Management of Critical Incidents
- e. ICE Use of Force Policy, Dated July 7, 2004
- f. Memorandum: Use of Proceeds for Prosecution Related Expenses, Dated November 15, 2004
- g. Memorandum; Confidential Informant Policy Addendum, Dated May 27, 2004
- h. Memorandum; Domestic and International Undercover Alien Smuggling Investigations, March 23, 2014
- i. Notional Immigration Document Handbook, March 27, 2014

18. Undercover Training

- a. Undercover Operatives School (UCOS) –Two weeks training program conducted at FLETC
- b. Undercover Program Manager's School (UCMS) – One-week training program conducted at HSI HQ
- c. (b)(7)(E)
- d. (b)(7)(E)
- e. Undercover CUFFS Administrator School (UCAS) – One-week training conducted at HSI HQ
- f. Undercover Liaison Coordinator School (ULCS) – One-week training conducted at HSI HQ



Notes:

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D. EPO #4: Identify the policies and procedures relating to the issuance and control of

(b)(7)(E)

(b)(7)(E)

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(b)(7)(E)

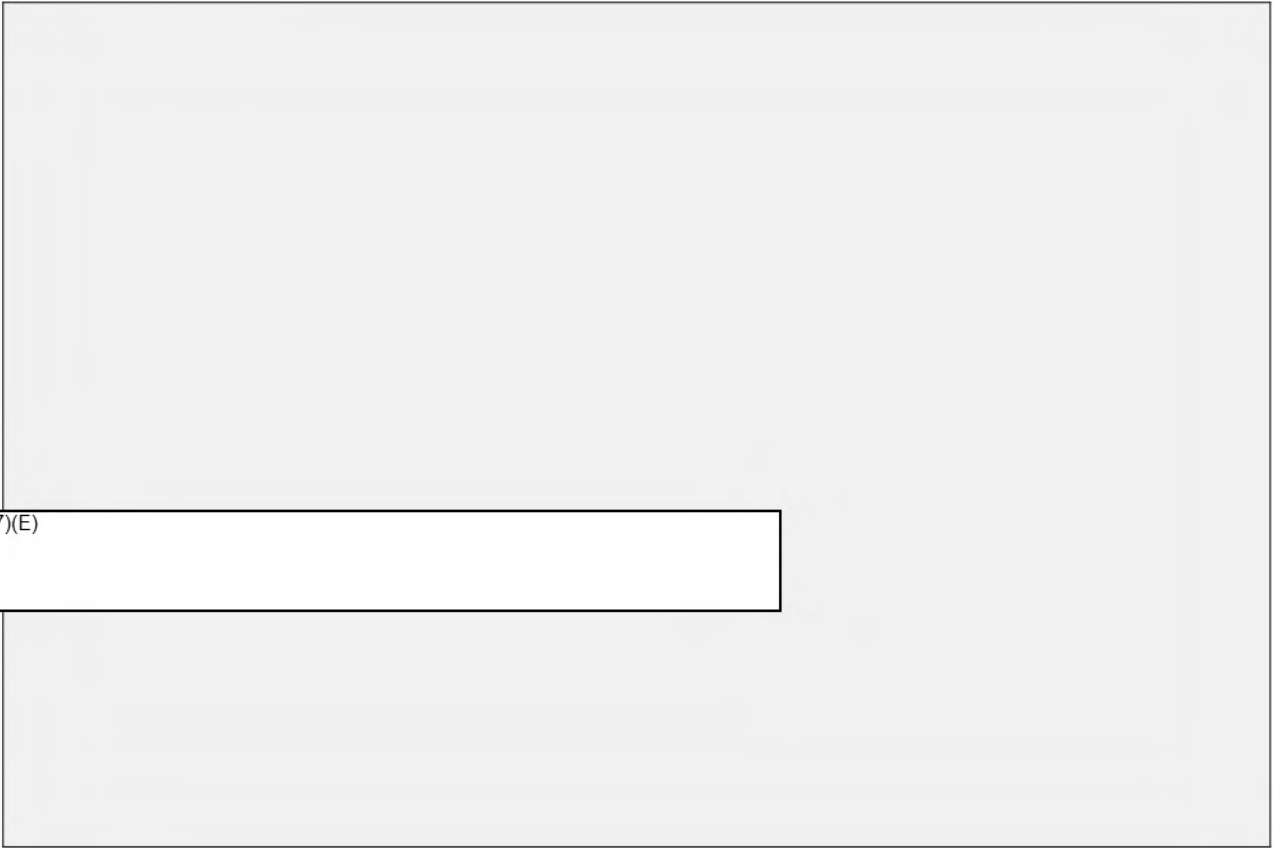
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Notes:



DEMONSTRATION

(b)(6); (b)(7)(C); (b)(7)(E)



(b)(7)(E)

Student Practice



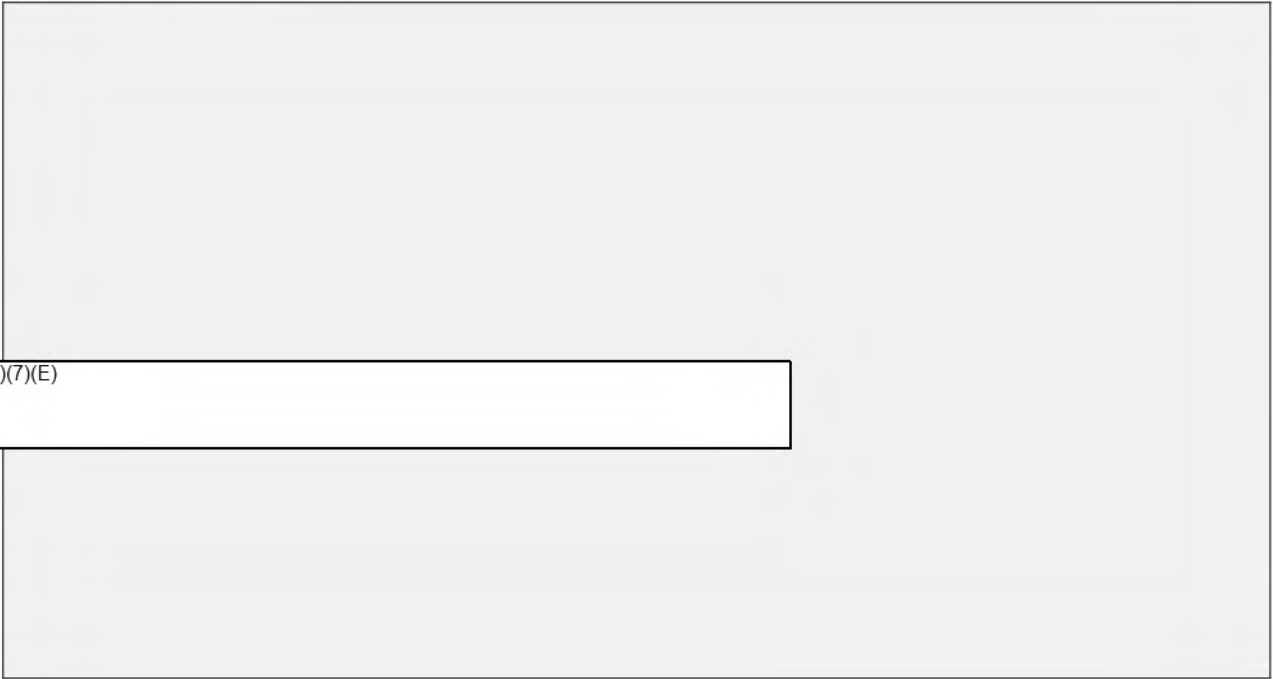
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(b)(7)(E)



CONCLUSION

Summary of Main Ideas

This lesson familiarized students with the standard policy and guidelines associated with undercover work and undercover operations as defined in the Undercover Operations Handbook and associated HSI Directives. This lesson examined what is involved in determining if an undercover operation is viable, and if so the objectives of the operation level of authorization needed to conduct the operation in compliance with the Handbook and directives. Focus was on:

- HSI authority to conduct UC operations and (b)(7)(E)
- (b)(7)(E)
- Primary concerns, function, advantages, and objectives of UC operation
- Roles and responsibilities of those individuals involved in and/or with UC operation
- Level of authorization needed to conduct the operation in compliance with the Handbook and directives
- Policies and procedures relating to the issuance and control of (b)(7)(E)
- (b)(7)(E)

Integration

(b)(7)(E)

Objectives

You are now able to:

- Identify HSI authority to conduct undercover operations (b)(7)(E)
- (b)(7)(E)
- Identify the primary concerns, function, advantages, and objectives of an undercover operation.
- Describe the roles and responsibilities associated with those individuals involved in/with (b)(7)(E)
- Identify the policies and procedures relating to the issuance and control of (b)(7)(E)
- (b)(7)(E)

Motivation

Undercover operations are very disciplined law enforcement endeavors that utilize resources in a creative and dynamic manner. As in any endeavor, the measure of success is quantified by demonstrated results.



Test or Final Activity

The material in this lesson will be tested in a multiple-choice exam.

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Demonstration Scenario

(b)(6); (b)(7)(C); (b)(7)(E)



(b)(7)(E)



Practice Scenario

(b)(6); (b)(7)(C); (b)(7)(E)



Questions:

(b)(7)(E)



Undercover Operation Flowchart

(b)(7)(E)





Forging a New Legacy

Homeland Security Investigations

Undercover Operations

HSI Special Agent Training

ICE Academy

Homeland Security Investigations (HSI)

Terminal Performance Objective

Given a situation where you are conducting a criminal investigation and planning to develop an undercover operation, determine the viability, objectives, and level of authorization needed to conduct the operation following the guidelines as specified in the Undercover Operations Handbook and associated HSI Directives

Homeland Security Investigations (HSI)

Enabling Performance Objectives

- Identify HSI authority to conduct undercover operations and Identify the primary concerns, function, advantages, and objectives of an undercover operation Describe the roles and responsibilities associated with those individuals involved in/with
 Identify the policies and procedures relating to the issuance and control of

Homeland Security Investigations (HSI)

Review of the Past

Topics covered thus far include: Investigative methods
Confidential informants
Surveillance

Homeland Security Investigations (HSI)

Main Ideas

An undercover operation: Sensitive investigative technique utilized to gather the necessary evidence for prosecution purposes
Concealing the true identity of a government operative
To gain the trust of individuals who are involved in criminal activities

Homeland Security Investigations (HSI)

Agenda

- HSI's authority to conduct undercover operations and the (b)(7)(E) Primary concerns, functions, advantages, and objectives of an undercover operation Roles and responsibilities associated with individuals involved in a (b)(7)(E) (b)(7)(E) Policies and procedures relating to issuance and control of (b)(7)(E) Case examples focused on determining if an undercover operation is viable, and if so, what investigative actions to take

Homeland Security Investigations (HSI)

HSI Authority To Conduct UC Operations

- HSI is granted statutory authority to engage in certain undercover investigative activities and operations

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Homeland Security Investigations (HSI)

Definition: Undercover Activity

Any investigative activity involving the use of undercover resources and techniques, including the use of an undercover operative. An undercover investigation

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

Homeland Security Investigations (HSI)

Definition: Undercover Investigation

Any investigation involving any undercover activity. This can take place over a period of time. Undercover activity involving

any (b)(7)(E)
(b)(7)(E)

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Homeland Security Investigations (HSI)

Concern and Function of UC Operation

- (b)(7)(E)

Homeland Security Investigations (HSI)

Advantages of UC Operation

- (b)(7)(E)


Homeland Security Investigations (HSI)

Objectives of UC Operation

- (b)(7)(E)

Homeland Security Investigations (HSI)

Objectives of UC Operation (cont'd)

-  (b)(7)(E)

Homeland Security Investigations (HSI)

Key Programmatic Areas

- (b)(7)(E)

Homeland Security Investigations (HSI)

Roles and Responsibilities in an Undercover Operation

- (b)(7)(E) Administrative Overseer (ASAC) Investigative GS (b)(7)(E) Program Manager Case Agent Undercover Operative Cover Agent (b)(7)(E) Administrator Undercover Liaison Coordinator (ULC)

Homeland Security Investigations (HSI)

(b)(7)(E)

Administrative Overseer (ASAC)

- Second-line supervisor with undercover investigative/operational management experience
Mandatory position in SAC offices that maintain undercover operations

Refer to Student Guide, p. 7

Homeland Security Investigations (HSI)

Investigative GS

- Provides supervision for day-to-day operational and strategic decisions and on-site guidance related to undercover policies and proceduresEnsures generation and approval of Ops Plans prior to any undercover activityEnsures sufficient resources are in place to provide necessary safety and security measures prior to any undercover activity

Refer to Student Guide, p. 7

Homeland Security Investigations (HSI)

(b)(7)(E)

Program Manager

- Has responsibility and authority (through the UC Lead/Administrative GS) to coordinate all administrative aspects of a particular (b)(7)(E) (b)(7)(E) If individual holding this position does not have approval authority within an operation, he or she will coordinate approvals with the appropriate supervisor

Refer to Student Guide, p. 8

Homeland Security Investigations (HSI)

Case Agent

- Makes day-to-day operational, strategic decisions involving the undercover investigation Ensures full Ops plans are developed, approved and briefings conducted before any UC activity Prepares, presents investigative findings to AUSA Works with UC operatives to monitor case activities, identify operational requirements Keeps Investigative GS apprised of case-related activities

Refer to Student Guide, p. 8

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Homeland Security Investigations (HSI)

Undercover Liaison Program

- Established for the benefit of personnel directly involved in UC activity
Protects safety and well-being of each UC agent
Protects ICE/HSI from liability issues
National ULC – ensures proper implementation, usage, and coordination of ULC Program
Primary/Secondary Field ULC – nominated by SAC within AOR

Refer to Student Guide, p. 10

Homeland Security Investigations (HSI)

Undercover Liaison Coordinator (ULC)

(b)(7)(E)



Homeland Security Investigations (HSI)

Legal and Liability Issues

- Consult the Office of Principal Legal Advisor (OPLA) on:
Legal issues
National policy issues
Personal Assistance Agreements
Consult AUSA on issues relating to direction, prosecution of investigation

Homeland Security Investigations (HSI)

Otherwise Illegal Activities

(b)(7)(E)

Homeland Security Investigations (HSI)

Otherwise Illegal Activities (cont'd)

- *Malum prohibitum – act that is a crime merely because it is prohibited by law, although the act is not necessarily immoral*
Actions that may be permitted although against law:
Purchase and possession of stolen goods or contraband
Payment of bribes
Obtaining false documents
Consensual monitoring

Homeland Security Investigations (HSI)

Legal and Liabilities Issues for UC Operative

- Oral communications Removal or copying of documents or property Alterations of conveyances Third party assistance Personal Assistance Agreement (PAA)

Homeland Security Investigations (HSI)

Restrictions and Guidelines for UC

(b)(7)(E)

Homeland Security Investigations (HSI)

Selection of Undercover Operative

(b)(7)(E)

Homeland Security Investigations (HSI)

Evaluation of Qualifications of UC Operatives

(b)(7)(E)

Homeland Security Investigations (HSI)

Levels of UC Operative Certification

- Primary Undercover Role without supervision
Secondary undercover Role with supervision
Not Recommended for Undercover Assignments

Homeland Security Investigations (HSI)

Exempt from Training Waiver

(b)(7)(E)



Homeland Security Investigations (HSI)

Operations and Approval Levels

- SAC and GS Authorized Operations Director of HSI
Authorized Operations Director of HSI Authorized
and (b)(7)(E)

Homeland Security Investigations (HSI)

SAC and GS Authorized Operations

- Operation anticipated to last less than six months

Do not involve

(b)(7)(E)

Do not require

(b)(7)(E)

(b)(7)(E)

Note: If during the

course of a SAC approved UC operation and an unforeseen circumstance arises, a proposal must be submitted to HQ UC Operations for the URC's review

Homeland Security Investigations (HSI)

Director of HSI Authorized Operations

- Executive Assistant Director, HSI may approve operations without review by URC when activities:

Do not involve

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

Are anticipated to last more than 6 months but less than 12 months

Homeland Security Investigations (HSI)

Director of HSI Authorized Operations

and (b)(7)(E)

- Executive Assistant Director may (b)(7)(E) approve undercover operations after review by URC when activities: Involve DHS and ICE sensitive circumstances (b)(7)(E)

(b)(7)(E)

Homeland Security Investigations (HSI)

Undercover Review Committee (URC)

- URC considers proposals for UC operations and activities involving (b)(7)(E) (b)(7)(E) (b)(7)(E) Considers formal approval for validation of any operation that has been approved under exigent circumstances Determines whether an operation that has had significant change in direction or objectives requires new authorization

Homeland Security Investigations (HSI)

Purpose of HSI Policy

- Provides greatest degree of flexibility to conduct undercover operations within limits of the law
- Establishes uniform and effective standards of oversight and accountability
- Promotes innovation and creativity in undercover investigations and operations

Homeland Security Investigations (HSI)

Major HSI Policy Issuances

- HSI Directive 05-003, Disposition of Excess Proceeds from Certified Undercover Operations
HSI Directive 05-004, Use of Proceeds to Fund Undercover Training
HSI Directive 06-004, Undercover Liaison Coordinator Program
HSI Directive, Management of Critical Incidents
ICE Interim Use of Force Policy, July 7, 2004

Homeland Security Investigations (HSI)

Major HSI Policy Issuances (cont'd)

- Memorandum: Use of Proceeds for Prosecution Related Expenses, November 15, 2004
Memorandum; Confidential Informant Policy Addendum, May 27, 2004
Memorandum; Domestic and International Undercover Alien Smuggling Investigations, March 23, 2014
Notional Immigration Document Handbook, March 27, 2014

Homeland Security Investigations (HSI)

Undercover Training

- Undercover Operatives School (UCOS) – two weeks at FLETC Undercover Program Manager’s School (UCMS) – one week at HSI HQ (b)(7)(E)
- (b)(7)(E)
- (b)(7)(E) Administrator School (UCAS) – One-week training conducted at HSI HQ Undercover Liaison Coordinator School (ULCS) – one week at HSI HQ

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Homeland Security Investigations (HSI)

Demonstration

(b)(6); (b)(7)(C); (b)(7)(E)

Refer to Student Guide, p. 18

Homeland Security Investigations (HSI)

Practice

(b)(6); (b)(7)(C); (b)(7)(E)

Refer to Student Guide, p. 19

Homeland Security Investigations (HSI)

Summary

- HSI authority to conduct UC operations and the exemptions granted by (b)(7)(E) Primary concerns, function, advantages, and objectives of UC operation Roles and responsibilities of those individuals involved in and/or with UC operation Level of authorization needed to conduct the operation in compliance with the Handbook and directives Policies and procedures relating to the (b)(7)(E)

(b)(7)(E)



Protecting the Borders Against Illicit Trade, Travel, and Finance

**U.S. Immigration and Customs Enforcement
Homeland Security Investigations Training**

**HSI Academy
Legal Division**



Fourth Amendment

Student Guide

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HSI Special Agent Training

6th Edition (2018)

ENFORCEMENT LAW COURSE

Fourth Amendment

I. Motivation

As discussed in the previous Chapters, the SA has a great deal of legal authority to draw upon when collecting evidence to enforce criminal provisions. Despite that authority, the Constitution clearly limits the manner in which law enforcement may go about collecting evidence for use in criminal prosecutions. The most notable examples can be found in the Fourth and Fifth Amendments of the Constitution. As a general matter, the Fourth Amendment acts as a limit on government efforts to obtain physical evidence, while the Fifth Amendment does so with respect to statements. Failure to comply with the Constitutional limitations just mentioned will result in a variety of sanctions.

II. Objectives

Terminal Performance Objective – Given a set of scenarios, demonstrate how to analyze Fourth Amendment search and seizure issues in the field per the United States Constitution and Fourth Amendment law.

EPO	OBJECTIVE
1	Define seizure and search.
2	Examine the Fourth Amendment's General Rule.
3	Explain the Fourth Amendment's Warrant Exceptions.
4	Describe the Fourth Amendment's Probable Cause Exceptions.
5	Apply Agency Policies and Directives to Fourth Amendment seizures and searches (including Use of Race Guidelines).

III. Review of the Past

Identify the sanctions that may result from failure to properly comply with the Fourth Amendment.

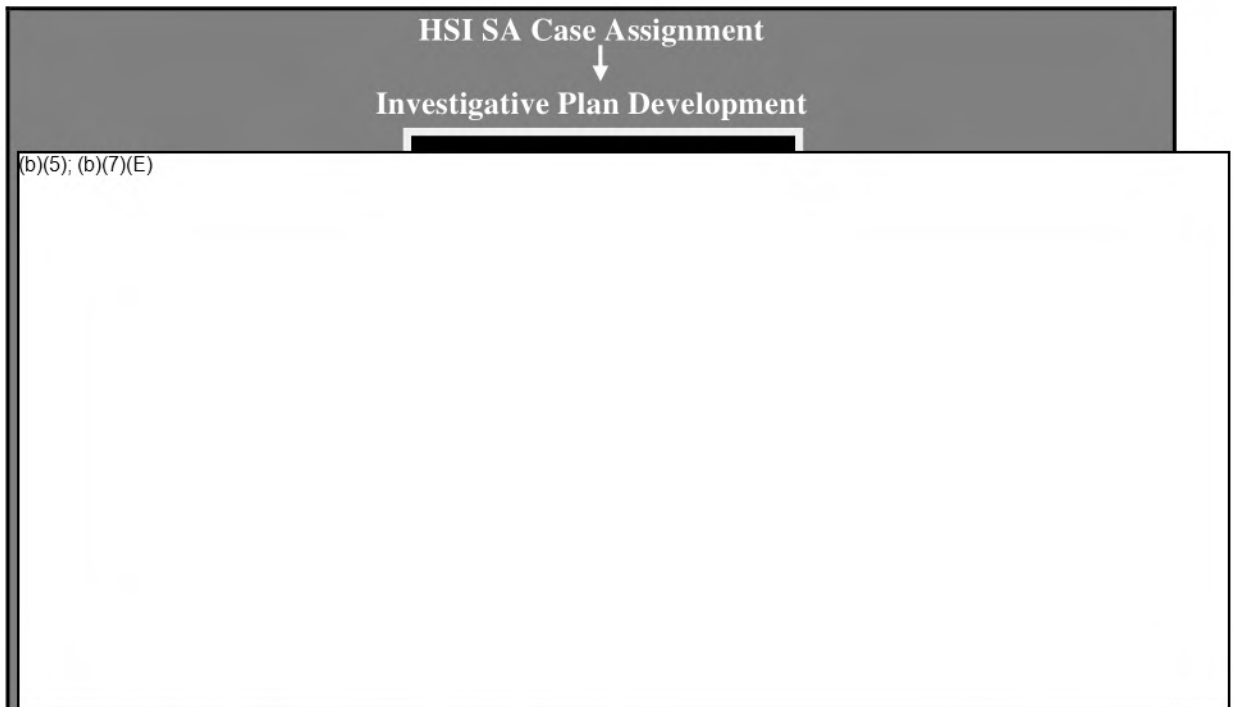
1. **Exclusionary Rule:** Generally, the government may not use any unlawfully obtained evidence in a criminal trial. Any evidence collected in violation of the Constitution will likely be suppressed (excluded) from use at trial.
2. **Fruit of the Poisonous Tree:** This doctrine extends the reach of the exclusionary rule to other evidence which is tainted by an earlier violation of the Constitution. Thus, illegally seized evidence cannot be used as the means of obtaining still more evidence.

- 3. Employment Consequences: A SA may be disciplined if he violates the Constitution, statutes, regulations or policies in the execution of his duties. The sanctions may range from a reprimand to termination of employment.
- 4. Personal Lawsuit: In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held agents may be sued for violating the Constitution. When a SA commits a Constitutional tort, he may be personally responsible for any monetary damages that the court awards to the plaintiff.
- 5. Criminal Prosecution: In addition to being prosecuted for state criminal offenses related to unconstitutional actions (such as assault), a Federal officer could be prosecuted for violating 18 U.S.C. § 242 (“Deprivation of rights under color of law”) or 18 U.S.C. § 241 (“Conspiracy against rights”).

Having the ability to accurately apply the rules discussed next will allow the SA to avoid these sanctions.

IV. Advanced Organizer

This Chapter and the Chapter on Border Search Authority address the lawful ways in which the SA collects physical evidence. See *SDR 4th A-1, Law Course, Search and Seizure, April 2010* and *SDR 4th A-2 HSI Search and Seizure Handbook, HSI HB 10-05, August 18, 2010*.



(b)(5); (b)(7)(E)

V. Define seizure and search (EPO 1).

- A. Fourth Amendment – generally regulates the government’s collection of physical evidence and 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.

(b)(5)

B. Seizure Defined

- 1. Seizure of an object: Government interference with a possessory right/interest.

- a. *Government* – All government personnel and anyone who is acting under the direction of, or with the help of, government. (b)(5)

(b)(5)

- b. *Interference* – This must be meaningful. (b)(5)

(b)(5)

- c. *Possessory right/interest* – When the interference serves to affect the individual’s ability to control, use or benefit from the object.

Key question: (b)(5)
 (b)(5)

Example: (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

Example: (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

- 2. Seizure of a person: Government interference with a person’s freedom of movement under circumstances where a reasonable person would not feel free to leave or to end the encounter with the government agent.

The Ultimate Question – (b)(5)
 (b)(5)

- 3. Consensual Encounter – Government interferences with people, during which a reasonable person in such a position would feel free to leave or end the encounter at a time and in a manner of their choosing. (*See seizure definition above.*) Government may engage in such encounters with **no suspicion** of wrongdoing. In order to prevent the encounter from turning into a seizure, government must honor the person’s wishes to leave and/or not answer questions posed.

4. Types of Seizures

- a. Seizures that require no suspicion (temporary)

- 1) Border Detentions
 - 2) Immigration Checkpoints
 - 3) Vessel Document Checks
 - 4) DUI/License Checkpoints
- b. Seizures that require reasonable suspicion (temporary) – referred to as an Investigative Detention or Terry Stop
- c. Seizures that require probable cause (more permanent)
- 1) Arrest of people
 - 2) Seizures of objects for forfeiture or evidence of criminal behavior
 - 3) Seizures of places for forfeiture

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

C. Search defined – Since the Jones case in 2012 there have been two definitions of the term “search” for Fourth Amendment purposes resulting in two “search” tests: The *Katz REP Test* and the *Jones Trespass Test*. According to *U.S. v. Jones*, 132 S. Ct. 945 (2012), the act of installing a GPS device on a target’s vehicle, and use of that device to monitor the vehicle’s movements, constitutes a Fourth Amendment search. See, *SDR 4th A-3 and 4th A-4 Jones GPS Tracking Device Guidance*. See also, *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

(b)(6); (b)(7)(E)

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- a. Reasonable Expectation of Privacy (“REP”) has been defined by the Supreme Court as any situation in which a person has a *subjective* expectation of privacy (i.e., does the person think that the situation is private) that is *objectively reasonable* (i.e., would society agree that the person has legitimate reasons to expect privacy under the existing circumstances).

- 2. SA “trespasses upon” a protected area for a specific purpose.
 - a. Trespasses Upon includes (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

 - b. Protected Area – this is specifically identified in the language of the Fourth Amendment: “persons, houses, papers, and effects.”
 - 1) House includes the home’s curtilage
 - 2) Effects include objects like cars, sheds, etc.

 - c. Specific Purpose – includes two situations:
 - 1) To gain information or
 - 2) An attempt to find something.

Two Tests:

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

D. Demonstration

(b)(5); (b)(7)(E)

VI. Examine the Fourth Amendment's General Rule (EPO 2).

Option 1
Comply with General Rule Requirements
1. Warrant
2. Probable Cause
3. Act in Reasonable Fashion

A. A search or seizure is reasonable if conducted with:

1. A warrant issued by a neutral/detached magistrate

“... [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.”

2. Supported by Probable Cause; and,

3. Executed in a reasonable manner.

*This is sometimes referred to as the **Fourth Amendment's general rule.***

B. Federal Warrants

(b)(5); (b)(7)(E)

1. A warrant may be issued for any of the following:

a. Evidence of a crime

b. Contraband, fruits of crime, or other items illegally possessed

- c. Property designed for use, intended for use, or used in committing a crime;
 - d. A person to be arrested or a person who is unlawfully restrained
2. There are four primary federal warrants identified in Rule 41 of the Federal Rules of Criminal Procedure:
- a. Seizure/Arrest – **Form AO 442**
 - b. Search Warrant – **Form AO 106** – *Sample Application for Search Warrant at SDR 4th A-5; Form AO 93* – *Sample Search/Seizure Warrant at SDR 4th A-6; Form AO 93A* – *Sample Search and Seizure Warrant on Oral Testimony at SDR 4th A-7*
 - c. Warrant Seeking Electronically Stored Information
 - d. Warrant for a Tracking Device **Form AO 102** – *See Sample Application for a Tracking Warrant at SDR 4th A-8*
3. A federal warrant (search or arrest/seizure) consists of three parts:
- a. The actual warrant
 - b. The affidavit of probable cause which is attached to the warrant

Note: (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

- c. The inventory/receipt is also attached to the warrant. (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

4. How to obtain a federal warrant per Rule 41 of the Federal Rules of Criminal Procedure.

- a. (b)(5); (b)(7)(E)
- b.

(b)(5); (b)(7)(E)

c.

d.

e.

5. How to execute a federal warrant per Rule 41 of the Federal Rules of Criminal Procedure.

a. (b)(5); (b)(7)(E)

b.

c.

6.

a.

(b)(5); (b)(7)(E)

Example: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- b. Policy and Directive can impact the reasonableness of a search or seizure executed pursuant to a warrant.

Example: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

c. (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

C. Demonstration

(b)(5); (b)(7)(E)

VII. Explain the Fourth Amendment’s warrant exceptions (EPO 3).

Option 2
Warrant Exceptions
~~1. Warrant~~
2. Probable Cause
3. Act in Reasonable Fashion

A. There are four court-created Warrant Exceptions (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

B. Warrant Exceptions

1. Arrest in Public
2. Plain View Seizure
3. Mobile Conveyance Doctrine
4. Exigent Circumstances

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

C. Demonstration

(b)(5); (b)(7)(E)

VIII. Describe the Fourth Amendment’s Warrant and Probable Cause Exceptions (EPO 4).

**Option 3
W and PC Exceptions**

~~1. Warrant~~
~~2. Probable Cause~~
3. Act in Reasonable Fashion

A. There are eight court-created Warrant and Probable Cause Exceptions. To comply with these rules, the

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

B. Warrant and Probable Cause Exceptions

1.	Search Incident to Arrest
2.	Consent
3.	Investigative Detention/Terry Stop
4.	Terry Frisk
5.	Inventory Search
6.	Protective Sweep
7.	Administrative/Regulatory Search
8.	Border Search Authority

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

Note: The Border Search Exception will be discussed in detail in the Border Search Authority Chapters.

The courts have not created an Exception to the Fourth Amendment’s reasonable execution requirement.

C. Demonstration

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

IX. Apply Agency policies and directives to Fourth Amendment seizures and searches (including Use of Race Guidelines) (EPO 5).

A. First Amendment

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. (b)(5); (b)(7)(E)
- 3.

- 4. Free Speech – law enforcement activity must not diminish a person’s ability to communicate a message in words or deeds. A proper investigative activity in this regard:

(b)(5); (b)(7)(E)

- 5. Religious Practice – law enforcement activity that impacts religious practice must be engaged in for an authorized purpose and take into consideration the proper time, place, and manner of execution.

- 6. Peaceful Assembly – law enforcement activity must recognize the breadth of this protection. The right protected includes public demonstration, postings on group websites, recruiting others to a cause, marketing a message, and fund raising.

- a. *Laird v. Tatum Rule*: The government action cannot engage in conduct that would reasonably deter the exercise of this right. [*Objective Test*].

- b. Investigative activities allowed:

(b)(5); (b)(7)(E)

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- c. Investigative activities disallowed:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- d. Least Intrusive Method – selecting the least intrusive means to gather information given the available options. Factors to consider:

(b)(5); (b)(7)(E)

B. Guidance Regarding the Use of Race by Federal Law Enforcement Agencies

The Department of Homeland Security's policy is to prohibit the consideration of race or ethnicity in our daily law enforcement activities in all but the most exceptional instances. The following is the Department's official policy on this issue:

“Racial profiling” concerns the invidious [that is, offensively unfair] use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement activities. It is premised on the incorrect assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity. DHS explicitly adopt[ed] the Department of Justice’s “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.” It is the policy of the Department of Homeland Security to prohibit the all but the most exceptional instances, as defined in the DOJ Guidance consideration of race or ethnicity in our daily law enforcement activities in.

Two standards in combination should guide use by Federal law enforcement officers of race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity in law enforcement or intelligence activities:

1. (b)(5); (b)(7)(E)
- 2.

(b)(5); (b)(7)(E)

HOMEWORK: Read the DOJ Guidance at SDR 4th A-14 prior to the next day’s class.

See SDR 4th A-13 DHS Management Directive 3500, 5-19-04; SDR 4th A-14 DOJ Use of Race Policy, 12-14; SDR 4th A-15 DHS Commitment to Race Neutrality, 6-1-04; SDR 4th A-16 Mechanisms to Mitigate the Risk of Racial Profiling, 4-17-09; SDR 4th A-17 DOJ Guidance on Use of Race by Federal Law Enforcement Agencies, June 2003; and SDR 4th A-18 DHS Commitment to Nondiscriminatory Law Enforcement and Screening Activities, 4-26-2013.

- C. DHS Use of Force Policy. (See, SDR 4th A-19, 4th A-20, and 4th A-21-1 to 4th A-21-8).

Rule: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- D. DHS Use of Deadly Force Policy. (DHS Policy on the Use of Deadly Force, SDR 4th A-22).

Rule: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

Disabling vehicles – firearms cannot be used solely to disable moving vehicles, vessels, aircraft, and other conveyances, except during maritime law enforcement activities. However, if the vehicle is being used as a weapon to harm the SA, then the SA is permitted to eliminate the threat by shooting at the driver.

Warning Shots are not permitted, except as follows:

- (1) (b)(5); (b)(7)(E)





(2) (b)(5); (b)(7)(E)

E. HSI Encounters with Diplomats. (See, SDR 4th A-23 Law Course, *Diplomatic Immunity Chapter, 2010* and SDR 4th A-24 *State Department Guidance to Diplomatic Immunity*).

1. Diplomatic Immunity – International Law principle by which certain foreign government officials are not subject to the jurisdiction of host country courts and legal authorities.
2. United States and US law enforcement are legally bound to ensure that privileges and immunities embodied in the Vienna Convention on Diplomatic Relations (VCDR) are respected and followed. According to the Constitution (Article VI, clause 2), treaties are the “supreme law of the land.”
3. Properly designated diplomatic agents and family members forming part of the diplomatic agent’s household may not be handcuffed (except in extraordinary circumstances), arrested, or detained.
Exception: U.S. Nationals, U.S. citizens, legal permanent residents, and foreign nationals permanently resident in the U.S. diplomatic immunity.
4. Identifying those with diplomatic immunity. The United States extends immunity to the individuals mentioned above and the State Department issues identification cards (color coded) that provide a picture, diplomatic classification, and immunities extended to each of those persons. The State Department identification cards are shown below:

U.S. DEPARTMENT OF STATE IDENTIFICATION CARDS

The United States Department of State's Office of Protocol, issues identification documents to foreign government personnel who are entitled to immunity. Samples of the identification cards are provided here. Because there are different degrees of immunity, law enforcement officers should read carefully identification cards presented to them. During business hours (8 a.m. – 5 p.m. EST) questions regarding an individual's status or immunity should be referred to the Office of Protocol at (202) 647-1985 or (202) 647-1727. After business hours, please contact the Diplomatic Security Command Center at (571) 345-3146 or toll-free at 1-866-217-2089.

 <p>DIPLOMATIC IDENTIFICATION CARD United States Department of State</p> <p>Number: 4004-0154-52 Expires: 7/31/2013 DOB: 1/1/1901 Name: DIPLOMAT, JOHN DOE - SAMPLE Title: COUNSELOR (ECONOMIC) Mission: CURIPANIA - EMBASSY Location: WASHINGTON, DC SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY</p>	<p>This person has been duly notified to the Department of State and under international law enjoys immunity from criminal jurisdiction. The bearer shall not be liable to any form of arrest or detention, but may be given a notice of violation.</p> <p>The bearer shall be treated with due respect and all appropriate steps shall be taken to prevent any attack on the bearer's person, freedom, or dignity.</p> <p>LAW ENFORCEMENT INQUIRES SHOULD BE DIRECTED TO (202) 647-1985 FROM 8AM TO 5PM EASTERN TIME AND (202) 647-7277 AT ALL OTHER TIMES.</p> <p>IF FOUND, RETURN TO: The Office of the Chief of Protocol 3807 International Pl. NW Washington, DC 20622-3302 Return postage guaranteed</p>	<p>BLUE bordered cards are issued to diplomatic officers and their families. they are entitled to full criminal immunity and may not be arrested or detained.</p>
 <p>UNITED STATES DEPARTMENT OF STATE Diplomatic Identification Card UNITED NATIONS</p> <p>Number: 4004-0154-52 Expires: 7/31/2013 DOB: 1/1/1901 Name: DIPLOMAT, JOHN DOE - SAMPLE Title: FIRST SECRETARY (POLITICAL) Mission: CURIPANIA - UN MISSION Location: NEW YORK, NY SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY</p>	<p>This person has been duly notified to the Department of State and under international law enjoys immunity from criminal jurisdiction. The bearer shall not be liable to any form of arrest or detention, but may be given a notice of violation.</p> <p>The bearer shall be treated with due respect and all appropriate steps shall be taken to prevent any attack on the bearer's person, freedom, or dignity.</p> <p>LAW ENFORCEMENT INQUIRES SHOULD BE DIRECTED TO (212) 415-4131 FROM 8AM TO 5PM EASTERN TIME AND (212) 415-4444 AT ALL OTHER TIMES.</p> <p>IF FOUND, RETURN TO: Host Country Affairs U.S. Mission to the U.N. 789 United Nations Plaza New York, NY 10017 Return postage guaranteed</p>	<p>BLUE bordered cards are issued to UN diplomatic officers and their families. they are entitled to full criminal immunity and may not be arrested or detained.</p>
 <p>OFFICIAL IDENTIFICATION CARD United States Department of State</p> <p>Number: 4004-0154-52 Expires: 7/31/2013 DOB: 1/1/1901 Name: DIPLOMAT, JOHN DOE - SAMPLE Title: ADMINISTRATIVE ASSISTANT Mission: CURIPANIA - EMBASSY Location: WASHINGTON, DC SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY</p>	<p>This person has been duly notified to the Department of State and under international law enjoys immunity from criminal jurisdiction. The bearer shall not be liable to any form of arrest or detention, but may be given a notice of violation.</p> <p>The bearer shall be treated with due respect and all appropriate steps shall be taken to prevent any attack on the bearer's person, freedom, or dignity.</p> <p>LAW ENFORCEMENT INQUIRES SHOULD BE DIRECTED TO (202) 647-1985 FROM 8AM TO 5PM EASTERN TIME AND (202) 647-7277 AT ALL OTHER TIMES.</p> <p>IF FOUND, RETURN TO: The Office of the Chief of Protocol 3807 International Pl. NW Washington, DC 20622-3302 Return postage guaranteed</p>	<p>GREEN bordered cards are issued to embassy administrative and technical staff employees and their families. This card signifies that the bearer is entitled to full criminal immunity and may not be arrested or detained.</p>
 <p>OFFICIAL IDENTIFICATION CARD United States Department of State</p> <p>Number: 4004-0154-52 Expires: 7/31/2012 DOB: 1/1/1901 Name: DIPLOMAT, JOHN DOE - SAMPLE Title: DRIVER Mission: CURIPANIA - EMBASSY Location: WASHINGTON, DC SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY</p>	<p>This person has been duly notified to the Department of State and under international law enjoys immunity from jurisdiction with respect to acts performed in the course of official duties. This form of immunity must be asserted before, and proven to, the appropriate judicial authorities. The bearer is not immune from arrest or the issuance of a citation.</p> <p>LAW ENFORCEMENT INQUIRES SHOULD BE DIRECTED TO (202) 647-1985 FROM 8AM TO 5PM EASTERN TIME AND (202) 647-7277 AT ALL OTHER TIMES.</p> <p>IF FOUND, RETURN TO: The Office of the Chief of Protocol 3807 International Pl. NW Washington, DC 20622-3302 Return postage guaranteed</p>	<p>GREEN bordered cards are issued to embassy service staff employees. This card signifies that the bearer is entitled to immunity for official acts only.</p>

5. Consular Posts – Consular personnel perform tasks such as issuance of travel documents, attending to the difficulties of their own nationals who are in the host country, and promote commerce of the sending country. Vienna Convention on Consular Relations (VCCR/1963) grants very limited privileges and immunities to consular personnel. Consular personnel possess the following types of cards:

RED bordered cards are issued to career consular officers. This card signifies that the bearer is entitled to immunity for official acts only.

RED bordered cards are issued to career consular employees. This card signifies that the bearer is entitled to immunity for official acts only.

RED bordered cards are issued to consular officers/employees and their families from countries with which the U.S. has special agreements. They are entitled to full criminal immunity and may not be arrested or detained.

RED bordered cards are issued to honorary consular officers. This card signifies that the bearer is entitled to limited immunity for official acts only.

The image displays four sample Consular Identification Cards from the United States Department of State. Each card includes the following information: Number (4004-0154-52), Expires (7/31/2013), DOB (1/1/1901), Name (DIPLOMAT JOHN DOE - SAMPLE), Title, Mission (CURIPANIA - CONSULATE), and Location. The titles and locations vary: 1. Consul General, Miami, FL; 2. Administrative Officer, Los Angeles, CA; 3. Deputy Consul, New York, NY; 4. Honorary Consul, Chicago, IL. Each card also features a photo placeholder and a statement of immunity on the reverse side.

6. International Organizations personnel typically enjoy only official acts immunities as provided by 22 U.S.C. § 2881, the International Organizations Immunities Act. This legislation grants immunities to senior executives within such organizations similar to those granted Diplomatic Agents. Example: Secretary General and Assistant Secretaries-General of the United Nations. Another notable organization includes the Organization of American States headquartered in the US.

F. Demonstration

(b)(5); (b)(7)(E)

X. Student Practice

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

XI. Summary

A. Seizure and search

1. Seizure can be of an object or person.
2. Search tests include Katz REP and Jones Trespass.

B. Fourth Amendment general rule:

1. Warrant must be issued.
2. Must have probable cause.
3. Search or seizure must be executed in a reasonable manner.

C. Warrant exceptions

1. Arrest in public
2. Plain view seizure
3. Mobile conveyance doctrine
4. Exigent circumstances

D. Warrant and probable cause exceptions

1. Search incident to arrest
2. Consent
3. Investigative detention/Terry Stop
4. Terry frisk
5. Inventory search
6. Protective sweep
7. Administrative/Regulatory search
8. Border search authority

E. Policies, directives, and constitutional limitations

1. First Amendment
2. Use of race
3. Use of force

4. Use of deadly force
5. Encounters with Diplomats
6. Prosecutorial discretion for persons who came to the U.S. as children

Integration

The fourth Amendment and Border Search Authority Chapters address the lawful ways in which the SA collects physical evidence.

Terminal Performance Objective – Given a set of scenarios, the student will demonstrate how to analyze Fourth Amendment search and seizure issues in the field per the United States Constitution and Fourth Amendment law.

EPO	OBJECTIVE
1	Define seizure and search.
2	Examine the Fourth Amendment’s General Rule.
3	Explain the Fourth Amendment’s Warrant Exceptions.
4	Describe the Fourth Amendment’s Probable Cause Exceptions.
5	Apply Agency Policies and Directives to Fourth Amendment seizures and searches (including Use of Race Guidelines).

Motivation

The HSI mission is an important one, but it must be done reasonably and legally. As a Special Agent, it is imperative that you understand the laws and policies that govern your professional behavior, specifically the Fourth Amendment. Your ability to accurately apply the rules we discussed will enable you to more effectively perform your job and avoid sanctions.

Test or Final Activity

You will be tested on your knowledge of the Fourth Amendment as it relates to searches, seizures, and warrants on the legal multiple-choice exam after the Sentencing Guidelines Chapter. However, your ability to address these legal questions will be tested during other practical exercises and each time you conduct a search or seizure.

References

Fourth Amendment Chapter Student Drive References:

- 4th A-1, Law Course, Search and Seizure, April 2010
- 4th A-2 HSI Search and Seizure Handbook, HSI HB 10-05, August 18, 2010
- 4th A-3 Jones GPS Tracking Device Guidance
- 4th A-4 Jones GPS Tracking Device Guidance
- 4th A-5 Sample Application for Search Warrant
- 4th A-6 Sample Search/Seizure Warrant
- 4th A-7 Sample Search and Seizure Warrant on Oral Testimony
- 4th A-8 Sample Application for a Tracking Warrant
- 4th A-9 Chimel Rule Checklist
- 4th A-10 DOJ Guidance on Gant
- 4th A-11 “Ruses”
- 4th A-12 ICE Inventory Search Guidelines
- 4th A-13 DHS Management Directive 3500, 5-19-04
- 4th A-14 DOJ Use of Race Policy, 12-14
- 4th A-15 DHS Commitment to Race Neutrality, 6-1-04
- 4th A-16 Mechanisms to Mitigate the Risk of Racial Profiling, 4-17-09
- 4th A-17 DOJ Guidance on Use of Race by Federal Law Enforcement Agencies, June 2003
- 4th A-18 DHS Commitment to Nondiscriminatory Law Enforcement and Screening Activities, 4-26-2013
- 4th A-19 *Graham v. Connor*, 490 U.S. 386 (1989)
- 4th A-20 *Tennessee v. Garner*, 471 U.S. 1 (1985)
- 4th A-21-1 to 4th A-21-8 DHS Interim Use of Force Policy, 7-7-04
- 4th A-22 DHS Policy on the Use of Deadly Force
- 4th A-23 Law Course, Diplomatic Immunity Chapter, 2010
- 4th A-24 State Department Guidance to Diplomatic Immunity
- 4th A-25 Exercising Prosecutorial Discretion Memorandum, June 15, 2012
- 4th A-26 Memorandum edit
- 4th A-27 Civil Immigration Enforcement Priorities Memorandum, 11-20, 2014

**U.S. Immigration and Customs Enforcement
Homeland Security Investigations Training**

**HSI Academy
Legal Division**



Post-Arrest Obligations

Student Guide

2105110

HSI Special Agent Training

6th Edition (2018)

ENFORCEMENT LAW COURSE

Post-Arrest Obligations

INTRODUCTION

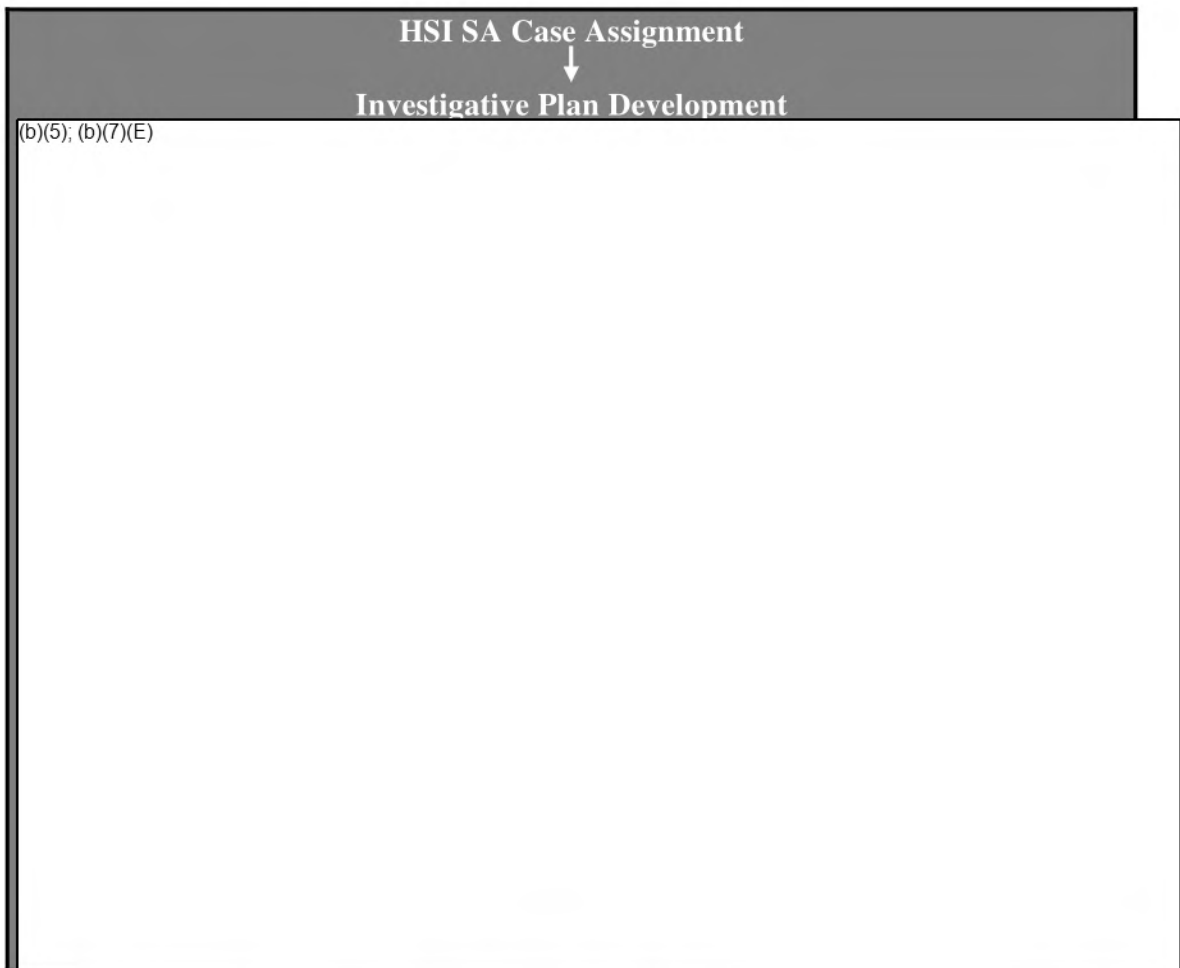
I. Motivation

A critical component of your job is arresting individuals who have committed crimes. However, your job does not end at the arrest. In addition to detaining the person, you must also complete several required steps after the arrest. If steps are omitted, the government cannot fully prosecute the subject, and your work will have been in vain.

II. Review of the Past

Post-arrest obligations are rooted in Due Process when deprived of life, liberty, or property (we covered this a couple of lessons back). These rules explain the government's fundamental fairness obligation concerning a criminal defendant within the criminal justice system.

III. Advance Organizer of Main Ideas



IV. Agenda

We will examine legal issues that arise post-arrest, as well as, during the pretrial phase of the prosecution. We will also look at the defendant’s Sixth Amendment rights (counsel and confrontation). Finally, you will be given questions and scenarios related to your post-arrest obligations. I will provide demonstrations and examples throughout the lesson. The practice exercise at the end of the lesson is like the test questions on your legal exam.

V. Objectives

Terminal Performance Objective – Given a law enforcement scenario with the arrest of a subject, determine and explain the post-arrest obligations; in accordance with the Sixth Amendment, Federal Rules of Criminal Procedure 4 and 5, and Section and Title 18 of the U.S. Code.

EPO	OBJECTIVE
1	Explain post-arrest obligations that arise immediately after arrest.
2	Describe the SA’s obligations associated with matters pretrial.
3	Describe the criminal defendant’s Sixth Amendment right to counsel.
4	Explain the SA’s obligations associated with pretrial depositions, witnesses, and the Confrontation Clause.

INSTRUCTION

I. Explain post-arrest obligations that arise immediately after arrest (EPO 1).

A. Post–Arrest Procedure (*See Post Arrest Flow Chart at SDR PA-1.*)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

B. Pre-Arrest and Arrest

1. Complaint [AO 91] – *See sample complaint at SDR PA-2.*
2. Arrest Warrant [AO 442] with Affidavit of Probable Cause – *See sample arrest warrant at SDR PA-3.*
3. USMJ will issue; (b)(5); (b)(7)(E)
4. Execution – (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)
5. After executing the warrant, it must be returned to the issuing magistrate.
6. Arrest without an arrest warrant – **If an arrest was made without first obtaining an arrest warrant,** (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

7. DNA sample collection – On April 18, 2012, HSI issued memorandum guidance that HSI personnel will now be responsible for collecting DNA samples from subjects taken into custody on criminal charges. *See SDR PA-4 HSI Implementation of DNA Sample Collection, April 18, 2012.*

C. Prompt Presentment – FRCrimP Rule 5(a) requires that law enforcement take the arrestee, **without unnecessary delay**, before a magistrate for the initial appearance. As a practical matter this will be addressed with the Assistant United States Attorney (AUSA) prior to arrest. *See SDR PA-5 Prompt Presentment Flow Chart.*

1. FRCrimP Rule 5(d) – USMJ advises defendant of criminal complaint; defendant’s right to counsel; pretrial release options; right to a preliminary hearing; **right to remain silent; and, right to consult with counsel. Note:** (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

2. Prompt presentment of juveniles – Juveniles charged with federal crimes (18 U.S.C. §§ 5031-5042) – The juvenile must be taken before a magistrate judge **“forthwith,”** which means as soon as possible. In no event can the juvenile be detained for longer than is **reasonably necessary to bring him before a magistrate judge. Note:**

(b)(5); (b)(7)(E)

a. (b)(5); (b)(7)(E)

b.

c.

d.

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Note:

(b)(5); (b)(7)(E)

- D. Post-arrest statement in compliance with the 18 U.S.C. § 3501(c)
1. 18 U.S.C. § 3501(c) – A confession made by a person while under arrest or other detention in the custody of any law enforcement agency shall not render the confession inadmissible solely due to delay in presentment if such confession:
 - a. Is given voluntarily; and,
 - b. The weight given the confession is left to the jury; and,
 - c. If such confession was given within **six hours** immediately following arrest or other detention (unless, the delay in presentment is found to be reasonable considering the means of transportation and the distance to be traveled to the nearest magistrate).
- Note:** This provision is frequently referred to as the **six-hour rule**.
2. **Corley Test** – Statements (even in compliance with *Miranda*) are subject to suppression as a violation of the Prompt Presentment Rule, if the statement is taken more than six hours after arrest and the taking of that statement unreasonably and/or unnecessarily delays presentment.
 - a. Statements made within six hours of arrest are lawful (unless it is deemed involuntary or a violation of the Rules of Evidence).
 - b. Statements made beyond six hours of arrest and before presentment are lawful if the delay in presentment was not unreasonable or unnecessary.

Example:	(b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)	

E. 48 Hour Rule

1. Arrest made without a warrant – The Fourth Amendment requires that a prompt judicial probable cause determination be made before a neutral and detached magistrate. *Gerstein Rule*.
2. “Prompt” in this context has been determined to be within 48 hours of the criminal arrest (absent extraordinary circumstances). *McLaughlin Rule*.

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Example:	(b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)	

(b)(5); (b)(7)(E)

F. Post-arrest consular notification for foreign nationals

1. Vienna Convention on Consular Relations (“VCCR” or “Vienna Convention”), ratified by the United States on October 22, 1969, requires law enforcement officials who have arrested a foreign national to so inform the consular post of the arrestee’s home country, and to allow consular officials to visit and consult with the arrestee. *See SDR PA-7 Consular Notification of Detained or Arrested Foreign Nationals, ICE Directive Number 7-3.0, February 13, 2006.*
2. The following steps should be followed when a foreign national is arrested *or* subjected to a lengthy detention:

- a. (b)(5); (b)(7)(E)
- b.

Example of Statement to Foreign National

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Mandatory Notification Countries and Jurisdictions – 8 C.F.R. Part 236.1(e)

Algeria	Guyana	Saint Lucia
Antigua and Barbuda	Hong Kong ²	Saint Vincent and the Grenadines
Armenia	Hungary	Seychelles
Azerbaijan	Jamaica	Sierra Leone
Bahamas, The	Kazakhstan	Singapore
Barbados	Kiribati	Slovak Republic
Belarus	Kuwait	Tajikistan
Belize	Kyrgyzstan	Tanzania
Brunei	Malaysia	Tonga
Bulgaria	Malta	Trinidad and Tobago
China ¹	Mauritius	Tunisia
Costa Rica	Moldova	Turkmenistan
Cyprus	Mongolia	Tuvalu
Czech Republic	Nigeria	Ukraine
Dominica	Philippines	United Kingdom ³
Fiji	Poland (non-permanent residents only)	U.S.S.R. ⁴
Gambia, The	Romania	Uzbekistan
Georgia	Russian Federation	Zambia
Ghana	Saint Kitts and Nevis	Zimbabwe
Grenada		

¹ Notification is not mandatory in the case of persons who carry “Republic of China” passports issued by Taiwan. Such persons should be informed without delay that the nearest office of the Taipei Economic and Cultural Representative Office (“TECRO”), the unofficial entity representing Taiwan’s interests in the United States, can be notified at their request.

² Hong Kong reverted to Chinese sovereignty on July 1, 1997, and is now officially referred to as the Hong Kong Special Administrative Region, or “SAR.” Under paragraph 3(f)(2) of the March 25, 1997, U.S.-China Agreement on the Maintenance of the U.S. Consulate General in the Hong Kong Special Administrative Region, U.S. officials are required to notify Chinese officials of the arrest or detention of the bearers of Hong Kong passports in the same manner as is required for bearers of Chinese passports— i.e., immediately, and in any event within four days of the arrest or detention.

³ British dependencies also covered by this agreement are Anguilla, British Virgin Islands, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

⁴ Although the U.S.S.R. no longer exists, some nationals of its successor states may still be traveling on its passports. Mandatory notification should be given to consular officers for all nationals of such states, including those traveling on old U.S.S.R. passports. The successor states are listed separately above.

e. If the nation appears on this list, then:

- 1) (b)(5); (b)(7)(E)
- 2)

Example of Statement When Consular Notification is Mandatory

(b)(5); (b)(7)(E)

- f. (b)(5); (b)(7)(E)
- g.

Demonstration

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)



II. Describe the SA’s obligations associated with matters pretrial. (EPO 2)

- A. The Fifth Amendment states that “[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...”
 - 1. Preliminary hearing – According to Rule 5.1 of the FRCrimP a preliminary hearing must be held unless the defendant:
 - a. Waives the preliminary hearing.
 - b. Is indicted by grand jury.
 - c. The government files a criminal *information* under FRCrimP Rule 7(b), which requires prosecution by indictment unless the defendant consents to be prosecuted by information.
 - d. The government files a criminal *information* charging the defendant with a misdemeanor.

Note: (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

2. Grand jury – FRCrimP Rule 6 outlines the rules governing grand jury proceedings. For our purposes, the grand jury is responsible for issuing an *indictment*. In the end, the information and the indictment are two means to the same end. (See, FRCrimP Rule 7). See *Sample Subpoena to Testify Before Grand Jury at SDR PA-10*.

Note: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- B. Arraignment – According to FRCrimP Rule 10, the arraignment must be conducted in open court and must:
1. Provide the defendant with a copy of the indictment or information.
 2. Read the indictment or information to the defendant.
 3. Ask the defendant to plead to the indictment or information.

Note: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- C. Pretrial motions (FRCrimP Rule 12)
1. Motion to Suppress Evidence
 2. Motion to Sever Charges or Defendants
 3. Motion for Discovery

- D. Pretrial discovery (FRCrimP Rule 16)

(b)(5); (b)(7)(E)

1. **Brady and Rule 16 FRCrimP** – In *Brady v. Maryland*, the Court ruled that the suppression by the prosecution of evidence favorable to an accused upon request *violates due process* where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Rule 16 – Government must permit the defendant to inspect, copy or photograph:

- 1) All statements of the defendant
- 2) A defendant's prior criminal record, if any, and
- 3) books, papers, documents, data, photographs, tangible objects, buildings, or places and
 - (a) the item is material to preparing the defense
 - (b) the government intends to use the item in its case-in-chief
 - (c) the item was obtained from or belongs to the defendant
- 4) Reports of physical or mental examination or any scientific test or experiment if
 - (a) the item is within the government's possession, custody, or control
 - (b) the AUSA knows or should know it exists
 - (c) the item is material to preparing the defense or the government intends to use the item in its case-in-chief
- 5) Written summary of expert witnesses the government intends to call during its case-in-chief

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Continuing duty to disclose: Once a defendant has requested discovery, the government has a continuing duty to provide the information requested, even if it is not found until after the original request. For example: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Defense disclosure: Since the defense has no obligation to prove innocence, very little discovery will be provided by the defense to the prosecution. Some exceptions include the notice of an alibi or insanity defense.

2. **Giglio material** – The government must disclose any information that bears adversely on the credibility or bias of a **government witness** (including SA's). See *SDR PA-11 ICE Giglio Policy, June 28, 2018*. Example: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

a. **Giglio procedure** – (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

b. **Employment complications** – (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

3. **Henthorn Rule** – Henthorn’s attorney asked the prosecution “to produce the personnel files of **all law enforcement witnesses** whom it intends to call at the trial ... for evidence of perjury or other like dishonesty for impeachment purposes.” If the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an in-camera inspection and evaluation.

4. **Jencks Rule** – The government must disclose any statements or reports made by a government witness (including SA’s) relating to the subject of that person’s testimony at trial.

Note: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

5. **ICE Policy** – Electronic messaging may not be used for substantive communications because these communications are often not as complete as formal investigative reports. Additionally, informal opinions may not appropriately reflect the position of the agency or provide a complete picture of the situation, and could potentially hinder prosecutorial efforts. Thus, while substantive communications must occur by an ROI, an ROI may still be transmitted to United States Attorney's offices electronically. Electronic messaging may still be used to communicate efficiently

concerning non-substantive matters, such as scheduling a witness interview or making travel arrangements. However, employees must use caution when communicating about such non-substantive matters not to permit the discussions to turn to matters of substance.

Substantive electronic messages that are potentially subject to disclosure must be preserved for production and review by the attorney prosecuting the case, as he or she will make the final determination as to what constitutes discoverable material under Jencks or the Federal Rule. Adequate preservation includes ensuring that email statements stored in electronic and /or paper files are easily retrievable upon demand.

See SDR PA-12 The Use of Electronic Messaging and Investigative Reports, June 17, 2009.

Demonstration	(b)(5); (b)(7)(E)	
(b)(5); (b)(7)(E)		

III. Describe the criminal defendant’s Sixth Amendment Right to Counsel (EPO 3).

- A. The Sixth Amendment, in part, states that “[I]n all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.” This provision guarantees that the conviction of the accused will be the product of an adversary process, rather than the *ex parte* investigation and determination by the prosecutor.
- B. When the right to counsel starts (what the law calls "attaches")
 - 1. The right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.

2. One does not become an accused for right to counsel purposes simply because he has been detained by government authorities who contemplate filing criminal charges against him.
3. On the other hand, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all **“critical” stages** of the criminal proceedings and if police deliberately elicit incriminating statements from him in the absence of a lawyer, the right will have been denied.
4. The **“critical” stage** has been interpreted by the Court to start at the time of formal charging, preliminary hearing, indictment, information, or arraignment. (See Right to Counsel Analysis chart below.)

C. The right to counsel is offense specific.

Texas v. Cobb, 532 U.S. 162 (2001): Raymond Cobb, a 17-year-old accused of burglarizing a home, waived his *Miranda* rights and admitted to the burglary while denying any knowledge of the whereabouts of a mother and her 16-month-old daughter who had occupied the home at the time of the burglary. Cobb was later indicted on the burglary charge that fixed his Sixth Amendment right to counsel. While free on bond Cobb confessed to his father that he had murdered the mother during the burglary and buried alive the daughter with her mother. After being reported to the police by his father, Cobb was arrested on murder charges, waived his *Miranda* rights, confessed and was convicted of the murders. On appeal, the defense argued that Cobb’s Sixth Amendment right to counsel precluded any attempts by the police to deliberately elicit information from Cobb about the “factually related” murders. The Supreme Court held, however, that even though the murders were closely related to the burglary, the burglary and murder offenses required different elements of proof and thus were separate offenses. Since Cobb’s Sixth Amendment rights were specific to the burglary charges, Cobb had no right to the presence of his previously appointed counsel during the interrogation concerning the murder charges, and his confession was admissible.

D. The right to counsel may be waived by a defendant and the defendant may do so whether represented by counsel or not.

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

E. Right to Counsel Analysis Chart

Right to Counsel Analysis
(b)(5); (b)(7)(E)

Demonstration
(b)(5); (b)(7)(E)

IV. Explain the SA’s obligations associated with pretrial depositions, witnesses, and the Confrontation Clause. (EPO 4)

- A. Confrontation – The Confrontation Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.” The Sixth Amendment protects the right of a criminal defendant to confront the prosecution’s witnesses for the purpose of challenging their testimony.

- B. **Crawford Rule** – Testimonial statements of witnesses absent from trial will be admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. *See SDR PA-13 Alien Witnesses*. This is based on the defendant’s right to confront his accusers in his criminal trial (Confrontation Clause).

- C. Impact of *Crawford Rule* on SA

- 1. (b)(5); (b)(7)(E)

- 2.

- 3.

- 4.

- 5.

- 6.

(b)(5); (b)(7)(E)

Demonstration: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

V. Student Practice

(b)(5); (b)(7)(E)

Page 1802

Withheld pursuant to exemption

(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

CONCLUSION

I. Summary of Main Ideas

- A. A criminal complaint is needed. If an arrest warrant was obtained without a criminal complaint, then one must be promptly prepared and presented to the magistrate after the execution of the arrest warrant.
- B. SAs must promptly present criminal defendants before a magistrate judge.
- C. Foreign nationals should be provided with rights connected to consular notification.
- D. Defendants are entitled to a grand jury or a preliminary hearing. If their case is held over for trial, then they must be arraigned.
- E. Certain information, in the form of discovery, must be made available to the defendant prior to trial.
- F. In a criminal prosecution, the accused has the right to counsel.
- G. A defendant has a right to confront and cross-examine any witness against him.

II. Objectives

Terminal Performance Objective – Given a law enforcement scenario with the arrest of a subject, determine and explain the post-arrest obligations; in accordance with the Sixth Amendment, Federal Rules of Criminal Procedure 4 and 5, and Section and Title 18 of the U.S. Code.

EPO	OBJECTIVE
1	Explain post-arrest obligations that arise immediately after arrest.
2	Describe the SA’s obligations associated with matters pretrial.
3	Describe the criminal defendant’s Sixth Amendment right to counsel.
4	Explain the SA’s obligations associated with pretrial depositions, witnesses, and the Confrontation Clause.

III. Motivation

As a Special Agent, your handling of post-arrest obligations is critical to the government’s ability to appropriately prosecute defendants. Without proper care and following of procedures, criminal elements can be released on technicalities.

IV. Integration

This lesson addressed the obligations you must meet after arresting a subject. You have now been exposed to the investigative plan development, evidence collection, and arrest and post-arrest obligations for a case assignment. Next, we

will discuss the Federal Sentencing Guidelines and how the FSG can aid the criminal investigation process.

V. Test or Final Activity

Although you will be tested on your knowledge of post-arrest obligations in the legal examination, your ability to address these obligations will be tested each time you make an arrest.

PA Lesson Student Drive Reference Index

- PA-1 Post Arrest Flow Chart
- PA-2 Sample Criminal Complaint
- PA-3 Sample Arrest Warrant
- PA-4 HSI Implementation of DNA Sample Collection, April 18, 2012
- PA-5 Prompt Presentment Flow Chart
- PA-6 DRO/OI Protocols Handling Unaccompanied Alien Children, 10-1-2007
- PA-7 Consular Notification or Detained or Arrested Foreign Nationals, ICE Directive 7-3.0, 2-13-2006
- PA-8 Questions about Foreign Nationals
- PA-9 Foreign Embassies Contact Information
- PA-10 Sample Subpoena to Testify Before a Grand Jury
- PA-11 ICE Giglio Policy, June 28, 2018.
- PA-12 The Use of Electronic Messaging and Investigative Reports, June 17, 2009
- PA-13 Alien Witnesses and Informants Pending Removal, 5-18-2005
- PA-14 Sample Warrant for the Arrest of a Witness or Material Witness Pending Criminal Case
- PA-15 Sample Order to Detain a Defendant Temporarily Under 18 U.S.C. 3142(d)
- PA-16 Operations Manual ICE Performance Based National Detention Standards Index, 5-17-2011



Forging a New Legacy

Homeland Security Investigations

Fourth Amendment

ICE HSI Special Agent Training

ICE Academy

Homeland Security Investigations (HSI)

Working within the Constitution

- The Constitution clearly limits the manner in which law enforcement may go about collecting evidence for use in criminal prosecutions Failure to comply with the Constitutional limitations will result in a variety of sanctions

Homeland Security Investigations (HSI)

Terminal Performance Objective

Given a set of scenarios, demonstrate how to analyze Fourth Amendment search and seizure issues in the field per the United States Constitution and Fourth Amendment law.

Homeland Security Investigations (HSI)

Enabling Performance Objectives

1. Define seizure and search. Examine the Fourth Amendment's General Rule. Explain the Fourth Amendment's Warrant Exceptions. Describe the Fourth Amendment's Probable Cause Exceptions. Apply Agency Policies and Directives to Fourth Amendment seizures and searches (including Use of Race Guidelines).

Homeland Security Investigations (HSI)

Review of the Past

Sanctions that may result from failure to properly
comply with the Fourth Amendment: Exclusionary
Rule Fruit of the Poisonous Tree Employment
Consequences Personal Lawsuit Criminal
Prosecution

Homeland Security Investigations (HSI)

Investigative Phases

(b)(5), (b)(7)(E)

Investigative Phases, cont'd

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Agenda

- Seizures and searches
Fourth Amendment's general rule requirements
Fourth Amendment's warrant and probable cause exceptions
Agency policies and directives
Practice activity

Homeland Security Investigations (HSI)

Fourth Amendment

Generally regulates the government's collection of physical evidence 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.

Homeland Security Investigations (HSI)

Seizure of an Object

- Government interference with a possessory right/interest
Government: All government personnel and anyone who is acting under the direction of, or with the help of, government
Interference: Must be meaningful
Possessory right/interest: When interference serves to affect the individual's ability to control, use or benefit from the object



Homeland Security Investigations (HSI)

Seizure of a Person

- Government interference with a person's freedom of movement under circumstances where a reasonable person would not feel free to leave or to end the encounter with the government agent. Ultimate Question: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5);
(b)(7)(E)

? Consensual encounters: Government interferences with people, during which a reasonable person in such a position would feel free to leave or end the encounter at a time and in a manner of their choosing.



Homeland Security Investigations (HSI)

Types of Seizures & Requirements

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Search

- Defined by two “search” tests: Katz REP Test Jones Trespass Test
Courts conclude Fourth Amendment Search when:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

SA “trespasses upon” a protected area for a specific purpose

Homeland Security Investigations (HSI)

Three Types of Intrusion



- Physical intrusion Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Auditory intrusion

Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Reasonable Expectation of Privacy (REP)

- Any situation in which a person has...A subjective expectation of privacy (i.e., does the person think that the situation is private) That is objectively reasonable (i.e., would society agree that the person has legitimate reasons to expect privacy under the existing circumstances)

Homeland Security Investigations (HSI)

SA Trespasses Upon a Protected Area for a Specific Purpose

- Trespasses Upon SA physically intrudes, or SA uses a tool to physically intrude Protected Area:
“persons, houses, papers, and effects” House includes the home’s curtilage Effects include objects such as cars, sheds, etc. Specific Purpose To gain information, or An attempt to find something



Homeland Security Investigations (HSI)

Two Tests to Determine Search

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Privacy

(b)(5); (b)(7)(E)



Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(7)(E)

See Student Guide p. 9

Homeland Security Investigations (HSI)

Fourth Amendment's General Rule

A search or seizure is reasonable if:

- Conducted with a warrant issued by a neutral/detached magistrate, Supported by Probable Cause, and Executed in a reasonable manner

Option 1: Comply with General Rule Requirements
Warrant
Probable Cause
Act in Reasonable Fashion

Homeland Security Investigations (HSI)

Federal Warrants

**May be issued for: Evidence of a crime
Contraband, fruits of crime, or other items illegally possessed
Property designed for use, intended for use, or used in committing a crime
A person to be arrested or a person who is unlawfully restrained**

Homeland Security Investigations (HSI)

Federal Warrants, cont'd

- Types of warrants identified in Rule 41: Seizure/Arrest Search Warrant Warrant Seeking Electronically Stored Information Warrant for a Tracking Device Parts of a warrant: Actual warrant Affidavit of probable cause Inventory/receipt

Homeland Security Investigations (HSI)

Obtaining a Federal Warrant

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Executing a Federal Warrant

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Reasonableness of Execution

- Execution of warrant regulated by Fourth Amendment's reasonableness standard SA's actions must be appropriate for situation Offending the reasonableness standard will result in suppression of evidence obtained and arrests made Policies and directives can impact reasonableness of search or seizure Warrant to search for contraband founded on probable cause implicitly carries limited authority to detain occupants of premises while proper search conducted

Homeland Security Investigations (HSI)

Inventory/Receipt

- Record of what was seized during the execution of the Search Warrant Must be completed and original must be returned to the magistrate judge

Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(7)(E)

See Student Guide p. 13



Homeland Security Investigations (HSI)

Warrant Exceptions

- Four court-created Warrant Exceptions: Arrest in public Plain view seizure Mobile conveyance doctrine Exigent circumstances

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

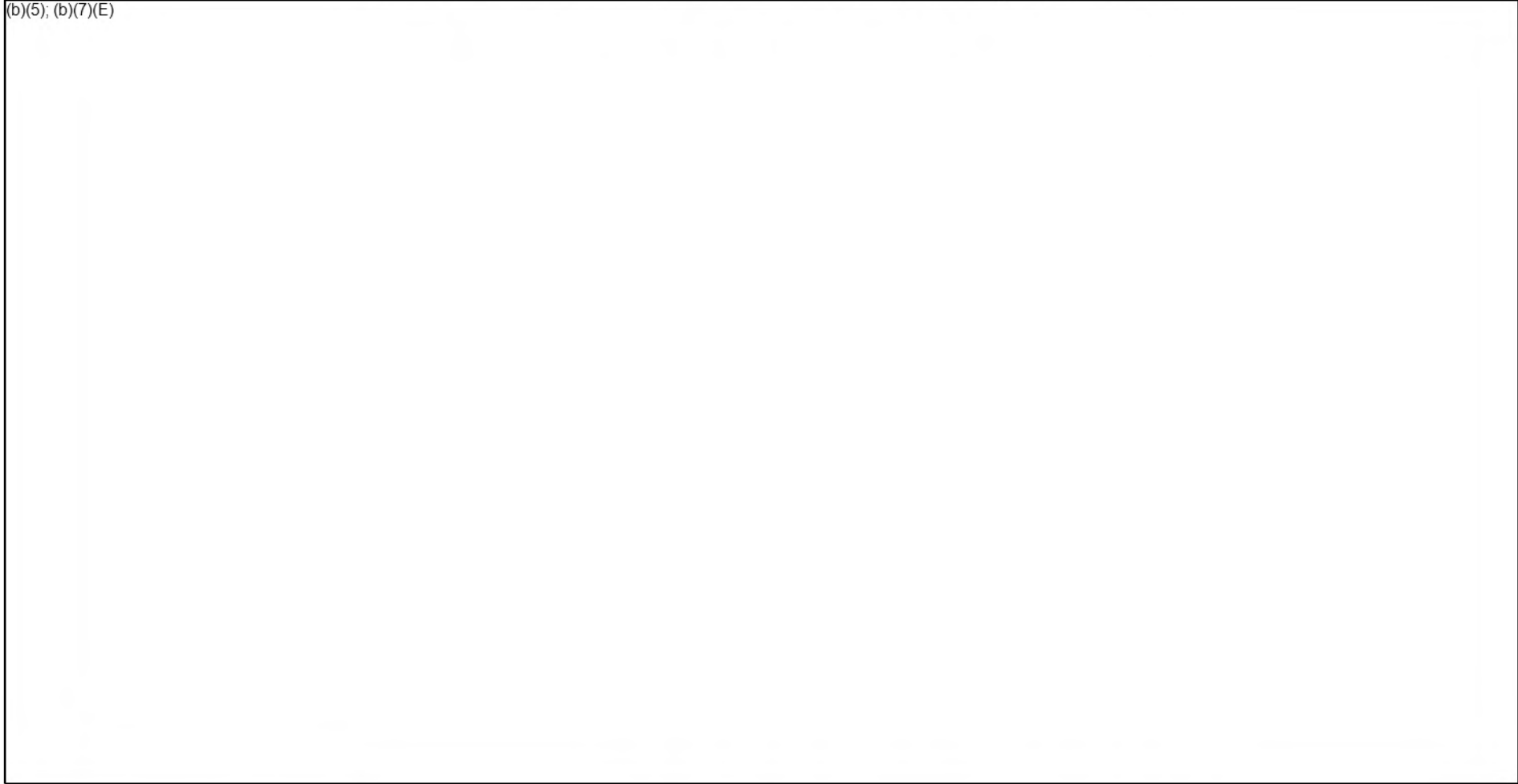
Option 2: Warrant Exceptions
Probable Cause Act in Reasonable Fashion



Homeland Security Investigations (HSI)

Rules for Warrant Exceptions

(b)(5); (b)(7)(E)



Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(7)(E)

See Student Guide p. 15



Homeland Security Investigations (HSI)

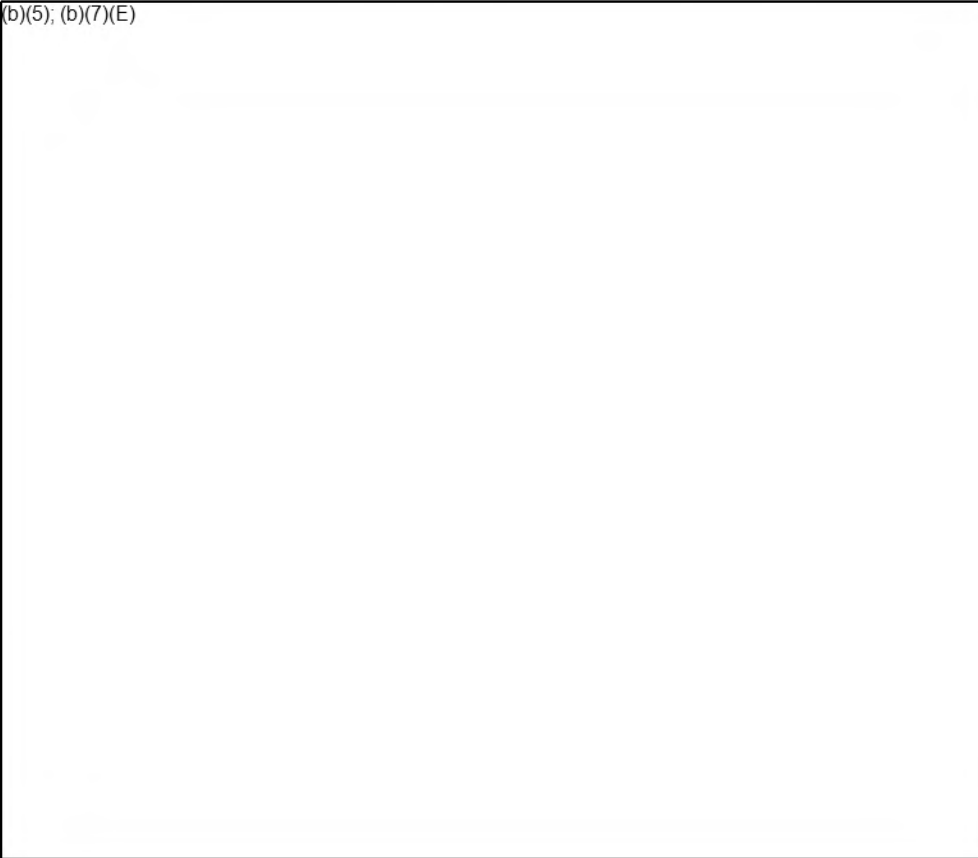
Warrant and Probable Cause Exceptions

- Eight court-created Warrant and Probable Cause Exceptions
Search Incident to Arrest
Consent
Investigative Detention/Terry Stop
Terry Frisk
Inventory Search
Protective Sweep
Administrative/Regulatory Search
Border Search Authority

Option 3: Warrant and PC Exceptions
~~Probable Cause Act in Reasonable Fashion~~

Homeland Security Investigations (HSI)

Warrant and Probable Cause Exceptions, cont'd

- 

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Rules for Warrant Exceptions

(b)(5); (b)(7)(E)

See Student Guide p. 16

Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(7)(E)

See Student Guide p. 18

Homeland Security Investigations (HSI)

First Amendment

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

First Amendment, cont'd

- Free Speech – Law enforcement activity must not diminish a person's ability to communicate a message in words or deeds
- Religious Practice – Law enforcement activity that impacts religious practice must be engaged in for an authorized purpose and take into consideration the proper time, place, and manner of execution
- Peaceful Assembly – Law enforcement activity must recognize the breadth of this protection
- Laird v. Tatum Rule
- Certain investigative activities allowed
- Certain investigative activities disallowed
- Must use least intrusive method

Homeland Security Investigations (HSI)

Guidance Regarding Use of Race by Federal Law Enforcement Agencies

- Based on Department of Justice (DOJ) Guidance DHS policy prohibits consideration of race or ethnicity in daily law enforcement activities in all but the most exceptional instances Guided by two standards

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

HOMEWORK: Read the DOJ guidance at TDR 4thA-14

Homeland Security Investigations (HSI)

DHS Use of Force Policy

- See DHS Use of Force Policy at SDRs 4th A-19, 4th A-20, 4th A-21-1, 4th A-21-8 See DHS Use of Deadly Force Policy at SDR 4th A-22 Subject must pose imminent threat of death or serious physical injury Firearms cannot be used solely to disable moving vehicle Warning shots not permitted unless specific maritime or aviation law enforcement operation



Homeland Security Investigations (HSI)

HSI Encounters with Diplomats

- Diplomatic Immunity United States legally bound to ensure that privileges and immunities embodied in the VCDR are respected and followed Properly designated diplomatic agents and family members may not be handcuffed, arrested, or detained U.S. extends immunity to particular individuals Consular Posts International Organizations personnel typically enjoy only official acts immunities as provided by 22 U.S.C. § 2881

See Student Guide p. 23

Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(7)(E)

See Student Guide p. 25



Homeland Security Investigations (HSI)

Practice

(b)(5); (b)(7)(E)

See Student Guide p. 26

Homeland Security Investigations (HSI)

Practice – Q 1, cont'd

(b)(5); (b)(7)(E)

See Student Guide p. 26

Homeland Security Investigations (HSI)

Practice, cont'd

(b)(5); (b)(7)(E)

See Student Guide p. 26

Homeland Security Investigations (HSI)

Practice, cont'd

(b)(5); (b)(7)(E)

See Student Guide p. 26



Homeland Security Investigations (HSI)

Practice – Q3 cont'd

(b)(5); (b)(7)(E)

See Student Guide p. 26

Homeland Security Investigations (HSI)

Practice, cont'd

(b)(5), (b)(7)(E)

See Student Guide p. 27



Homeland Security Investigations (HSI)

Practice – Q4 cont'd

(b)(5); (b)(7)(E)

See Student Guide p. 27

Homeland Security Investigations (HSI)

Practice, cont'd

(b)(5); (b)(7)(E)

See Student Guide p. 27

Homeland Security Investigations (HSI)

Practice – Q5 cont'd

(b)(5); (b)(7)(E)

See Student Guide p. 27

Homeland Security Investigations (HSI)

Practice, cont'd

(b)(5); (b)(7)(E)

See Student Guide p. 27

Homeland Security Investigations (HSI)

Practice – Q6 cont'd

(b)(5); (b)(7)(E)

See Student Guide p. 28

Homeland Security Investigations (HSI)

Summary

- Seizure and search Fourth Amendment's general rule
Warrant exceptions
Warrant and probable cause exceptions
Policies, directives, and constitutional limitations

Homeland Security Investigations (HSI)

Looking Ahead

- Previous lessons addressed the development of the Investigative PlanNext lesson will provide more information on evidence collection



Protecting the Borders Against Illicit Trade, Travel, and Finance



Protecting the Borders Against Illicit Trade, Travel, and Finance

**U.S. Immigration and Customs Enforcement
Homeland Security Investigations Training**

**HSI Academy
Legal Division**



Fifth Amendment: Self-Incrimination

Student Guide

XXXXXX

HSI Special Agent Training

6th Edition (2018)

ENFORCEMENT LAW COURSE

Fifth Amendment: Self-Incrimination

INTRODUCTION

I. Motivation

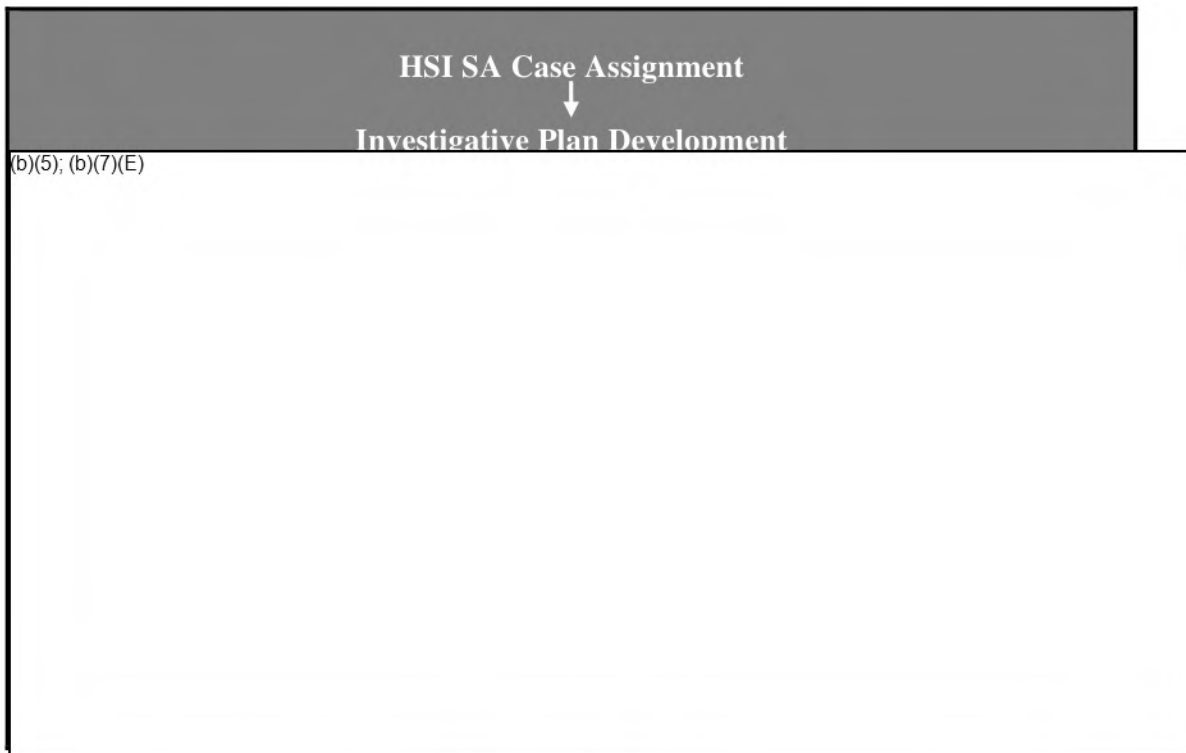
As a Special Agent, much of what you do leads to criminal prosecution. Just as there are laws and policies regulating the lawful manner to collect physical evidence, there are laws and policies governing how one lawfully collects statements. During this lesson we will explain how to lawfully collect a statement for use in a criminal prosecution in compliance with the Self-Incrimination Clause mentioned in the Fifth Amendment.

II. Review of the Past

Up to this point we have discussed the lawful means to collect a wide variety of physical evidence, the methods employed to do so, and how to avoid various pitfalls when collecting such evidence. This lesson looks at the evidence collection process in terms of collecting evidence in the form of statements. One of the most powerful pieces of evidence can be the spoken word.

III. Advance Organizer of Main Ideas

Review the investigative process through evidence collection using the HSI SA case assignment graphic.



(b)(5); (b)(7)(E)

The cornerstone of the protections mentioned in the Fifth Amendment is the Due Process Clause. Another significant protection within the Fifth Amendment centers on what is referred to as the Self-Incrimination Clause. During this session we will explain how *Miranda* applies when collecting a statement for use in a criminal prosecution in compliance with the Self-Incrimination Clause.

IV. Agenda

We will define and discuss custody and interrogation in the context of *Miranda*. Next, we will cover if a subject has waived or invoked his rights. Then, we will examine the differences between administrative and *Miranda* warnings. Finally, you will be given practice scenarios that require you to determine if a subject's statements were voluntary and/or admissible in court.

V. Objectives

Terminal Performance Objective – Given an interview scenario, determine if the subject's statements are voluntary and/or admissible in court; according to the Fifth Amendment's Self-Incrimination Clause and the Supreme Court's *Miranda* decision.

EPO	OBJECTIVE
1	Identify Fifth Amendment protections that impact the taking of a statement and distinguish Voluntary Statements from the <i>Miranda</i> protocol; and determine if a subject is in custody for <i>Miranda</i> purposes.
2	Distinguish between interrogation and non-interrogation for <i>Miranda</i> purposes.
3	Determine if a subject has waived his rights after <i>Miranda</i> warnings are provided.
4	Determine if a subject has invoked his rights to silence and/or counsel after <i>Miranda</i> warnings are provided.
5	Explain the purpose of an administrative warning and how it differs from a <i>Miranda</i> warning.

INSTRUCTION

I. Identify Fifth Amendment protections that impact the taking of a statement and distinguish Voluntary Statements from the Miranda protocol; and determine if a subject is in custody for Miranda purposes. (EPO 1)

A. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

-
1. *Right to presentment or indictment of grand jury when accused of a crime.*
 2. *Right to be free from being placed in jeopardy twice for the same crime (double jeopardy).*
 3. *Right against being compelled in a criminal case to be a witness against oneself (right against self-incrimination).*
 4. *Right to due process when deprived of life, liberty, or property.*
 5. *Right to be free from the taking of private property for public use, without just compensation.*
-

B. Fifth Amendment Basics

1. There are two rights protected in the Fifth Amendment that impact how the SA takes statements for use in criminal prosecutions.
 - a. **Right to Due Process** – Protects the right to be treated fairly in the criminal justice system (Fundamental Fairness). The Supreme Court has held that it is *fundamentally unfair* to use statements in court that are involuntarily collected.
 - b. **Right against being compelled in a criminal case to be a witness against oneself (Self-Incrimination)** – Protects the right to not be forced to testify against oneself in a criminal case. The Supreme Court has held that it is unlawful to use a compelled or involuntarily collected statement from by the accused as evidence in the accused's

criminal trial. It is also unlawful to force the accused to be a witness in the accused's criminal trial.

2. These two protections tend to overlap with one another and it can become very confusing when trying to apply them in the field.

C. Voluntary Statements

1. *Bram v. United States*, 168 U.S. 532 (1897) – the right against self-incrimination pre-dates the Fifth Amendment protection. The concept originated as a protest to the inquisitorial and manifestly unjust methods of interrogating accused persons. The Court stated that, if an accused person is asked to explain his apparent connection with a crime under investigation, *the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him in a corner, and to entrap him into fatal contradictions, . . .*, made the system so odious as to give rise to a demand for its abolition. Specifically, the common law rule recognized that coerced confessions and/or statements are inherently untrustworthy and to be admissible, a confession must be free and voluntary. [*See also, Brown v. Walker*, 161 U.S. 591 (1896)].

Bram Voluntariness Test – Was the statement extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence. This test has typically been used by the Court to determine whether a statement is involuntary in violation of the Fifth Amendment's Self-Incrimination Clause.

2. *Brown v. Mississippi*, 297 U.S. 278 (1936) – the Court created a separate voluntariness test. This test, though, was created to determine whether the taking of the statement violated the Fifth Amendment's Due Process protections.

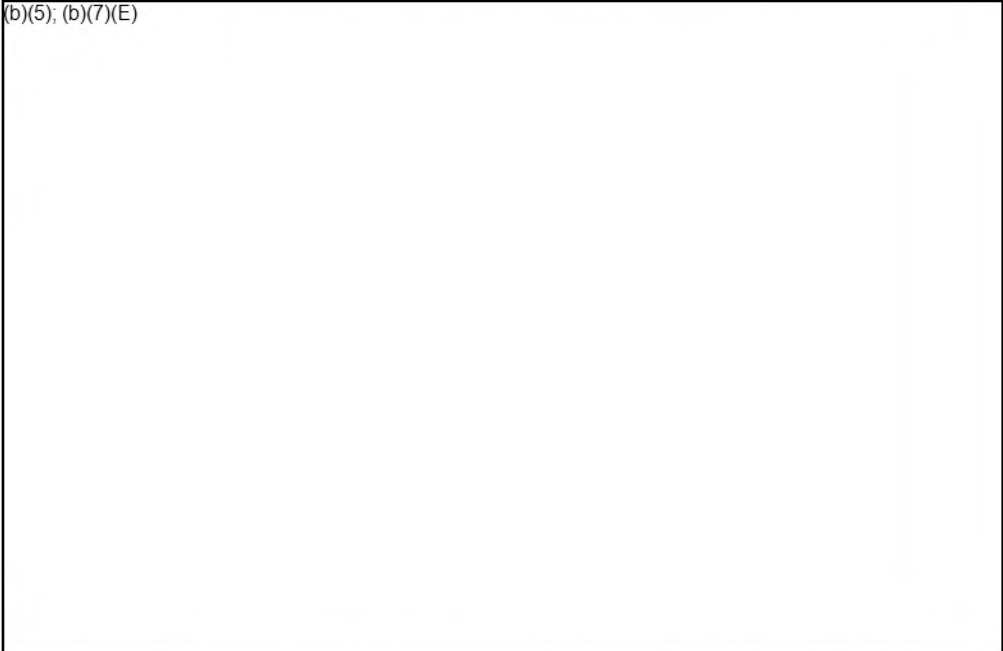
Due Process Voluntariness Test – When looking at the totality of facts and circumstances surrounding the taking of the statement (including the characteristics of the accused and the details of the interrogation), did law enforcement overbear the defendant's will to resist? [*To be explained further in the Due Process legal training block*].

3. Voluntary Statement must be:
 - a. freely and voluntarily made and

- b. not the result of threats or violence and
- c. not the result of direct or implied promises and
- d. not the result of improper influence and
- e. not the result of overbearing the defendant’s will to resist.

4. (b)(5); (b)(7)(E)

5.



D. Self-Incrimination Clause – “No person shall be...compelled in a criminal case to be a witness against oneself.”

1. It is unlawful to:
 - a. Compel/force a criminal defendant to take the witness stand and testify in his own criminal trial; and,
 - b. Use an accused’s statement made outside the trial setting to convict that accused when the statement is deemed involuntarily taken in violation of the Fifth Amendment’s Self-Incrimination Clause.
2. Statements taken in violation of the Self-Incrimination protection within the Fifth Amendment will be considered involuntary and will not be allowed in court and any evidence stemming from an involuntary statement will be suppressed as fruit of the poisonous tree.
3. On the other hand, if deemed voluntary, the statement still may be precluded from court if it was collected in violation of the *Miranda* protocol.

Self-Incrimination Clause

(b)(5); (b)(7)(E)

- E. *Miranda v. Arizona*, 384 U.S. 436 (1966)
1. Supreme Court determined that rights protected within the Fifth (silence) and Sixth (counsel) Amendments had been placed in jeopardy due to official overbearing. The Court reiterated the traditionally recognized methods of overbearing one's will to resist (inherently coercive):
 - a. threats or violence, and
 - b. direct or implied promises, and
 - c. improper influence
 2. The *Miranda* Court then identified a fourth method of obtaining a statement that qualified as potentially inherently coercive:
 - a. ***Statements obtained during custodial interrogation.***
 - b. Reason: When one is subjected to custodial interrogation, the officer cannot ensure that the statements taken were the product of the accused's free choice (voluntary).
 - c. Therefore, procedural safeguards were needed to dispel the compulsion inherent in custodial surroundings; otherwise, no statement obtained in such a setting could truly be the product of one's free choice (voluntary) and would have to be deemed collected in violation of the Fifth Amendment.
 - d. The procedural safeguards are part of the *Miranda protocol* and referred to as *Miranda Warnings*.
- F. *Miranda* protocol
1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from **custodial interrogation** of the

subject/accused unless the prosecution demonstrates that they used **procedural safeguards** to secure the privilege against self-incrimination.

2. **Custodial Interrogation** means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
3. **Procedural safeguards** are to be explained before initiated and must advise the subject or accused that he has:
 - a. a right to remain silent
 - b. anything he says can and will be used against the individual in court
 - c. a right to consult with and have present during questioning counsel, and
 - d. a right to counsel free of charge if he is indigent.
4. The subject or accused can **waive these rights** if the waiver is **voluntarily, knowingly, and intelligently** made by the person giving the statement.
5. If the subject or accused refuses, at any time before or during questioning, the **interrogation will have to stop**.

G. Determine if a subject is in custody for *Miranda* purposes

5th Amendment – Self-Incrimination Clause – Voluntary Statement

Miranda Applied

(b)(5); (b)(7)(E)

H. How to apply the protocol in the field. Ask and answer each question in turn.

(b)(5); (b)(7)(E)

- 1.
- 2.
- 3.
- 4.
- 5.

I. Custody defined – The *Miranda* Court’s definition of custody has been modified by the definition discussed below. See, *Thompson v. Keohane*, 516 U.S. 99 (1995).

1. *Miranda* definition – Questioning by law enforcement officers after a person has been taken into **custody or otherwise deprived of his freedom of action in any significant way.**
2. Since *Miranda*, the Supreme Court has further refined the definition of custody in *Thompson v. Keohane*:

[T]wo discrete inquiries are essential to the [*custody*] determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene has been set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve “*the ultimate inquiry*”: [*was*] *there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.*

(b)(5); (b)(7)(E)

J. The custody determination involves a three-step process:

(b)(5); (b)(7)(E)

- K. Factors that courts consider when determining custody include:
1. The extent to which the person is confronted with evidence of guilt
 2. The duration of the detention
 3. The manner and scope in which pressure is being applied
 4. The location of the interrogation
 5. The time of day
 6. The number of officers involved
 7. The degree and manner of force used
 8. The information provided to the subject about the reason for the interrogation
 9. Subject's Age – On June 11, 2011, the Supreme Court ruled that the subject's age (especially when under 18) may be considered in the determination whether that person is in custody for *Miranda* purposes. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).
 10. Nature of the questions asked

Note: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- L. Demonstration: Custody determination away from the border

(b)(5); (b)(7)(E)

Page 1871

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

M. Encounters at the border

(b)(5); (b)(7)(E)

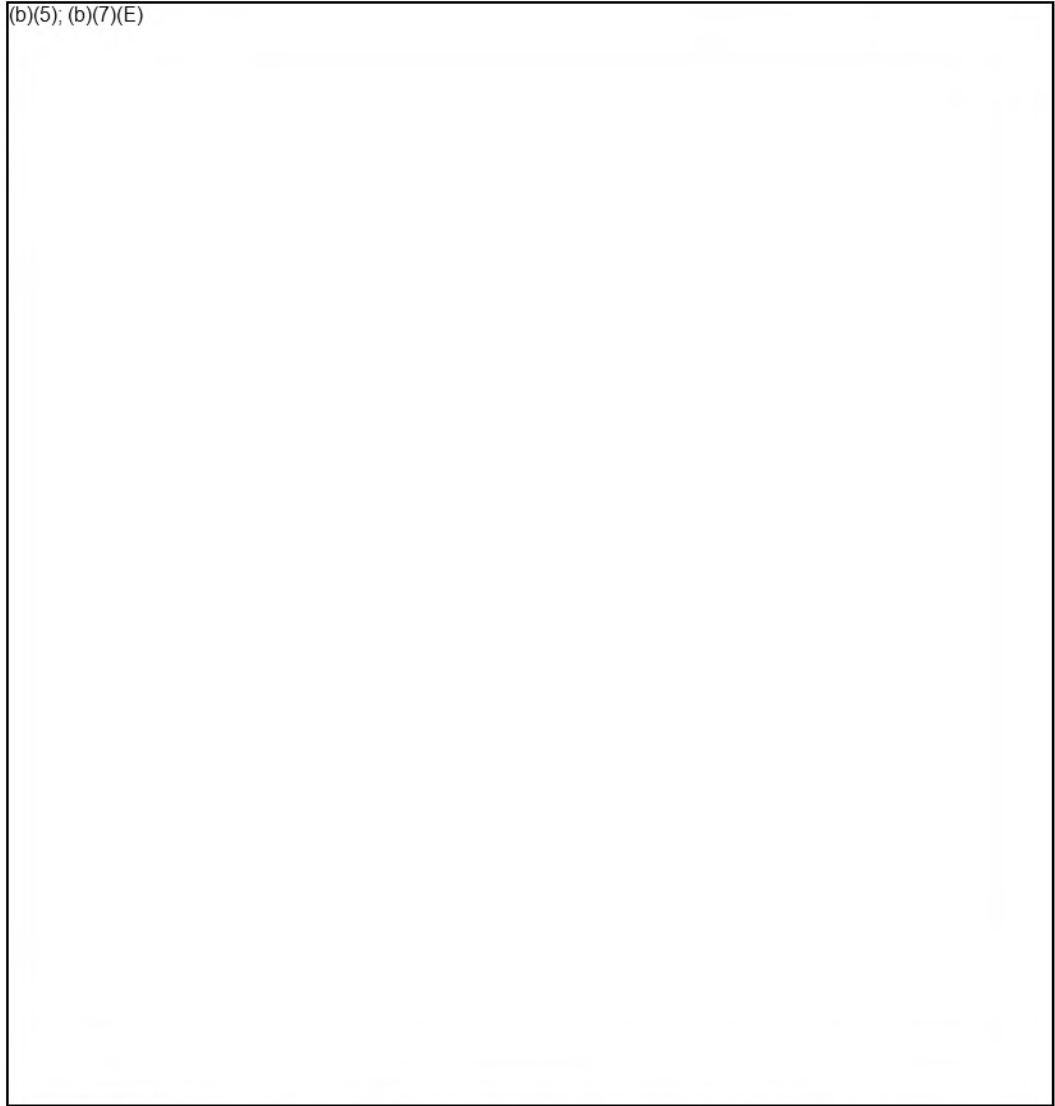
1.

(b)(5); (b)(7)(E)

2.

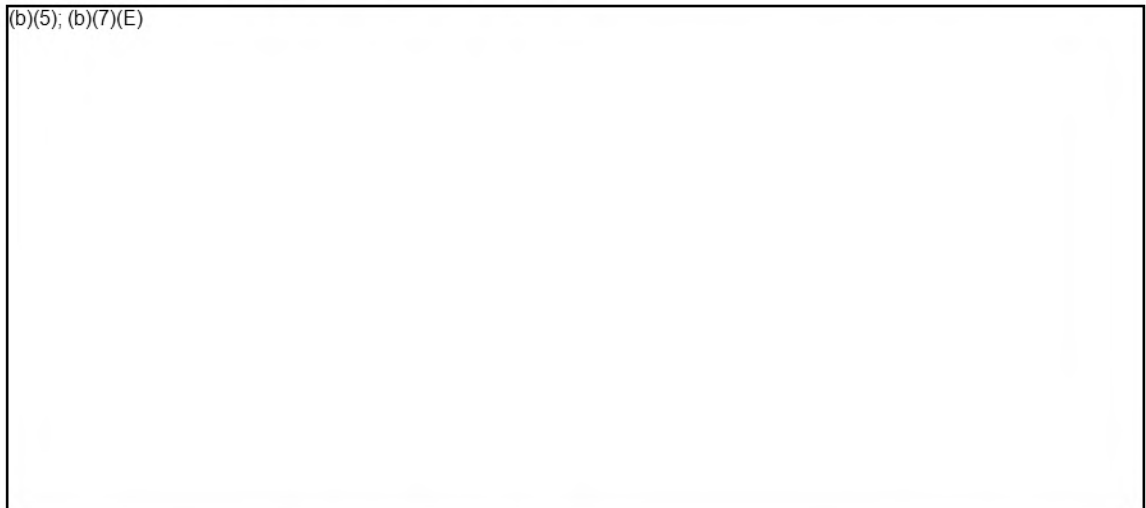
(b)(5); (b)(7)(E)

3.



N. How does the SA determine whether the person is in custody for *Miranda* purposes when questioned at the border?

(b)(5); (b)(7)(E)



Page 1874

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

4. ICE Policy: Invasive Personal Searches/Detentions at the Border – By policy (Personal Search Handbook, CIS HB 3300-04B, Revised July 2004), anyone subject to a partial body, x-ray, body cavity search, and/or detention for monitored bowel movement is in custody for *Miranda* purposes.
- O. Demonstration: Custody determination at the border

(b)(5); (b)(7)(E)

Page 1876

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

Apply the test.

(b)(5); (b)(7)(E)

II. Distinguish between interrogation and non-interrogation for *Miranda* purposes. (EPO 2)

5th Amendment – Self-Incrimination Clause – Voluntary Statement

***Miranda* Applied**

(b)(5); (b)(7)(E)

A. Interrogation defined - The original definition of interrogation used by the Supreme Court in *Miranda* has been replaced by the definition discussed in *Rhode Island v. Innis*, 446 U.S. 291 (1979). See below.

1. The *Miranda* Court defined interrogation as “questioning initiated by law enforcement officers.”
2. In *Rhode Island v. Innis*, the Court expanded the definition to include, not only express questioning, but also any words or actions on the part of the police (other than those words or actions normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response (that is, any response, whether inculpatory or exculpatory, that the prosecution may seek to introduce at trial), from the subject, rather than the intent of the police.

(b)(5); (b)(7)(E)

3. **Questions** – (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

4. **Words** – (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

5. **Actions** – (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- B. Volunteered statements – Any statements a subject makes without any prompting from the SA will be admissible at trial.

Example: (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

- C. Biographical questions exception – Routine “booking questions” or biographical questions have been found to fit into this exception. Questions concerning identity and physical characteristics such as name, age, address, height, weight, and so on, are not interrogation. In addition, general informational questions, routine inspectional questions, and requests for personal history are part of a legitimate administrative inquiry; meaning, they are not being asked in order to get an incriminating response, and not interrogation. In the same manner, statements made to an arrestee that are normally attendant to arrest are not interrogation, even if they produce an incriminating response.

Example: (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

- D. Public safety exception – The public safety exception states that *Miranda* warnings are not required when an officer asks a subject, who is in custody, questions prompted by an objectively reasonable concern for the public safety regarding an immediate danger and the information sought is necessary to protect public safety. Public safety includes protecting the general public, officers, victims, and subjects.

1. Public safety exception test – The test is whether a reasonable officer given the same facts and circumstances would believe that the information sought is necessary to protect public safety.
2. DHS policy (DHS Memorandum, Public Safety Custodial Interrogation of Certain Terrorism Suspects, October 22, 2010) *See SDR 5th SI-1*, which states that HSI personnel are to use all lawful and appropriate means to gather terrorist threat information. (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- 3. The types of questions that would be appropriate under these circumstances would include:

(b)(5); (b)(7)(E)

- 4. (b)(5); (b)(7)(E)
- 5.

Example

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

E. Demonstration

(b)(5); (b)(7)(E)

IV. Determine if a subject has waived his rights after *Miranda* warnings are provided. (EPO 4)

See, ICE Form 73-025 (09/09) Statement of Rights [See SDR 5thSI-2]. See also SDR 5thSI-3 Record of Sworn Statement in Criminal Proceeding Form I-263B; SDR 5thSI-4 Record of Sworn Statement Form I-263A; SDR 5thSI-5 Witness Sworn Statement Form I-263W, SDR 5thSI-6 Interviewing Techniques Handbook, OI HB 10-03, April 28, 2010 and SDR 5thSI-7 Interview and Interrogation reference. See also, SDR 5thSI-8 Side-by-side comparison of 263B, 215B, and 73-025.

5th Amendment – Self-Incrimination Clause – Voluntary Statement

Miranda Applied

(b)(5); (b)(7)(E)

- A. Waivers: *Miranda* stated, “[I]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant *knowingly and intelligently waived* his privilege against self-incrimination and his right to retained or appointed counsel.”
1. This determination involves a *two-part inquiry*:
 - a. The relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception; [the uncoerced choice] and,
 - b. The waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon that right [the level of comprehension of the right waived].
 2. If, based on a totality of the circumstances, the individual makes an uncoerced choice with an appropriate level of comprehension of the right waived, the court will find the waiver voluntary, knowing, and intelligent.
 3. Express waivers – An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could, and generally does, constitute a valid waiver.
 4. Implicit waivers – Waivers can be established even absent formal or express statements of waiver (“implicit waiver”). An implied waiver will serve as a legitimate waiver as long as the defendant’s silence is coupled with an understanding of his rights and then the defendant follows a course of conduct indicating waiver.

Example:	(b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)	

(b)(5); (b)(7)(E)

5. Partial waivers – Subjects can agree to waive their rights to discuss certain topics, while at the same time invoking their rights as to others. Such limitations are a prerogative of the subject and the interrogation can continue so long as the limits established by the subject are honored.
6. Breaks in interrogation – If the subject waives the rights outlined in the *Miranda* warnings and a break in interrogation occurs of such length that the subject’s appreciation of the warnings is reasonably likely to decrease, the warnings should be read again.

B. Demonstration

(b)(5); (b)(7)(E)

IV. Determine if a subject has invoked his rights to silence and/or counsel after *Miranda* warnings are provided. (EPO 4)

5th Amendment – Self-Incrimination Clause – Voluntary Statement

(b)(5); (b)(7)(E)

A. Invocation of right to remain silent

1. According to *Miranda*, “[O]nce warnings have been given, the subsequent procedure is clear. If the individual indicates *in any manner* (since *Miranda* the Court has interpreted this as *unambiguously and clearly*), at any time prior to or during questioning, that he wishes to remain silent the interrogation must cease.
2. Any person who desires the protection of the Self-Incrimination Clause privilege must claim it at the time he relies on it.

Exceptions:

- a. A criminal defendant need not take the stand and assert the privilege at his own trial.
- b. A witness’ failure to invoke the privilege against self-incrimination must be excused where governmental coercion makes his forfeiture of the privilege involuntary. One example of such a situation is a subject exposed to custodial interrogation. Hence, *Miranda* said that the only lawful way for a subject to give up his privilege against self-incrimination requires suitable warnings before interrogation.

- c. Silence alone is not a proper invocation of the protection.

Example: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

Note: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- 3. If the subject makes a *clear, unambiguous, and timely* invocation to silence, he should not be interrogated.

Example (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- 4. When clearly exercised, however, the choice to remain silent must be “scrupulously honored.”

5. (b)(5); (b)(7)(E)

6.

(b)(5); (b)(7)(E)

B. Invocation of right to counsel

1. According to *Miranda*, “[O]nce warnings have been given, the subsequent procedure is clear...If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.”
2. *Edwards Rule* – When a subject invokes his right to counsel during custodial interrogation, the interrogation must cease; except, if the accused *initiates* further communication, exchanges, or conversations with the SA. *Edwards v. Arizona*, 451 U.S. 477 (1981).
3. *Minnick Rule* – Once the subject states that he wants a lawyer, the interrogation must stop **until an attorney is present**. *Minnick v. Mississippi*, 498 U.S. 146 (1990).
4. Ambiguous request for counsel – The court will first determine whether the individual expressed his desire for, or clearly asserted his right to counsel, and if so, the court will then assess whether he initiated further discussions with police and knowingly and intelligently waived that right.

Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- 5. Subject initiates communication, exchange, or conversation with police – A subject will **not** be found to have initiated such dialogue where the “initiation” is preceded by actions or comments by the SA that equate to interrogation or are construed as attempts to induce the subject into “waiving” his right to counsel. Further, not all statements or actions by a subject can be interpreted as willingness to resume interrogation. For example,

(b)(5); (b)(7)(E)

- 6. Right to re-approach one who has invoked his right to counsel – *Shatzer* permits law enforcement to re-approach a subject 14 days after an initial request for counsel has been made as long as the subject has been released from custody.

(b)(5); (b)(7)(E)

- 7. *Edward/Minnick/Shatzer* Rule summary: Once the subject requests an attorney pursuant to *Miranda*, no further custodial interrogation can take place unless:
 - a. Less than 14 days: The subject initiates further communications, exchanges or communications and waives his right to the presence of counsel during interrogation; or,

- b. The subject is “released from custody” and the SA waits 14 days before re-approaching the subject.

(b)(5); (b)(7)(E)

D. Demonstration

(b)(5); (b)(7)(E)

V. Explain the purpose of an administrative warning and how it differs from a *Miranda* warning. (EPO 5)

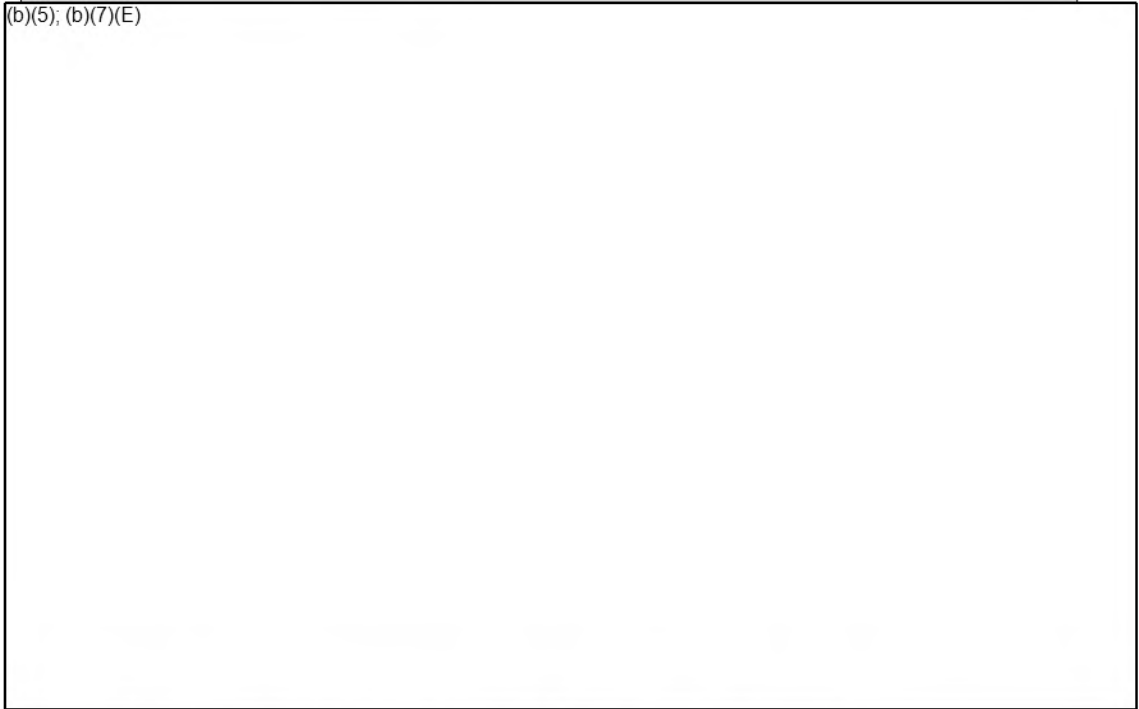
A. Administrative warnings (Form I-214A)

- 1. General – If you are not seeking information to criminally prosecute an alien, but rather merely plan to obtain a statement for use at the alien’s removal hearing, the interview, including the sworn statement, should proceed pursuant to standard processing methods used for administrative (civil) removal. *Miranda* warnings are not required in such circumstances.

2. However, aliens arrested on administrative immigration violations must receive a different set of warnings, referred to as Administrative warnings. 8 C.F.R. 287.3(c).

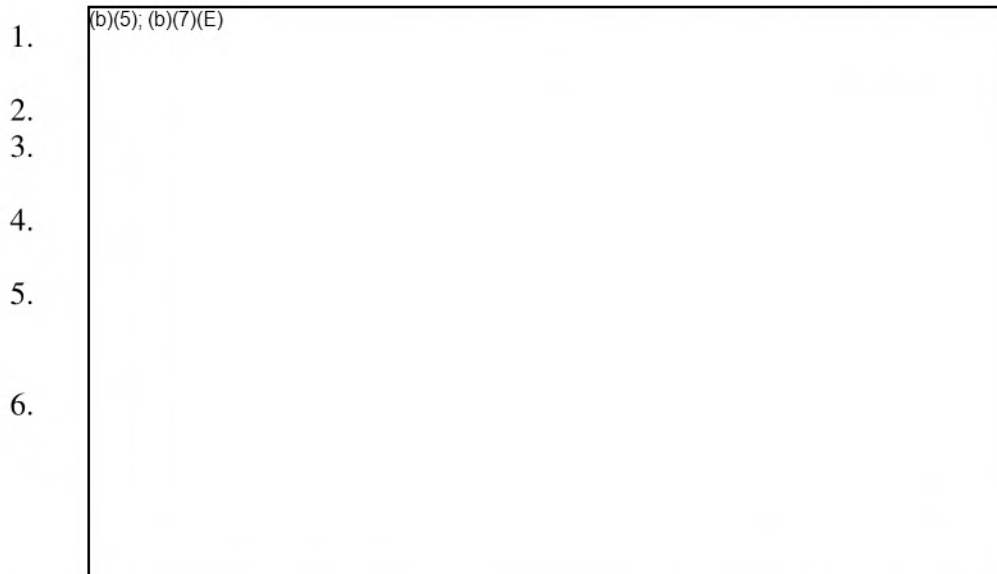
B. Content of administrative warnings

(b)(5); (b)(7)(E)



C. Differences between administrative warnings and *Miranda* warnings:

1. (b)(5); (b)(7)(E)
- 2.
- 3.
- 4.
- 5.
- 6.



- D. While the I-213 serves as the basis for removal, it is the I-214A that contains the Administrative Warnings. The I-214A is required when a NTA is issued.

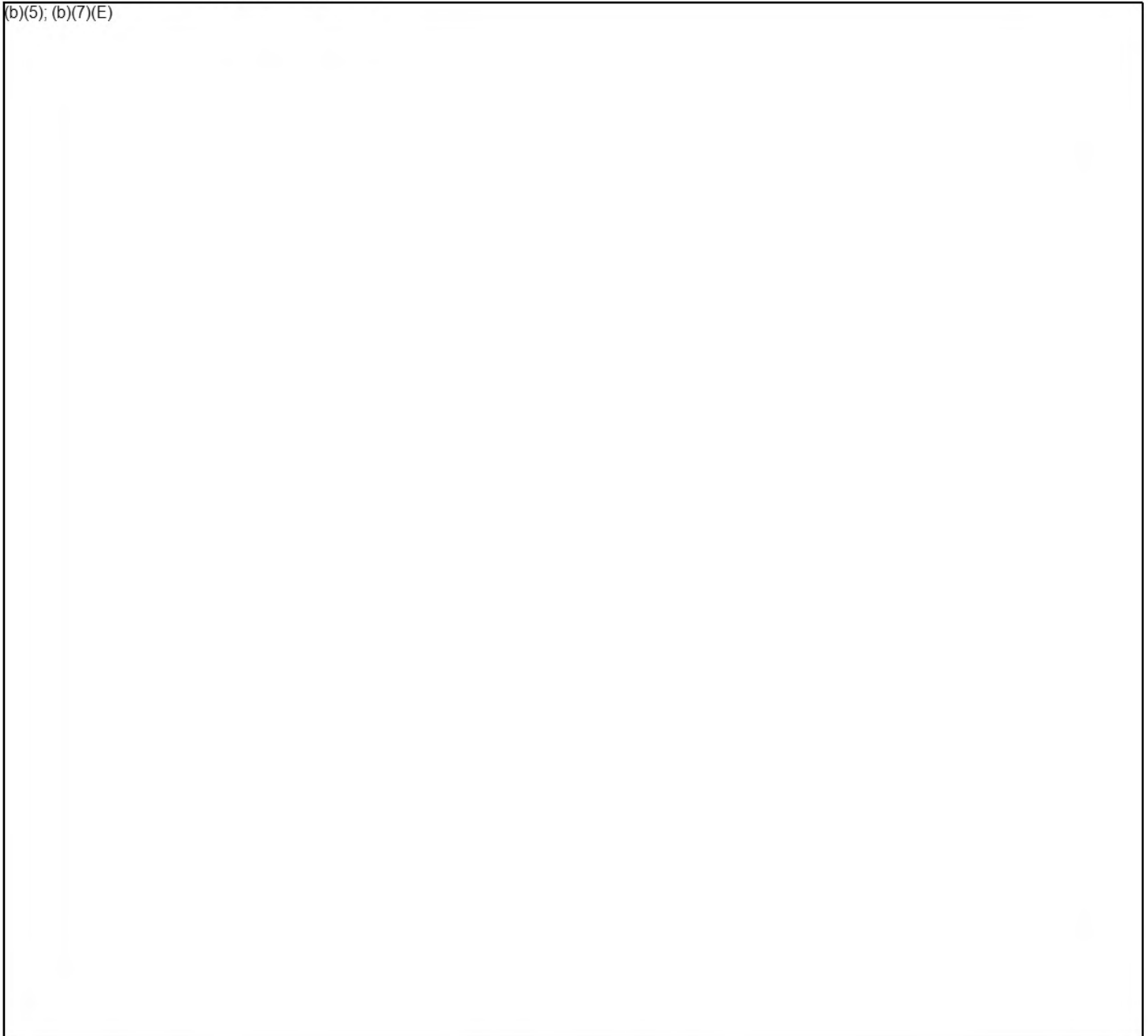
E. Demonstration

(b)(5); (b)(7)(E)



VI. Student Practice

(b)(5); (b)(7)(E)



Page 1891

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)



CONCLUSION

I. Summary of Main Ideas

<p>5th Amendment – Self-Incrimination Clause – Voluntary Statement</p> <p><i>Miranda Applied</i></p>
<p>(b)(5); (b)(7)(E)</p>

II. Integration

In this lesson, we addressed the Fifth Amendment’s Self-Incrimination Clause. More specifically, we examined the impact of the *Miranda* decision and how it applies in determining if you have custody of a subject and if you have interrogated a subject. We also discussed how a subject can waive or invoke rights after receiving *Miranda* warnings. This lesson was the last in the evidence collection process, and your next lesson will focus on post-arrest obligations and will detail your legal responsibilities during the criminal prosecution process.

III. Objectives

Terminal Performance Objective – Given an interview scenario, determine if the subject’s statements are voluntary and/or admissible in court; according to the Fifth Amendment’s Self-Incrimination Clause and the Supreme Court’s *Miranda* decision.

EPO	OBJECTIVE
1	Identify Fifth Amendment protections that impact the taking of a statement and distinguish Voluntary Statements from the <i>Miranda</i> protocol; and determine if a subject is in custody for <i>Miranda</i> purposes.

2	Distinguish between interrogation and non-interrogation for <i>Miranda</i> purposes.
3	Determine if a subject has waived his rights after <i>Miranda</i> warnings are provided.
4	Determine if a subject has invoked his rights to silence and/or counsel after <i>Miranda</i> warnings are provided.
5	Explain the purpose of an administrative warning and how it differs from a <i>Miranda</i> warning.

IV. Motivation

As a HSI Special Agent, a substantial component of your job consists of obtaining statements. In addition to ensuring you comply with the 5th Amendment's Due Process Clause, you must also act in accordance with the Self-Incrimination Clause.

V. Test or Final Activity

You will be tested on your knowledge of the 5th Amendment, more specifically, how the Self-Incrimination Clause impacts statements and rights of subjects, on the legal multiple-choice examination. However, your ability to address these legal questions can be tested when you conduct an interview or interrogation.

5th SI Lesson Student Drive Reference Index

- 5thSI-1: DHS Memorandum, Public Safety Custodial Interrogation of Certain Terrorism Suspects, October 22, 2010)
- 5thSI-2: Statement of Rights, Form 73-025 (09/09)
- 5thSI-3: Record of Sworn Statement in Criminal Proceedings, DHS Form I-263B
- 5th SI-4: Record of Sworn Statement, Form I-263A
- 5thSI-5: Witness Sworn Statement Form I-263W
- 5thSI-6: Interviewing Techniques Handbook, OI HB 10-03, April 28, 2010
- 5thSI-7: Interviews and Interrogation
- 5thSI-8: Side-by-side comparison



Forging a New Legacy

Homeland Security Investigations

Fifth Amendment: Self-Incrimination

ICE HSI Special Agent Training

ICE Academy

Homeland Security Investigations (HSI)

Investigative Phases

(b)(5); (b)(7)(E)

Investigative Phases, cont'd



(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Agenda

- Custody and interrogation in the context of
Miranda if a subject has waived or invoked his rights
Differences between administrative and Miranda
warnings
Practice activity

Homeland Security Investigations (HSI)

Terminal Performance Objective

Given an interview scenario, determine if the subject's statements are voluntary and/or admissible in court; according to the Fifth Amendment's Self-Incrimination Clause and the Supreme Court's *Miranda* decision.

Homeland Security Investigations (HSI)

Enabling Performance Objectives

- Identify 5th Amendment protections that impact the taking of a statement and distinguish Voluntary Statements from the Miranda protocol; and determine if a subject is in custody for Miranda purposes. Distinguish between interrogation and non-interrogation for Miranda purposes. Determine if a subject has waived his rights after Miranda warnings are provided. Determine if a subject has invoked his rights to silence and/or counsel after Miranda warnings are provided. Explain the purpose of an administrative warning and how it differs from a Miranda warning.

Homeland Security Investigations (HSI)

Self-Incrimination Clause

“No person shall be...compelled in a criminal case to be a witness against oneself.” General Rule Exceptions Self-Incrimination Clause Test

Homeland Security Investigations (HSI)

Statements as Evidence in Criminal Case

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Miranda Protocol

- Prosecution may not use statements stemming from custodial interrogation of the subject unless procedural safeguards were used to secure the privilege against self-incrimination.

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)



Homeland Security Investigations (HSI)

Miranda Applied

(b)(5); (b)(7)(E)



Homeland Security Investigations (HSI)

Custody Defined

- *Miranda definition – Questioning by law enforcement officers after person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Modified by Thompson v. Keohane – Formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.*

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Custody Determination

1. What facts and circumstances surround the interrogation? Given those facts and circumstances, would a reasonable person believe he or she was unable to terminate the encounter – Was the person seized at the time of the interrogation? “Ultimate Inquiry” – Was the government’s seizure a formal arrest or restraint on one’s freedom of movement of the degree associated with a formal arrest?

Homeland Security Investigations (HSI)

Factors Courts Consider in Determining Custody

1. Extent to which person is confronted with evidence of guilt
Duration of detention
Manner and scope in which pressure is being applied
Location of interrogation
Time of day
Number of officers involved
Degree and manner of force used
Information provided to subject about reason for interrogation
Subject's age
Nature of the questions asked

Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 10

Homeland Security Investigations (HSI)

Encounters at the Border

(b)(5); (b)(7)(E)



Homeland Security Investigations (HSI)

Encounters at the Border, cont'd

- (b)(5); (b)(7)(E)

See Example in Student Guide p. 12

Homeland Security Investigations (HSI)

Test of Custody for *Miranda* Purposes at the Border

(b)(5); (b)(7)(E)

-

See Examples in Student Guide p. 13



Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 15

Homeland Security Investigations (HSI)

Interrogation or Non-Interrogation for *Miranda*

(b)(5); (b)(7)(E)



Homeland Security Investigations (HSI)

Interrogation Defined

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Interrogation v. Non-Interrogation

- Volunteered statements – Any statements a subject makes without any prompting from the SA will be admissible at trial. Biographical questions exceptions – Routine “booking questions” or biographical questions have been found to fit into this exception. Public safety exception – Miranda warnings not required for subject in custody for public safety.

See Examples in Student Guide p. 18



Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(7)(E)

See Student Guide p. 20



ICE Academy

Homeland Security Investigations (HSI)

Rights Waived After *Miranda* Warnings

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Miranda Waivers

“[I]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” Relinquishment of right must be voluntary – uncoerced choice. With full awareness of nature of right and consequences of decision – level of comprehension of the right waived.

Homeland Security Investigations (HSI)

Waivers

- Express waivers – An express statement that the individual is willing to make a statement and does not want an attorney. Implicit waivers – Defendant understands rights and conduct indicates waiver. Partial waivers – Subjects can agree to waive their rights to discuss certain topics, while at the same time invoking their rights as to others. -- Breaks in interrogation – If lengthy break occurs, re-Mirandize.

See Student Guide p. 22



Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 23



Homeland Security Investigations (HSI)

Subject Invokes Rights after *Miranda* Warnings

(b)(5); (b)(7)(E)



Homeland Security Investigations (HSI)

Invocation of Fifth and/or Sixth Amendment Rights

- Once warnings given, if individual indicates in any manner before or during questioning, that he wishes to remain silent, interrogation must cease. If the individual states that he wants an attorney, interrogation must cease until attorney is present. At that time, individual must have an opportunity to confer with attorney and have attorney present during any subsequent questioning.

Homeland Security Investigations (HSI)

Invoking Right to Remain Silent

- If subject chooses to exercise his right to remain silent he, should not be interrogated. Right to remain silent must be asserted unambiguously and clearly before terminating interrogation. Choice to remain silent must be “scrupulously honored.” Second interrogation would not violate Miranda if first request to remain was silent was honored, and subject re-Mirandized. But subject can again invoke right to remain silent.

Homeland Security Investigations (HSI)

Invoking Right to Counsel

- *Edwards Rule: When subject invokes right to counsel during custodial interrogation, interrogation must cease, except if accused initiates further communication, exchanges, or conversations with SA [Edwards v. Arizona]. Minnick Rule: Once subject states he wants a lawyer, interrogation must stop until an attorney is present [Minnick v. Mississippi]. Ambiguous request for counsel – Court will assess if right was waived. Subject initiates communication, exchange, or conversation with police – Not initiated by subject if preceded by interrogation or inducement of waiver. Arizona v. Roberson – When right to counsel invoked, subject cannot be questioned with respect to any crime. Maryland v. Shatzer – Can re-approach subject after 14 days.*



Homeland Security Investigations (HSI)

Edward / Minnick / Shatzer Rule

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 27

Homeland Security Investigations (HSI)

Administrative Warnings (Form I-214A)

- (b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Content of Administrative Warnings

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Administrative Warnings vs. *Miranda* Warnings

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(7)(E)

See Student Guide p. 29

Homeland Security Investigations (HSI)

Practice

1.

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 29



Homeland Security Investigations (HSI)

Practice, cont'd

2.

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 29

Homeland Security Investigations (HSI)

Practice, cont'd

3.

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 30

Homeland Security Investigations (HSI)

Practice, cont'd

4.

(b)(5); (b)(7)(E)

See Student Guide p. 30

Homeland Security Investigations (HSI)

Practice, cont'd

5.

(b)(5), (b)(7)(E)

See Student Guide p. 31

Homeland Security Investigations (HSI)

Summary

(b)(5); (b)(7)(E)



Homeland Security Investigations (HSI)

Looking Ahead

- This lesson addressed 5th Amendment's Self-Incrimination Clause Next lesson addresses Due Process.



Protecting the Borders Against Illicit Trade, Travel, and Finance



Forging a New Legacy

Homeland Security Investigations

Arrest Authority

ICE HSI Special Agent Training

ICE Academy



Protecting the Borders Against Illicit Trade, Travel, and Finance



Forging a New Legacy

Homeland Security Investigations

Tracing of Assets and Forfeitures

HSI Special Agent Training

ICE Academy

Homeland Security Investigations (HSI)

Terminal Performance Objective

Given case-related facts that indicate illicit assets and an example of a forfeiture proceeding (administrative, civil, or criminal), determine the appropriate seizure/forfeiture procedure and asset tracing method to locate illicit proceeds and assets according to HSI guidelines in the Asset Forfeiture Handbook

Homeland Security Investigations (HSI)

Enabling Performance Objectives

- Explain methods of proving income identify sources of information to locate illicit proceeds and assets Determine the difference between evidence and intelligence gathering Describe terms, utilization of AIRG, and HSI policy/guidelines related to seizures and forfeitures

Homeland Security Investigations (HSI)

Review of the Past

- Financial Investigations lesson introduced the fundamentals of the HSI focus CITP training taught how to use the determining net-worth method of tracing illicit income Legal lessons provided the statutory basis for seizing and forfeiting assets

Homeland Security Investigations (HSI)

Agenda

Explanation

- Methods of proving income
- Sources of information to locate illicit proceeds and assets
- Difference between evidence and for intelligence gathering
- Terms, utilization of AIRG, HSI policy/guidelines on seizures and forfeitures

Demonstration of concepts and methods

Practice of concepts and methods

Homeland Security Investigations (HSI)

Methods of Proving Income

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Indirectly Tracing Illicit Income

(b)(5); (b)(7)(E)



Homeland Security Investigations (HSI)

Indirect Methods of Tracing Illicit Income

(b)(5); (b)(7)(E)

Page 1949

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 1950

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Page 1951

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Page 1952

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Page 1953

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Page 1954

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Page 1956

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Page 1969

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of the Freedom of Information and Privacy Act

Homeland Security Investigations (HSI)

Asset Identification Removal Groups (AIRGs)

Primary mission: support asset removal of real property in concert with major criminal investigations and prosecutions

Expertise to assist agents in:

- Identifying assets with forfeiture potential
- Establishing forfeiture provisions (civil/criminal)
- Establishing probable cause for seizure



Homeland Security Investigations (HSI)

Information: Evidence or Intelligence

Certain information is only suitable as intelligence, not actionable information because of:

- Low or not enough equity ***and/or***
- Insufficient probable cause to seize and forfeit the assets

Homeland Security Investigations (HSI)

Avoiding Pitfalls

(b)(5); (b)(7)(E)

Asset Forfeiture

- Found throughout federal criminal code
Asset Forfeiture has become one of the most powerful and important tools used against all manner of criminal organizations
Used to abate nuisances and to take the instrumentalities of crime out of circulation
Takes profit out of crime and returns property to victims
Both deterrent and punishment
Sometimes prosecution and incarceration not needed to achieve the ends of justice

Homeland Security Investigations (HSI)

Forfeiture

Divestiture of illicit assets without compensation of property – used in a manner contrary to sovereign's laws

Illegal use alone does not grant government automatic right to seize and forfeit

Requires specific authorization by statute

Requires express statutory authority before proceeding against property

Homeland Security Investigations (HSI)

Tools/Job Aids for Forfeiture

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Forfeiture Terms and Definitions

- Equitable Sharing
- Encumbrance
- Facilitation
- Final Order of Forfeiture
- Interlocutory Sale
- Lien
- Lis Pendens
- Net Equity
- Payment in Lieu of Forfeiture
- Post- and-Walk
- Preliminary Order of Forfeiture

Forfeiture Terms and Definitions	
Equitable Sharing	Division and transfer of forfeited property, or proceeds from forfeited property, between government agencies, based on each agency's contributions to and participation in an investigation.
Encumbrance	Anything that affects or limits the title of a property, e.g., liens, mortgages, easements, leases, or restrictions.
Facilitation	Use of an asset in the commission of a crime or in furtherance of criminal or otherwise proscribed activity.
Final Order of Forfeiture	An order entered by the court in a criminal forfeiture proceeding, following the preliminary order of forfeiture and any ancillary proceedings, authorizing the Government to take ownership and dispose of a property. The final order takes into account any third-party rights, as well as the defendant's interest in the property - known in some judicial districts as an "amended order of forfeiture."
Interlocutory Sale	The court-ordered sale of an asset prior to a final order or judgment of forfeiture. A court may authorize such an action in cases where loss of market value or physical deterioration of an asset has occurred or is imminent.
Lien	A legal claim against an asset, which is used to secure a loan and must be repaid if the asset is sold.
Lis Pendens	Latin for "suit pending." A written notification, filed with a county recorder's office, indicating that a forfeiture action against the property is pending on behalf of the Government. The notice minimizes the potential for the transfer of ownership by alerting potential buyers or lenders that the title of the property is in question and any purchase of the property may result in the new owner being bound by the court decision.
Net Equity	The market value of an owner's unencumbered interest in an asset, i.e., the difference between the fair market value of an asset and the outstanding balance of liens against that asset.
Payment in Lieu of Forfeiture	A defendant's voluntary substitution of a monetary payment in place of the forfeiture of a particular asset.
Post- and-Walk	Process of delivering a warrant of arrest <i>in rem</i> to the owner of a real property and affixing a copy of the warrant to the property itself. Undertaken as part of a civil forfeiture action following the filing of a civil complaint for forfeiture.
Preliminary Order of Forfeiture	In criminal forfeiture proceedings, an order of the court, issued after the defendant is found guilty by a jury or enters a plea of

See Definitions in Student Guide



Homeland Security Investigations (HSI)

Forfeiture Terms and Definitions (cont'd)

- Payment in Lieu of Forfeiture
- Post- and-Walk Preliminary Order of Forfeiture
- Pre-Seizure Analysis
- Proceeds Seizure Threshold
- Turnover Order

Forfeiture Terms and Definitions	
Equitable Sharing	Division and transfer of forfeited property, or proceeds from forfeited property, between government agencies, based on each agency's contributions to and participation in an investigation.
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Preliminary Order of Forfeiture	In criminal forfeiture proceedings, an order of the court, issued after the defendant is found guilty by a jury or enters a plea of

See Definitions in Student Guide



Homeland Security Investigations (HSI)

Asset Identification and Removal Group (AIRG)

- Expertise in identifying and tracking illegally acquired assets in all HSI categories
Identifies assets and investments illegally acquired
Establishes probable cause to seize and forfeit property used and/or acquired from criminal activity
Identifies, analyzes, traces, seizes, and forfeits criminal proceeds deposited into financial institutions
Dismantles known criminal organizations by targeting financial infrastructure and seeking criminal, civil, or administrative actions to accomplish

Homeland Security Investigations (HSI)

AIRG (cont'd)

- Develops sources of information that can provide leads and intelligence on criminal groups and how they try to legitimize their wealth Collects and assesses intelligence on:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

AIRG (cont'd)

- AIRG help is requested as a COLLATERAL REQUEST to the AIRG Group via (b)(7)(E) does not run a parallel investigation

Homeland Security Investigations (HSI)

Collaboration on Search Warrants

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

During Execution of Warrant

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

General Guidelines

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

General Guidelines (cont'd)

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Evaluation of a Property

Determining whether to take a real property requires information from various sources

Factors to be considered:

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Pre-seizure Planning

Anticipate and make decisions about:

(b)(5); (b)(7)(E)

Coordinate with local Seized Property Specialist

Coordinate with FP&F paralegal specialist early in investigation in which multiple seizures anticipated

Homeland Security Investigations (HSI)

What is Being Seized

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

What is Being Seized (cont'd)

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Net Equity and Seizure Thresholds

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Treasury Executive Office of Asset Forfeiture

- TEOAF administers Treasury Forfeiture Fund (TFF) TFF is the receipt account for deposit of non-tax forfeitures made by: Criminal Investigation Division, Internal Revenue Service ICE CBP U.S. Secret Service U.S. Coast Guard

Homeland Security Investigations (HSI)

Demonstration

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

Demonstration Scenario in Student Guide

Homeland Security Investigations (HSI)

Student Practice

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

Student Practice Scenario in Student Guide



Homeland Security Investigations (HSI)

Summary

- Seizures and forfeitures aims to undermine the economic infrastructure of a criminal enterprise
Asset forfeiture can remove the tools, equipment, cash flow, profit, and, sometimes, the product itself
Three indirect methods can trace illicit income (b)(7)(E)
(b)(7)(E) can provide indications of worth
Collaborate with AIRG, AUSA, CFAs, FP&F in planning seizure
Ensure affidavit covers (b)(7)(E)





Protecting the Borders Against Illicit Trade, Travel, and Finance

**U.S. Immigration and Customs Enforcement
Homeland Security Investigations Training**

**HSI Academy
Legal Division**



Border Search Exception

Student Guide

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HSI Special Agent Training

6th Edition (2018)

ENFORCEMENT LAW COURSE

Fourth Amendment: Border Search Exception

*Border Search Exception
HSI Academy Legal Training Division*

For Official Use Only

*Page 1
May 2019*

I. Motivation

As a Special Agent, you will perform searches and seizures in the field and ports of entry. By understanding your authority, which includes the border search exception, you can ensure your searches and seizures are legal and correctly performed, which will ultimately lead to a successful criminal prosecution.

II. Review of the Past and Advanced Organizer

In the Fourth Amendment Chapter, you learned how to apply the Fourth Amendment's general rule requirements as well as agency policy to determine if a search or seizure is lawful. You also learned warrant and probable cause exceptions that can be used in searches and seizures.

What are the three components that must be met under the general rule requirements?

Example:

What are the warrant exceptions that are available to you?

Example:

What are the warrant and probable cause exceptions you may use?

Example:

HSI SA Case Assignment
↓
Investigative Plan Development

(b)(5); (b)(7)(E)

III. Agenda

We will discuss the three elements of a lawful border search. Next, we will examine application of the Functional Equivalent of the Border and Extended Border Rules. Then, we will discuss how to lawfully border search people and items in compliance with the Fourth Amendment's reasonableness requirement. Finally, you will be given practice scenarios and exercises that require you to determine if a lawful border search was conducted. I will provide demonstrations and examples throughout the lesson. The practice questions at the end of the lesson are like the test questions on the legal exam.

IV. Objectives

Terminal Performance Objective – Given past case information or scenarios at a border or its equivalent, determine the legality of a search/seizure and what can be searched/seized; in accordance with the Border Search Exception outlined by law, caselaw and policy.

EPO	OBJECTIVE
1	Identify the relationship between the Fourth Amendment and border search authority and explain the border search general rule.
2	Explain and apply the Functional Equivalent of the Border (in an inbound setting) authority.
3	Explain and apply the Functional Equivalent of the Border (in an outbound setting) authority.
4	Explain and apply the Extended Border Search authority.
5	Determine when and how to border search people.
6	Determine, for the border search of an object, the level of suspicion required and any follow-up actions.

V. Identify the relationship between the Fourth Amendment and border search authority and explain the border search general rule (EPO 1).

A. Fourth Amendment Analysis

1. The Fourth Amendment commands that searches and seizures be reasonable. *US v Montoya de Hernandez*, 473 U.S. 531 (1985).
2. What is reasonable depends upon all the circumstances surrounding the search or seizure and the nature of the search or seizure itself. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
3. The permissibility of a particular law enforcement practice is judged by “balancing its **intrusion on the individual's Fourth Amendment interests** against its **promotion of legitimate governmental interests.**” *U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983).
4. Promotion of legitimate governmental interests:
 - a. The authority to conduct a **border search** is based upon the **inherent right of the sovereign to protect itself** by stopping and examining persons and property crossing into this country. *US v. Ramsey*, 431 US 606 (1977).
 - b. Travelers may be ... 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. *Carroll v. U.S.*, 267 U.S. 132 (1925).

- c. Searches at the border are authorized to **regulate the collection of duties** and to **prevent the introduction of contraband into this country**. *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985).

5. Reasonableness:

- a. Searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by the fact that they occur at the border. *US v. Ramsey*, 431 US 606 (1977).
- b. Routine searches of the persons and effects of border entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant. *U.S. v. Ramsey*, 431 US 606 (1977) and *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985).
- c. The detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal. *U.S. v. Montoya de Hernandez*.

B. Border Search General Rule: *At the border* an **authorized agent** may stop (temporarily detain/seize) all people and objects that enter the United States from foreign to search those people and objects for **merchandise and evidence of merchandise**.

1. **Authorized Agent:**

- a. Art. I, § 8, cl. 3 – The Constitution gives Congress broad comprehensive powers “[t]o regulate Commerce with foreign Nations.” Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry. *US v. Ramsey*, 431 US 606 (1977).
- b. Act of July 31, 1789, ch. 5, 1 Stat. 29 – Congress granted authority to “**Officers of the Customs**” to conduct routine searches and seizures at the border, without probable cause or a warrant.

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- c. 19 U.S.C. § 1401 (i) – Officer of the Customs: Customs Officer. The terms “officer of the customs” and “customs officer” mean any **officer of the... “Customs Service”** or any **commissioned, warrant, or petty officer of the Coast Guard**, or any agent or other person, including foreign law enforcement officers, **authorized by law or designated** by the Secretary of the Treasury to perform any duties of an officer of the Customs Service.

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

- d. Others authorized: **19 U.S.C. § 507** allows customs officers (relevant to this course, HSI Special Agents) to demand

assistance from any person when necessary to perform the agent's lawful duties. (One who provides assistance under 19 U.S.C. § 507 is not an "officer of the customs" as defined in 19 U.S.C. § 1401(i) and has no *independent* authority to perform border searches.).

e.

(b)(5); (b)(7)(E)

2. Search detained people and objects for ***merchandise and evidence of merchandise***
 - a. 19 U.S.C. §1401(c) – Merchandise means goods, wares, and chattels of every description and includes merchandise the importation of which is prohibited, and monetary instruments.
 - b. 19 U.S.C. § 482. Search of vehicles and persons. (a) Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is

merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

- c. 19 U.S.C. § 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, within a customs-enforcement area established under the Anti-Smuggling Act [19 USC § 1701 et seq.], 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.

3. **At the Border**

- a. The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. *U.S. v. Ramsey*, 431 US 606 (1977).
- b. **Border Defined**
 - 1) Land Border – Lines between U.S./Mexico and US/Canada.
 - 2) Sea Border – Waters adjacent to United States coasts claimed as part of United States sovereign territory.
 - 3) Air Border – Directly upward from the land or sea borders.

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(b)(5) ; (b)(7)(E)

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Page 2004

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2005

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

VI. Explain and apply the Functional Equivalent of the Border (in an inbound setting) authority (EPO 2).

(b)(5); (b)(7)(E)

Case law recognizing FEB inbound rule:

United States v. Victoria-Peguero, 920 F.2d 77 (1st Cir 1990)
United States v. Glaziou, 402 F. 2d 8 (2nd Cir. 1968)
United States v. Hyde, 37 F.3d 116 (3rd Cir. 1994)
United States v. Helms, 703 F. 2d 759 (4th Cir. 1982)
United States v. Amuny, 767 F.2d 1113, 1123 (5th Cir. 1985)
United States v. Williams, 617 F.2d 1063 (5th Cir. 1980)
United States v. Prince, 491 F. 2d 655 (5th Cir. 1974)
United States v. Jackson, 825 F.2d 853 (5th 1987)
United States v. Lawson, 461 F. 3d 697 (6th Cir. 2006)
Kaniff v. United States, 351 F. 3d 780 (7th Cir. 2003)
United States v. Oyekan, 786 F. 2d 832 (8th Cir. 1986)
United States v. Solmes, 527 F.2d 1370 (9th Cir. 1975)
United States v. Mayer, 818 F.2d 725 (10th Cir. 1987)
United States v. Garcia, 672 F.2d 1349 (11th Cir. 1982)
United States v. Carter, 760 F.2d 1568 (11th Cir. 1985)
United States v. Puig, 810 F.2d 1085 (11th Cir. 1987)
Denson v. United States, 574 F. 3d 1318 (11th Cir. 2009)
United States v. Gurr, 471 F.3d 144 (DC Cir. 2006)

A. Preliminary matters

1.

(b)(5); (b)(7)(E)

2. ***Reasonable Certainty*** defined: *The totality of the facts and circumstances within the officer's knowledge and of which they have reasonably trustworthy information in the light of their*

experience to warrant a firm belief that an event occurred (e.g., that a border crossing took place). Note:

(b)(5); (b)(7)(E)

3.

(b)(5); (b)(7)(E)

4.

B. Functional Equivalent of the Border (in an inbound setting) Rule

(b)(5); (b)(7)(E)

Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

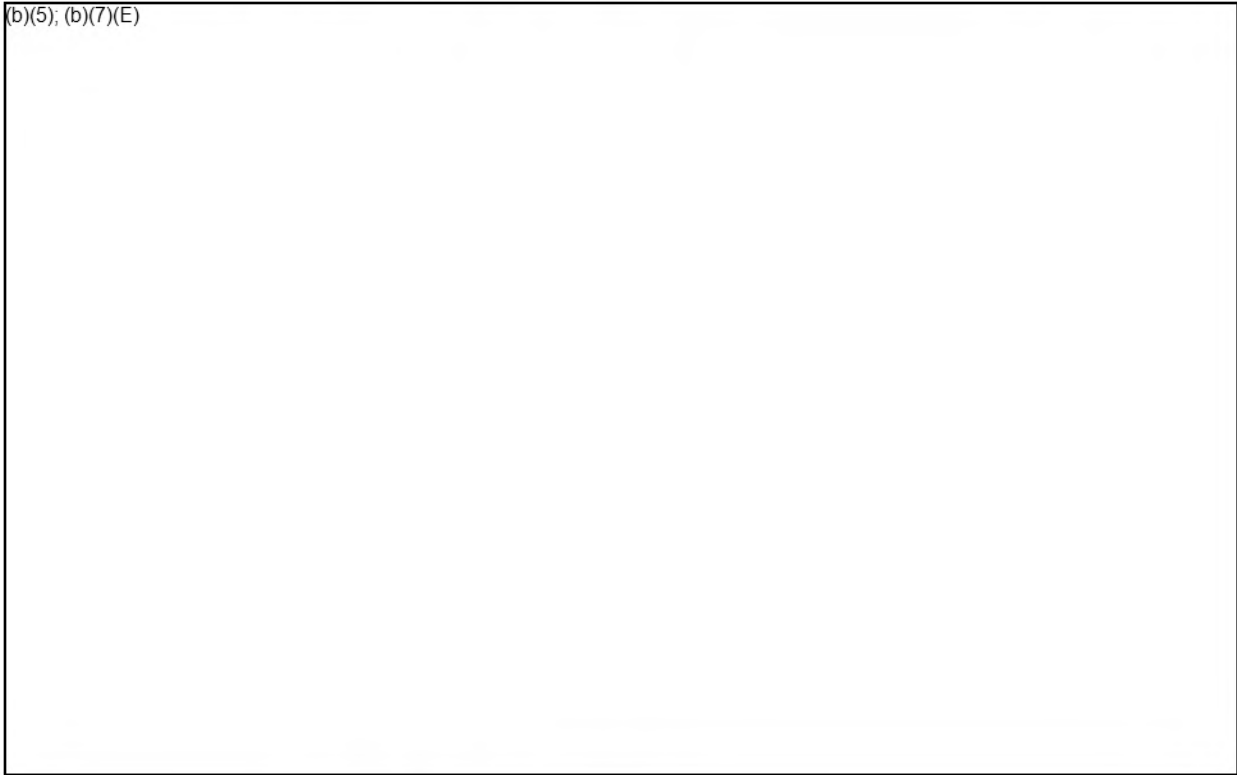
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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)



2. The SA must (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

a. A material change is one that is important or impacts the SA's underlying border search authority.

- 1) (b)(5); (b)(7)(E)
 - 2)
-
- A large rectangular area that has been completely redacted, leaving a blank white space within a black border.

b. Remember:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

c.

d.

Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

C. Demonstration scenarios:

FEB Inbound Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

FEB Inbound Example:

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2014

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

VII. Explain and apply the Functional Equivalent of the Border (in an outbound setting) authority (EPO 3).

(b)(5); (b)(7)(E)

Functional Equivalent of the Border (Outbound)

(b)(5); (b)(7)(E)

- A. Functional Equivalent of the Border (FEB) Outbound: a border search of people or objects that are just about to leave the United States. We have extended the rationale underlying the suspicionless search of persons and effects *entering* the country to situations where persons or articles attempt to *exit* the country as well. **United States v. Boumelhem, 339 F.3d 414 (6th Cir.2003).**

Julian v. United States, 463 U.S. 1308 (1983)
California Bankers Association v. Shultz, 416 U.S. 21 (1974)
United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980)
United States v. Ezeiruaku, 936 F.2d 136 (3rd Cir. 1991)
United States v. Oriakhi, 57 F.3d 1290 (4th Cir. 1995)
United States v. Berisha, 925 F. 2d 791 (5th Cir. 1991)
United States v. Boumelhem, 339 F.3d 414 (6th Cir. 2003)
United States v. Udofot, 711 F.2d 831 (8th Cir. 1980)
United States v. Duncan, 693 F.2d 971, 977 (9th Cir. 1982)
United States v. Hernandez-Salazar, 813 F. 2d 1126 (11th Cir. 1987)
United States v. Baren-Burgos, 739 F. Supp. 772 (E.D.N.Y. 1990)

- B. Functional Equivalent of the Border (in an outbound setting) Rule

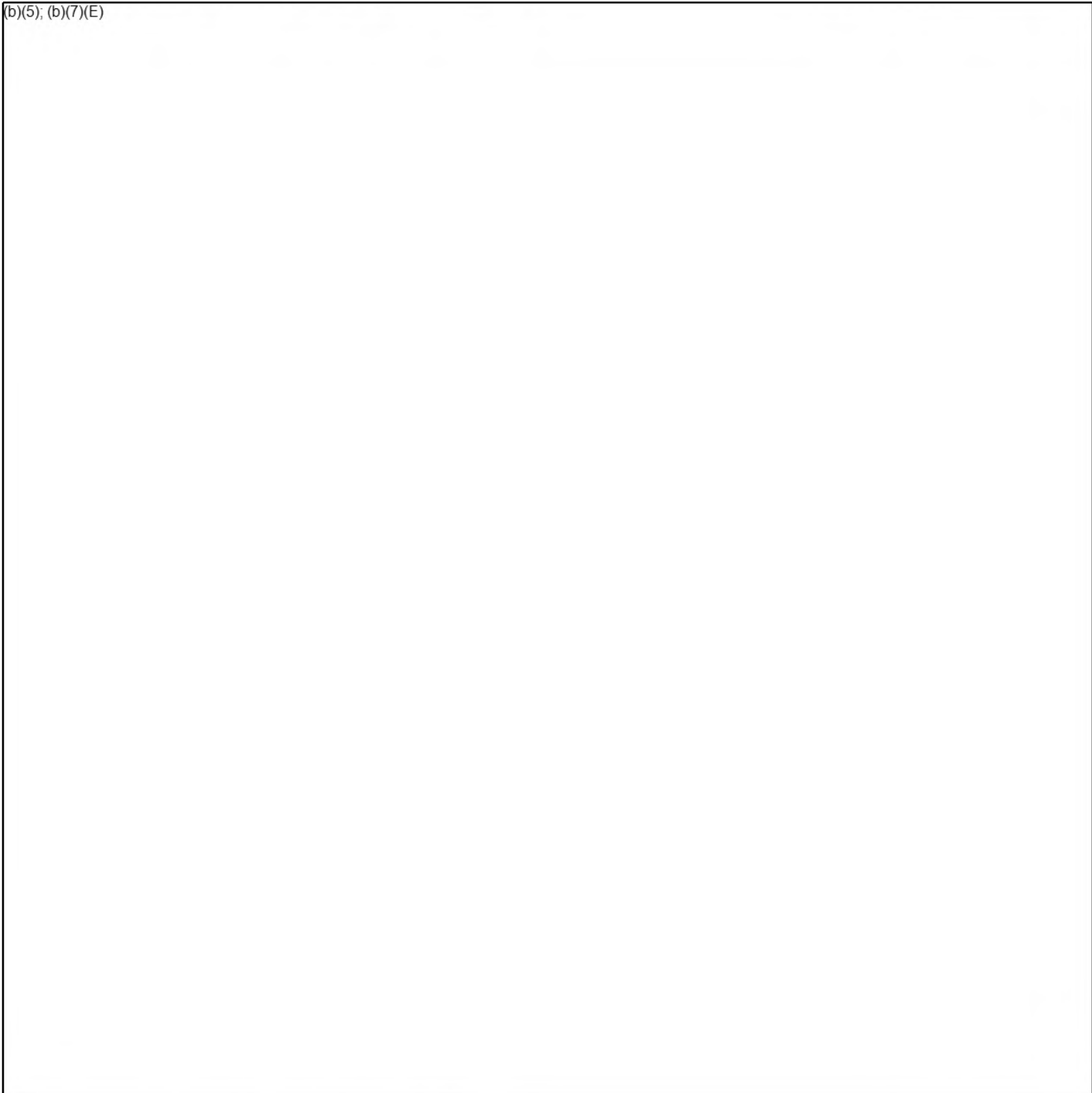
(b)(5); (b)(7)(E)

Example:

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

(b)(5); (b)(7)(E)

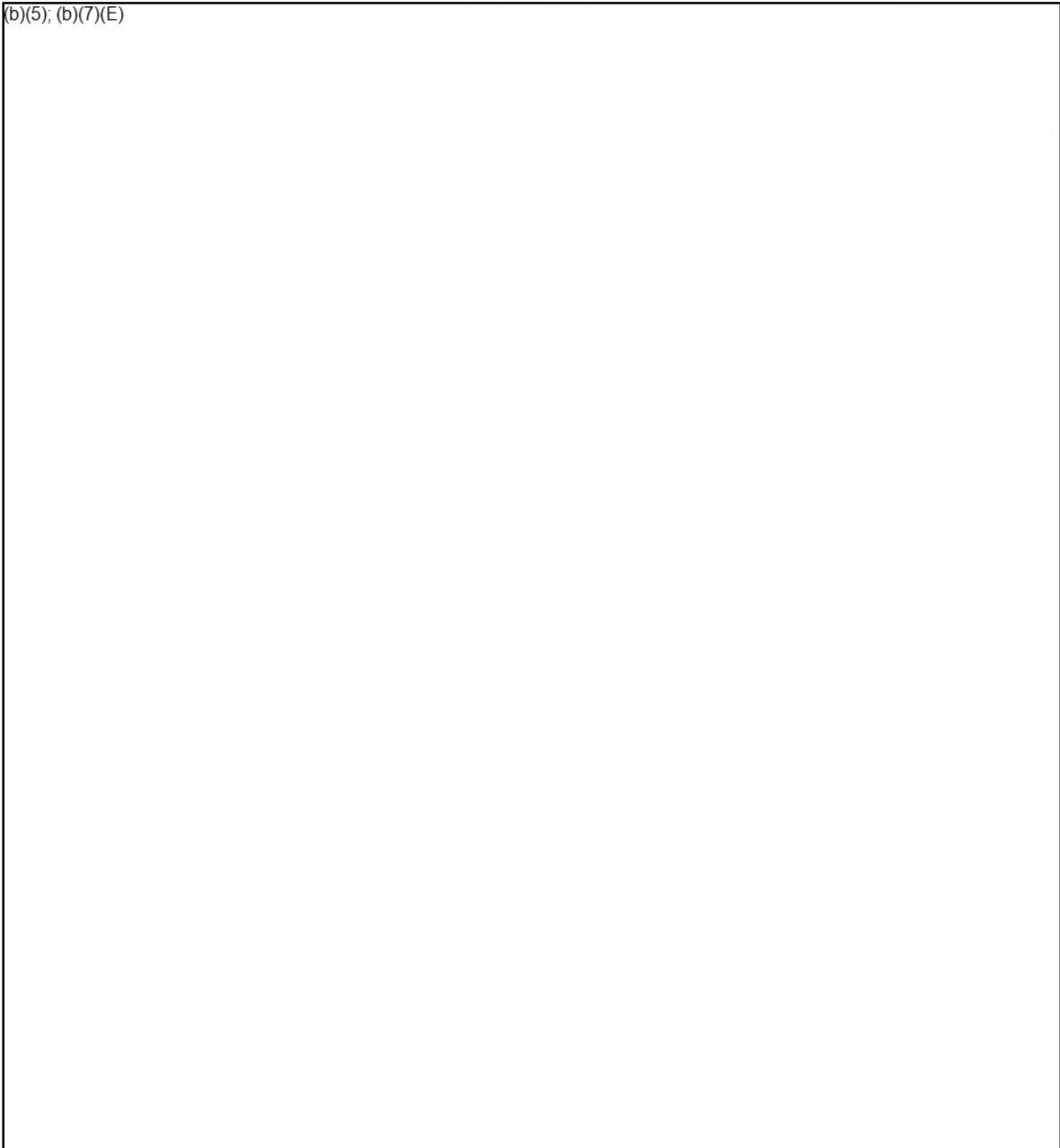


C. Demonstration scenarios:

FEB Outbound Example: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

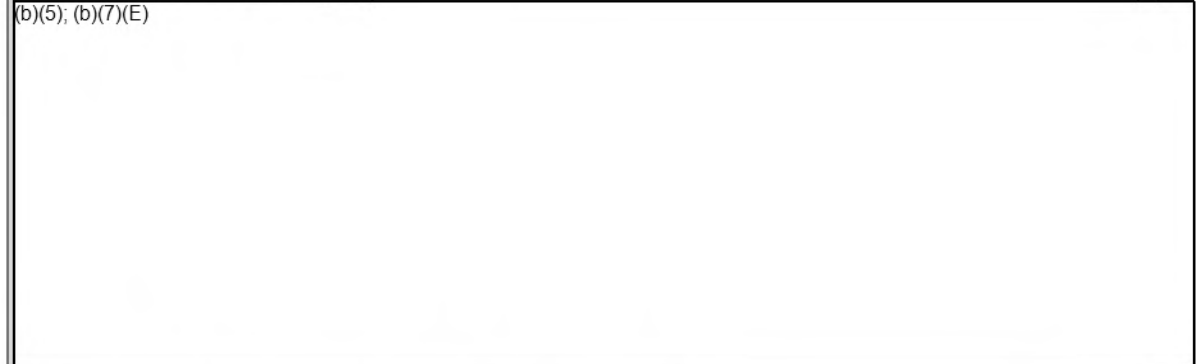
(b)(5); (b)(7)(E)



FEB Outbound Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)



(b)(5); (b)(7)(E)

VIII. Explain and apply the Extended Border authority (EPO 4).

Border Search Exception

(b)(5); (b)(7)(E)

Extended Border

(b)(5); (b)(7)(E)

A. “Extended Border” – an inbound border search conducted at some point beyond the FEB. The Extended Border Search Doctrine allows authorized government officials to conduct warrantless searches and seizures beyond the border or its functional equivalent on reasonable suspicion of criminal activity.

1.

(b)(5); (b)(7)(E)

2. Requiring reasonable suspicion stems from the notion that an extended border search involves a delay which entails a greater level of intrusion on legitimate expectations of privacy than the ordinary border search. **US v. Abbouchi, 502 F.3d 850 (9th Cir 2007).**

3. Continuous surveillance is not a requirement of an extended border search.

United States v. Glaziou, 402 F. 2d 8 (2nd Cir. 1968)
United States v. Hyde, 37 F.3d 116, 120 n.2 (3rd Cir. 1994)
United States v. Bilir, 592 F.2d 735 (4th Cir. 1979)
United States v. Espinoza-Seanez, 862 F.2d 526 (5th Cir. 1988)
United States v. Flynn, 664 F.2d 1296, 1306, n.17 (5th Cir. 1982)
United States v. McGinnis, 247 Fed. Appx. 589 (6th Cir. 2007)
United States v. Teng Yang, 286 F.3d 940 (7th Cir. 2002)
United States v. Caicedo-Guarnizo, 723 F.2d 1420 (9th Cir. 1984)
United States v. Garcia, 672 F.2d 1349 (11th Cir. 1982)

B. Extended Border Search Rule

(b)(5); (b)(7)(E)

Example: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

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(b)(5) ; (b)(7)(E)

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(b)(5); (b)(7)(E)

Example: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

4. 19 U.S.C. § 1595(b) authorizes a “customs officer” (HSI SA) to enter the private lands and buildings of another, **but not dwellings**, to perform border searches and seizures.

a. There is no geographical limitation on the exercise of 19 U.S.C. § 1595(b) authority (unlike 8 U.S.C. § 1357(a)(3), which is limited to lands located within 25 miles of the U.S. border/100 miles per regulation).

b. In the example above, (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

5. Ninth-Circuit Caveat: One panel of the Ninth Circuit Court of Appeals has indicated that SAs conducting an extended border search must seek a warrant if the illegal merchandise is deposited into a privately-owned building (non-dwelling). *United States v. Mendoza-Ortiz*, 262 F.3d 882 (9th Cir. 2001).

C. Demonstration scenarios:

Extended Border Search Example (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

IX. Determine when and how to border search people (EPO 5).

A. Fourth Amendment Analysis

1. The **reasonableness of a search** is determined by balancing the legitimate governmental interests against the offensiveness of the intrusion. *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985).
2. **Routine searches** of a person's belongings and effects are made reasonable by his decision to cross the border. *U.S. v. Ramsey*,

431 US 606 (1977). *United States v. Irving*, 452 F.3d 110 (2d Cir.2006).

3. **Routine searches** of the persons and effects of border entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant. *U.S. v. Ramsey*, 431 US 606 (1977) and *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985).

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

4. The degree of invasiveness or intrusiveness associated with any particular type of search determines whether or not that search qualifies as routine. *US v Braks*, 842 F. 2d 509 (1st 1988).
5. Factors courts consider for determining the degree of intrusiveness:
- whether the search results in the exposure of intimate body parts or requires the suspect to disrobe;
 - whether physical contact between Customs officials and the suspect occurs during the search;
 - whether force is used to effect the search;
 - whether the type of search exposes the suspect to pain or danger;
 - the overall way the search is conducted; and
 - whether the suspect's reasonable expectations of privacy, if any, are abrogated by the search;

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

6. Border searches of people (in search room) deemed routine by lower courts include:
- Currency found in bra.
 - Narcotics found under girdles, underpants.
 - Pat-down searches.
 - Raising a skirt or pant leg.
 - Outer clothing removal (e.g., jackets, shoes, etc.).
 - Examining contents of purses, wallets, or pockets.
 - Pat-down followed by removal of shoes.
7. An **intrusive body search** (i.e., non-routine) at the border is justified only if the border official can **articulate facts** “based upon something more than the border crossing” that raise the

suspicion of illegal concealment. U.S. v Asbury, 586 F. 2d 973 (2nd 1978).

8. To justify **an intrusive body search** (i.e., non-routine) conducted at the **border** the circumstances must warrant a “**reasonable suspicion**” that the party to be searched is guilty of illegal concealment (e.g., (b)(5); (b)(7)(E))
(b)(5); (b)(7)(E)
9. **Lower courts have identified several articulable facts** (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)
 - a. Excessive nervousness. U.S. v. Chiarito, 507 F. 2d 1098 (5th Cir. 1975); U.S. v. Mastberg, 503 F. 2d 465 (9th Cir. 1974); U.S. v. Diaz, 503 F. 2d 1025 (3rd Cir. 1974).
 - b. Unusual conduct. U.S. v. Diaz, 503 F. 2d 1025 (3rd Cir. 1974); U.S. v. Shields, 453 F. 2d 1235 (9th Cir. 1972).
 - c. An informant's tip. U.S. v. Afanador, 567 F. 1325 (5th Cir. 1978); U.S. v. Castle, 409 F. 2d 1347 (9th Cir. 1969).
 - d. Computerized information showing pertinent criminal propensities. U.S. v. Kallevig, 534 F. 2d 411 (1st Cir. 1976).
 - e. Loose-fitting or bulky clothing. U.S. v. Kallevig, 534 F. 2d 411 (1st Cir. 1976); U.S. v. Chiarito, 507 F. 2d 1098 (5th Cir. 1975); U.S. v. Diaz, 503 F. 2d 1025 (3rd Cir. 1974).
 - f. An itinerary suggestive of wrongdoing. U.S. v. Kallevig, 534 F. 2d 411 (1st Cir. 1976); U.S. v. Chiarito, 507 F. 2d 1098 (5th Cir. 1975); U.S. v. Diaz, 503 F. 2d 1025 (3rd Cir. 1974); U.S. v. Shields, 453 F. 2d 1235 (9th Cir. 1972).
 - g. Discovery of incriminating matter during routine searches. U.S. v. Wilson, 488 F. 2d 400 (5th Cir. 1973); U.S. v. Flores, 477 F. 2d 608 (1st Cir. 1973); U.S. v. Summerfield, 421 F. 2d 684 (9th Cir. 1970).
 - h. Lack of employment or a claim of self-employment. U.S. v. Smith, 557 F. 2d 1206 (5th Cir. 1977).
 - i. Needle marks or other indications of drug addiction. U.S. v. Shields, 453 F. 2d 1235 (9th Cir. 1972).
 - j. Information derived from the search or conduct of a traveling companion. U.S. v. Wilson, 488 F. 2d 400 (5th Cir. 1973); U.S. v. Gil de Avila, 468 F. 2d 184 (9th Cir. 1972).
 - k. Inadequate luggage. U.S. v. Smith, 557 F. 2d 1206 (5th Cir. 1977); U.S. v. Diaz, 503 F. 2d 1025 (3rd Cir. 1974); U.S. v. Holtz, 479 F. 2d 89 (9th Cir. 1973).

- l. Evasive or contradictory answers. U.S. v. Himmelwright, 551 F. 991 (5th Cir. 1977).

10. **Non-routine personal searches** include:

- a.
- b.
- c.
- d.
- e.

(b)(5); (b)(7)(E)

B. **Border Searching people at the Ports of Entry:**

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

C. **Personal Searches at the POE:**

(b)(5); (b)(7)(E)

a.

(b)(5); (b)(7)(E)

b. a **partial body search** permits the officer to lift or remove the clothing in that area of the body to determine the nature of the merchandise that remains hidden. This concept includes the removal and search of an artificial limb. *US v Sanders*, 663 F. 2d 1 (2nd 1981).

(b)(5); (b)(7)(E)

Note: A (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

D. Demonstration/scenarios:

Personal Search Example: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

Personal Search Example: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

Personal Search Example: (b)(5); (b)(6); (b)(7)(C); (b)(7)(E)
(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

(b)(5); (b)(7)(E)

Personal Search Example:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

X. Determine, for the border search of an object, the level of suspicion required and any follow-up actions (EPO 6).

A. Fourth Amendment Analysis

1.

(b)(5); (b)(7)(E)

2. (b)(5); (b)(7)(E)

B. Routine searches of items/objects authorized with no warrant and **zero suspicion**.

1. Personal belongings and effects – baggage, luggage, other containers in a traveler’s possession, outer clothing, a purse, wallet, pockets, or shoes which, unlike strip searches, do not substantially infringe on a traveler's privacy rights. *See US v. Irving*, 452 F.3d 110 (2nd Cir 2006).
2. Cargo and other commercial items
3. Conveyances – Cars, trucks, buses, planes, trains, vessels
4. Use of technology – density busters, x-ray/VACIS, and radiation pagers

C. Non-routine searches of items/objects authorized with no warrant but still require **reasonable suspicion**. These involve situations in which the courts have deemed the search so intrusive or invasive that makes the search non-routine.

1. Destructive searches – Cutting, serious damage to or destroying an object:

(b)(5); (b)(7)(E)

2. Examples:

- a. (b)(5); (b)(7)(E)
- b.
- c.

d. (b)(5); (b)(7)(E)

3. Use of drills/probes. [See SDR BSE-2 Use of drills to inspect conveyances and containers, CBP Directive 3340-019A, April 20, 2004 – CBP policy requires reasonable suspicion when drilling].

a. (b)(5); (b)(7)(E)
b.
c.

4. Cruise ship cabins/sleeper cabin trains/cargo ship cabin

a. (b)(5); (b)(7)(E)
b.
c.
d.

Non-routine searches of items/objects Example (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

- D. Border search of documents. *See SDR BSE-2 ICE Directive 7-6.0; July 8, 2008 Use of Border Search Authority for Documents and Electronic Media.*
1. **Policy:** HSI SAs acting under border search authority may search, detain, seize, retain, and share **documents**. With no suspicion, the SA may review the information transported by any individual attempting to enter, reenter, depart, pass through, or reside in the United States. [7-6.0 Part 6].

- 2. **Document defined:** All papers and other written documentation including but not limited to, those relating to the alien's identity and/or admissibility (e.g., passports, visas, credit cards, licenses, social security cards, evidence of direct threats, criminal terrorist or a threat to national security); those relating to the import and/or export of goods and merchandise to or from the United States; other materials such as books, pamphlets, and printed/manuscript material; monetary instruments; and written materials commonly referred to as "pocket trash" or "pocket litter." [7-6.0 Part 5.2].
- 3. SAs may make written notes, reports, and document impressions relating to a border encounter. [7-6.0 Part 6-Note].
- 4. SAs may detain documents for further review, either on-site at the place of detention or at an off-site location. The search must be conducted in a reasonable time. Factors include:

(b)(5); (b)(7)(E)

5. (b)(5); (b)(7)(E)

6. Translation and decryption (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

7. Subject matter assistance – (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Example: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

8.

9. Review and handling of certain types of information

a. Attorney-Client privilege – This privilege protects communications between attorney and client. Unless the document contains some form of communication (e.g., (b)(5); (b)(7)(E) it is not privileged. The document, however, may be protected under the Work Product Privilege. FR Evidence, Rule 502. Refer such matters to ICE Chief Counsel.

b. Work product privilege – Reflects an attorney’s opinions and impressions regarding the defense of the client’s case. The court must hold an evidentiary hearing to determine whether the documents contain true attorney work product under the privilege. FRE Rule 502. (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

c. Doctor-Patient privilege – The purpose of the physician-patient privilege is to protect those who are required to consult physicians from the disclosure of secrets imparted to them to protect the relationship of patient and physician, to prevent physicians from disclosing information which might result in humiliation, embarrassment, or disgrace to patients, and to encourage full disclosure by the patient so that the physician can advise and treat correctly. (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

d. Business information – Certain commercial information may be confidential pursuant to the Trade Secrets Act or the Privacy Act. (b)(5); (b)(7)(E)

e. Identification documents – May be copied for any legitimate government purpose without any suspicion of illegal activity.

- f. **Sealed letter class mail.** Border searches of mail are governed by particularized law and policy. See 19 C.F.R. Part 145; 19 U.S.C. § 1583. [REDACTED]

[REDACTED]

Letter Class Mail. U.S. first class mail and its international equivalent. This includes postcards, aerogrammes, letter packets, etc., mailed at the letter class rate or equivalent class or category of postage. [7-6.0 Part 5.4].

To be considered first class mail, a letter must be presently in the U.S. postal system. Only articles presently within the U.S. postal system are deemed "mail," even if they are stamped. Letters that are to be mailed, whether carried or in baggage, are not considered to be letter class mail. [7-6.0 Part 5.4].

Letters carried by individuals or private carriers such as DHL, UPS, or Federal Express, for example, are not considered to be mail, even if they are stamped, and thus are subject to border search as provided in this Directive. See 19 C.F.R. Part 145.3. [7-6.0 Part 8.7 1) b)].

**BORDER SEARCH OF
DOCUMENTS**

(b)(5); (b)(7)(E)

E. Demonstration/Exercise – Border searching documents

Review documents provided by the instructor. Assume these documents were discovered during a lawful border search. Determine if the documents can be reviewed based on law and policy.

F. Border search of electronic devices.

1. *U.S. v. Cotterman*, 709 F.3d 952 (9th Cir. 2013 en banc) – Forensic examination of a computer requires *reasonable suspicion*. Reasons given: (1) volume of private information an electronic device can hold is vast; (2) electronic devices are offices and personal diaries; (3) electronic devices hold browsing histories and records of deleted files; and, (4) with cloud computing the government could interact with information stored in a home location not just the electronic device.

- 2. U.S. v Kolsuz, 890 F. 3d 133 (4th Cir. 2018) – In 2012 Kolsuz was stopped outbound while attempting to export firearms parts without the required license. This happened again in 2013. In both instances, the parts were seized with no further action. In 2016, HSI New York notified CBP Dulles that Kolsuz planned to leave the country and HSI asked CBP to search his luggage. During this outbound search, CBP found more unlicensed firearms parts. While in secondary, CBP conducted a manual search of his iPhone (scroll through recent phone calls and text messages). He was then interviewed and arrested. HSI CFA then conducted a second “forensic search” of the phone offsite. The search was done as the phone was in airplane mode so did not reach information stored on the cloud. This process took 1 month to complete and resulted in an 896-page report.

Search of phone offsite deemed a border search:

(b)(5); (b)(7)(E)

- a.
- b.
- c.
- d.

Border search of phone offsite **deemed non-routine**:

(b)(5); (b)(7)(E)

- a.
- b.

(b)(5); (b)(7)(E)

c. **Reasonable suspicion** required to conduct forensic search.

3. HSI Legal Update – Border Search of Electronic Devices [May 9, 2018]: Although the Office of the Principal Legal Advisor (OPLA) advises Homeland Security Investigations (HSI) nationwide that it

(b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

4. U.S. Customs and Border Protection, CBP Directive No. 3340–049A, *Border Search of Electronic Devices* 5 (1-4-2018).

a. **Basic Search** – without suspicion an officer may examine an electronic device and may review and analyze information encountered at the border.

b. **Advanced Search** – with reasonable suspicion of activity in violation of laws enforced by CBP, or in which there is a national security concern, with supervisory approval, may conduct an advanced search. Defined as: *search in which an officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its content.*

F. U.S. v. Carpenter, 138 S. Ct. 2206 (2018) – The Government's acquisition of Carpenter's cell-site records was a Fourth Amendment search.

1. Cell-site location information (CSLI) provides a time stamped record each time phone connects to cell-site. Wireless carriers collect and store CSLI for business purposes.

(b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- 2. Person’s expectation of privacy in physical location and movements – *Knotts* (placement of beeper in car not a search); *Jones* (placement of GPS tracker on car deemed a search requiring a search warrant).
- 3. What a person keeps for himself and what he shares with others – there is no legitimate expectation of privacy in information a person shares with a third-party. That remains true “even if the information is revealed on the assumption that it will be used only for a limited purpose.” U.S. v. Miller, 425 U.S. 435 (1976). Miller (banks records not protected); *Smith* (phone records not protected).
- 4. Held: CSLI involves a person’s physical location and movement so government’s acquisition of the CSLI from the wireless carrier is a search.

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

XI. Student Practice

(b)(5); (b)(7)(E)

Page 2041

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2042

Withheld pursuant to exemption

(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

CONCLUSION

I. Summary of Main Ideas

(b)(5); (b)(7)(E)

II. Integration

In this lesson we examined the three elements of a lawful border search and discussed the Functional Equivalent of the Border and Extended Border. We have discussed the lawful means to collect physical evidence, the methods employed to do so, and how to avoid various pitfalls when collecting such evidence. In the next lesson, we will look at the evidence collection process in terms of collecting evidence in the form of statements.

III. Objectives

Terminal Performance Objective – Given past case information or scenarios at a border or its equivalent, determine the legality of a search/seizure and what can be searched/seized; in accordance with the Border Search Exception outlined by law, caselaw and policy.

EPO	OBJECTIVE
1	Identify the relationship between the Fourth Amendment and border search authority and explain the border search general rule.
2	Explain and apply the Functional Equivalent of the Border (in an inbound setting) authority.
3	Explain and apply the Functional Equivalent of the Border (in an outbound setting) authority.
4	Explain and apply the Extended Border Search authority.
5	Determine when and how to border search people.
6	Determine, for the border search of an object, the level of suspicion required and any follow-up actions.

IV. Motivation

The HSI mission is an important one, but it must be done reasonably and legally. As a Special Agent, it is imperative that you understand the laws and policies that govern your professional behavior, specifically the Fourth Amendment. Your ability to accurately apply the rules we discussed will enable you to more effectively perform your job and avoid sanctions.

V. Test or Final Activity

You will be tested on your knowledge of the Fourth Amendment as it relates to searches, seizures, and warrants on the legal multiple-choice exam after the Sentencing Guidelines Chapter. However, your ability to address these legal questions will be tested during other practical exercises and each time you conduct a search or seizure.

Attachments (determine if document can be border searched)

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

Page 2046

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2047

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2048

Withheld pursuant to exemption

(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2049

Withheld pursuant to exemption

(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2050

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2051

Withheld pursuant to exemption

(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2052

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2053

Withheld pursuant to exemption

(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2054

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2055

Withheld pursuant to exemption

(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2056

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(b)(5) ; (b)(6) ; (b)(7)(C) ; (b)(7)(E)

of the Freedom of Information and Privacy Act



Forging a New Legacy

Homeland Security Investigations

Fourth Amendment: Border Search Exception 1

ICE HSI Special Agent Training

ICE Academy

Homeland Security Investigations (HSI)

Border Search Exception

By understanding your authority, you can ensure your searches and seizures are legal and correctly performed, which will ultimately lead to a successful criminal prosecution.

(b)(6); (b)(7)(C)

Homeland Security Investigations (HSI)

Review of the Past

In the Fourth Amendment lesson, you learned: How to apply the Fourth Amendment's general rule requirements Agency policy to determine if a search or seizure is lawful Warrant and probable cause exceptions that can be used in searches and seizures

Homeland Security Investigations (HSI)

Advances Organizer

- What are the three components that must be met under the general rule requirements? What are the warrant exceptions that are available to you? What are the probable cause exceptions you may use?

Homeland Security Investigations (HSI)

Investigative Phases

(b)(5); (b)(7)(E)



Investigative Phases (cont'd)

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Agenda

- Three elements of a lawful border search
Application of the Functional Equivalent of the Border (FEB) and Extended Border Rules
Practice activity

Homeland Security Investigations (HSI)

Terminal Performance Objective

Given past case information or scenarios at a border or its equivalent, determine the legality of a search/seizure and what can be searched/seized; in accordance with the Border Search Exception outlined by law, case law, and policy.

Homeland Security Investigations (HSI)

Enabling Performance Objectives

1. Identify the relationship between the Fourth Amendment and border search authority, and explain the border search general rule. Explain and apply the Functional Equivalent of the Border (in an inbound setting) authority. Explain and apply the Functional Equivalent of the Border (in an outbound setting) authority. Explain and apply the Extended Border Search authority. Determine when and how to border search people. Determine, for the border search of an object, the level of suspicion required and any follow-up actions.

Homeland Security Investigations (HSI)

Fourth Amendment Analysis

- The Fourth Amendment commands that searches and seizure be reasonable. What is reasonable depends on circumstances surrounding the search or seizure and the nature of the search or seizure itself. Permissibility of a particular law enforcement practice. Promotion of legitimate governmental interests. Reasonableness.

Homeland Security Investigations (HSI)

Border Search General Rule

- Conducted by an authorized agent Searching for people and objects for merchandise and evidence of merchandise At the border Land border Sea border Air border

Homeland Security Investigations (HSI)

Border Search Scope

Warrant Required?	Suspicion Required?	Exception Policy	Border Search Exception
(b)(5); (b)(7)(E)			

Homeland Security Investigations (HSI)

Demonstration

1.

(b)(5); (b)(7)(E)

See Student Guide p. 9



Homeland Security Investigations (HSI)

Demonstration, cont'd

2 (b)(5); (b)(7)(E)

See Student Guide p. 9

Homeland Security Investigations (HSI)

Demonstration (cont'd)

3.

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 9

Homeland Security Investigations (HSI)

Demonstration (cont'd)

4.

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 9



Homeland Security Investigations (HSI)

Demonstration (cont'd)

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

5

See Student Guide p. 10



Homeland Security Investigations (HSI)

Demonstration (cont'd)

6.

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 10

Homeland Security Investigations (HSI)

Demonstration (cont'd)

7.

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 10

Homeland Security Investigations (HSI)

Almeida-Sanchez v. US, 413 US 266 (1973)

Border searches may in certain circumstances take place not only at the border itself, but at its functional equivalents as well. Functional Equivalent of the Border (in an inbound setting) Functional Equivalent of the Border (in an outbound setting) Extended Border

Homeland Security Investigations (HSI)

FEB Inbound

(b)(5); (b)(7)(E)

See Student Guide p. 11

Homeland Security Investigations (HSI)

Preliminary Matters

- FEB is not a fixed location Reasonable Certainty Officer entitled to conduct routine questioning, Terry pat-downs, and frisks Person performing the search must be an authorized agent looking for merchandise

Homeland Security Investigations (HSI)

Example 1

1.

(b)(5), (b)(7)(E)

See Student Guide p. 13

Homeland Security Investigations (HSI)

Example 2

2.

(b)(5); (b)(7)(E)

See Student Guide p. 13



Homeland Security Investigations (HSI)

Example 3

3.

(b)(5); (b)(7)(E)

See Student Guide p. 14



Homeland Security Investigations (HSI)

Example 4

4.

(b)(5); (b)(7)(E)

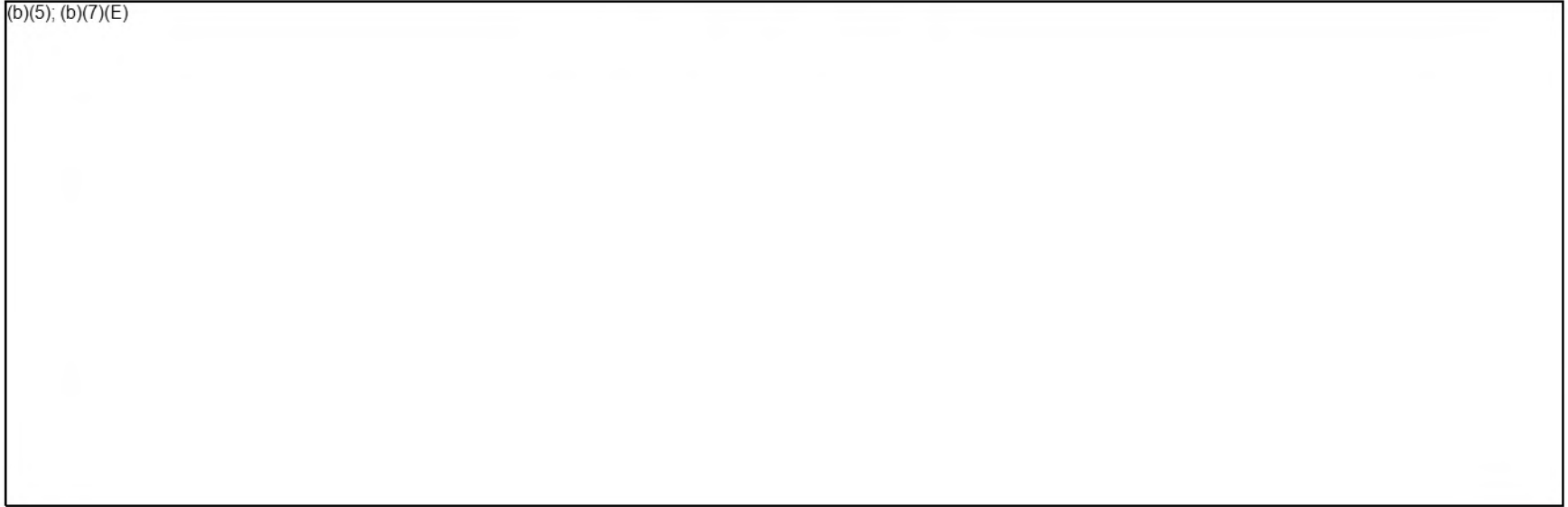
See Student Guide p. 16

Homeland Security Investigations (HSI)

Example 5

5.

(b)(5), (b)(7)(E)



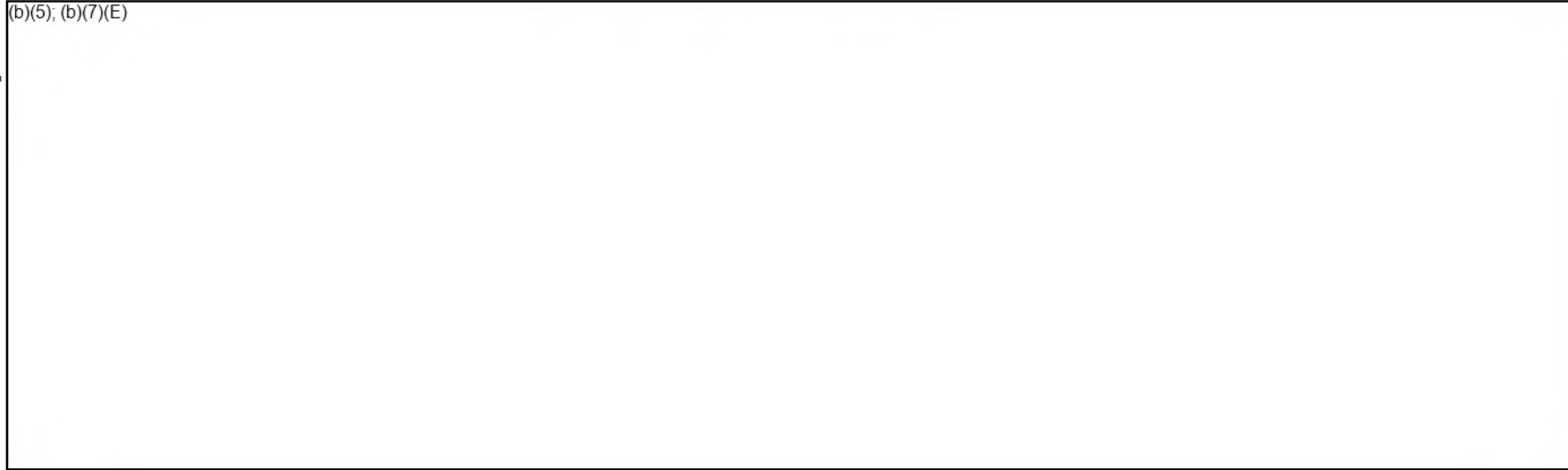
See Student Guide p. 16

Homeland Security Investigations (HSI)

Example 6

6.

(b)(5); (b)(7)(E)

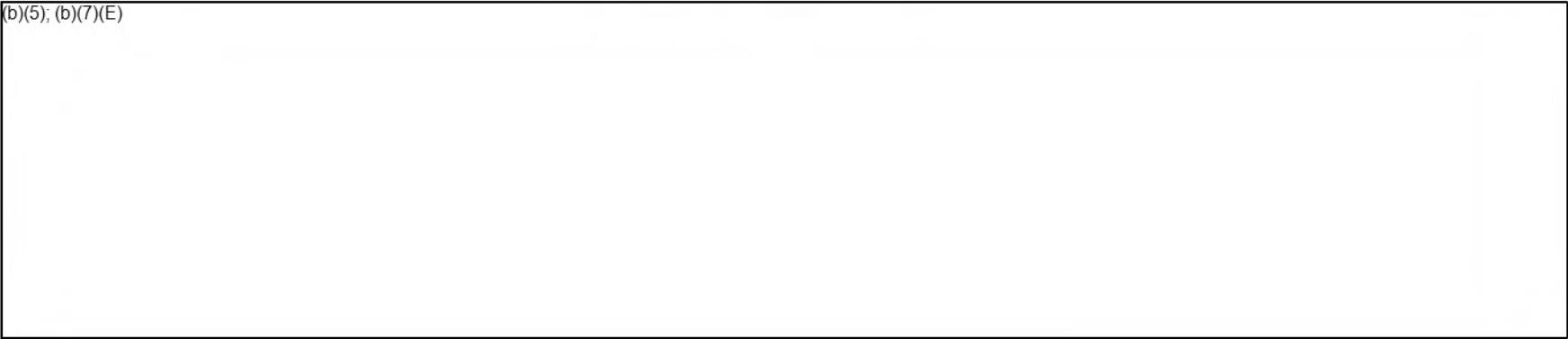


See Student Guide p. 16

Homeland Security Investigations (HSI)

Example 7

7. (b)(5); (b)(7)(E)



See Student Guide p. 17

Homeland Security Investigations (HSI)

Demonstration – FEB Inbound Example

(b)(5), (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 17

Homeland Security Investigations (HSI)

Demonstration – FEB Inbound Example

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 18

Homeland Security Investigations (HSI)

Demonstration – FEB Inbound Example

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 19

Homeland Security Investigations (HSI)

Demonstration – FEB Inbound Example

(b)(5); (b)(7)(E)

See Student Guide p. 19

Homeland Security Investigations (HSI)

FEB Outbound

(b)(5); (b)(7)(E)

See Student Guide p. 21

Homeland Security Investigations (HSI)

Demonstration – FEB Outbound Example

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 22

Homeland Security Investigations (HSI)

Demonstration – FEB Outbound Example

(b)(5); (b)(7)(E)

See Student Guide p. 23

Homeland Security Investigations (HSI)

Demonstration – FEB Outbound Example

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 23

Homeland Security Investigations (HSI)

Demonstration – FEB Outbound Example

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 24

Homeland Security Investigations (HSI)

Extended Border

(b)(5); (b)(7)(E)

See Student Guide p. 25



Homeland Security Investigations (HSI)

Example – Extended Border

(b)(5); (b)(7)(E)

See Student Guide p. 26

Homeland Security Investigations (HSI)

Example – Extended Border (cont'd)

(b)(5); (b)(7)(E)

See Student Guide p. 27

Homeland Security Investigations (HSI)

Example – Extended Border (cont'd)

(b)(5); (b)(7)(E)

See Student Guide p. 27

Homeland Security Investigations (HSI)

Extended Border, cont'd

- 19 U.S.C. § 1595(b) authorizes a “customs officer” (HSI SA) to enter the private lands and buildings of another, but not dwellings, to perform border searches and seizures Ninth-Circuit Caveat: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Demonstration – Extended Border Search

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 28

Homeland Security Investigations (HSI)

Demonstration – Extended Border Search

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 29

Homeland Security Investigations (HSI)

4th Amendment Analysis – Border Search People

- (b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

4th Amendment – Border Search People (cont'd)

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Demonstration – Personal Search Example

(b)(5); (b)(7)(E)

See Student Guide p. 34

Homeland Security Investigations (HSI)

Demonstration – Personal Search Example

(b)(5); (b)(7)(E)

See Student Guide p. 35

Homeland Security Investigations (HSI)

Demonstration – Personal Search Example

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 36

Homeland Security Investigations (HSI)

Demonstration – Personal Search Example

(b)(5); (b)(7)(E)

See Student Guide p. 36

Homeland Security Investigations (HSI)

4th Amendment Analysis – Border Search Object

- Government agents may conduct a routine search at the international border or its functional equivalent without probable cause, a warrant, or any suspicion to justify the search. The degree of invasiveness or intrusiveness associated with any particular type of search determines whether or not that search qualifies as routine. – US v Braks, 842 F. 2d 509 (1st 1988).

Homeland Security Investigations (HSI)

Routine Searches of Items/Objects

Authorized with no warrants and zero suspicion
Personal belongings and effects (See US v. Irving, 452 F.3d 110 (2nd Cir 2006)).
Cargo and other commercial items
Conveyances – cars, trucks, buses, planes, trains, vessels
Use of technology – density busters, x-ray/VACIS, and radiation pagers

Homeland Security Investigations (HSI)

Non-routine Searches of Items/Objects

Authorized with no warrant but still require and reasonable suspicion
Destructive searches – cutting, serious damage to or destroying an object
Examples
Use of drills/probes
Cruise ship cabins/sleeper cabin
trains/cargo ship cabin

Homeland Security Investigations (HSI)

Non-routine Searches of Items/Objects Example

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 38

Homeland Security Investigations (HSI)

Border Search of Documents

• (b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Demonstration – Border Searching Documents

(b)(5); (b)(7)(E)

See Student Guide p. 43

Homeland Security Investigations (HSI)

Border Search of Electronic Devices

- U.S. v. Cotterman, 709 F.3d 952 (9th Cir. 2013 en blanc) – Forensic examination of a computer requires reasonable suspicion
U.S. v. Kolsuz, 890 F.3d 133 (4th Cir. 2018) HSI Legal Update – Border Search of Electronic – May 9, 2018
U.S. Customs and Border Protection, CBP Directive No. 3340-09A, Border Search of Electronic Devices 5 (1-4-2018)
Basic Search – without suspicion
Advanced Search – with reasonable suspicion
U.S. v. Carpenter. 138 S. Ct. 2206 (2018) – The Government’s acquisition of Carpenter’s cell site records was a Fourth Amendment search



Homeland Security Investigations (HSI)

Practice

1.

(b)(5); (b)(7)(E)

[Redacted content]

See Student Guide p. 46

Homeland Security Investigations (HSI)

Practice (cont'd)

2.

(b)(5); (b)(7)(E)

See Student Guide p. 46



Homeland Security Investigations (HSI)

Practice (cont'd)

3.

(b)(5); (b)(7)(E)

See Student Guide p. 46



Homeland Security Investigations (HSI)

Practice (cont'd)

4.

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)

See Student Guide p. 46

Homeland Security Investigations (HSI)

Practice (cont'd)

5.

(b)(5); (b)(7)(E)

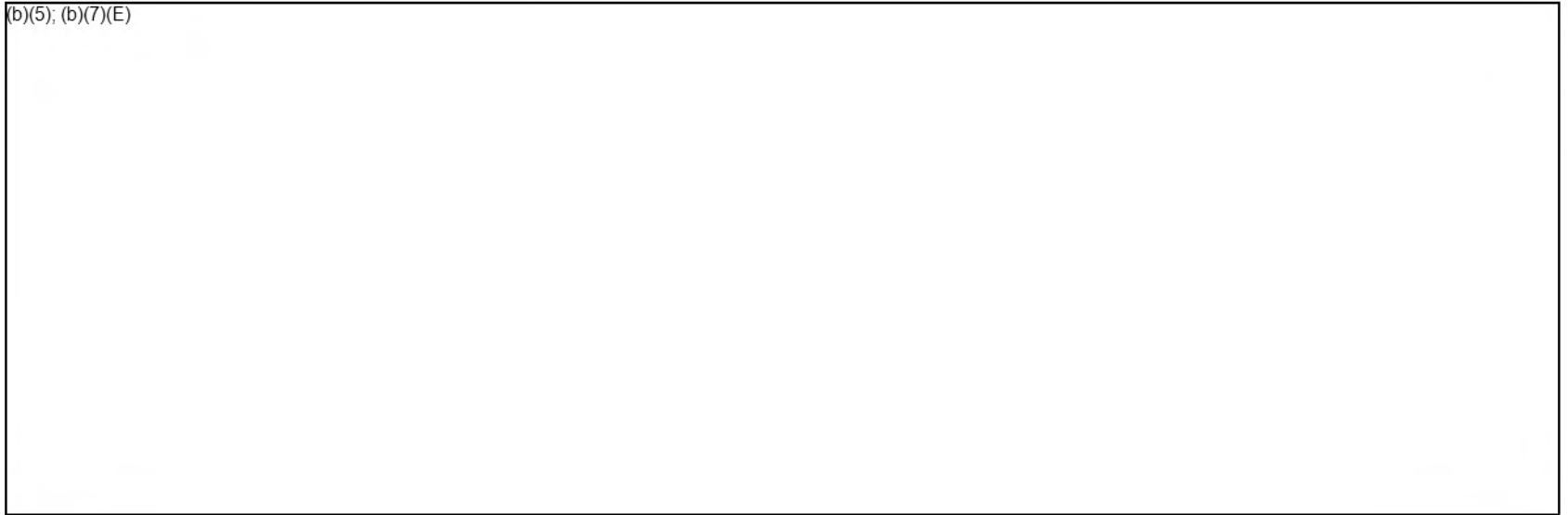
5. See Student Guide p. 47

Homeland Security Investigations (HSI)

Practice (cont'd)

6.

(b)(5); (b)(7)(E)



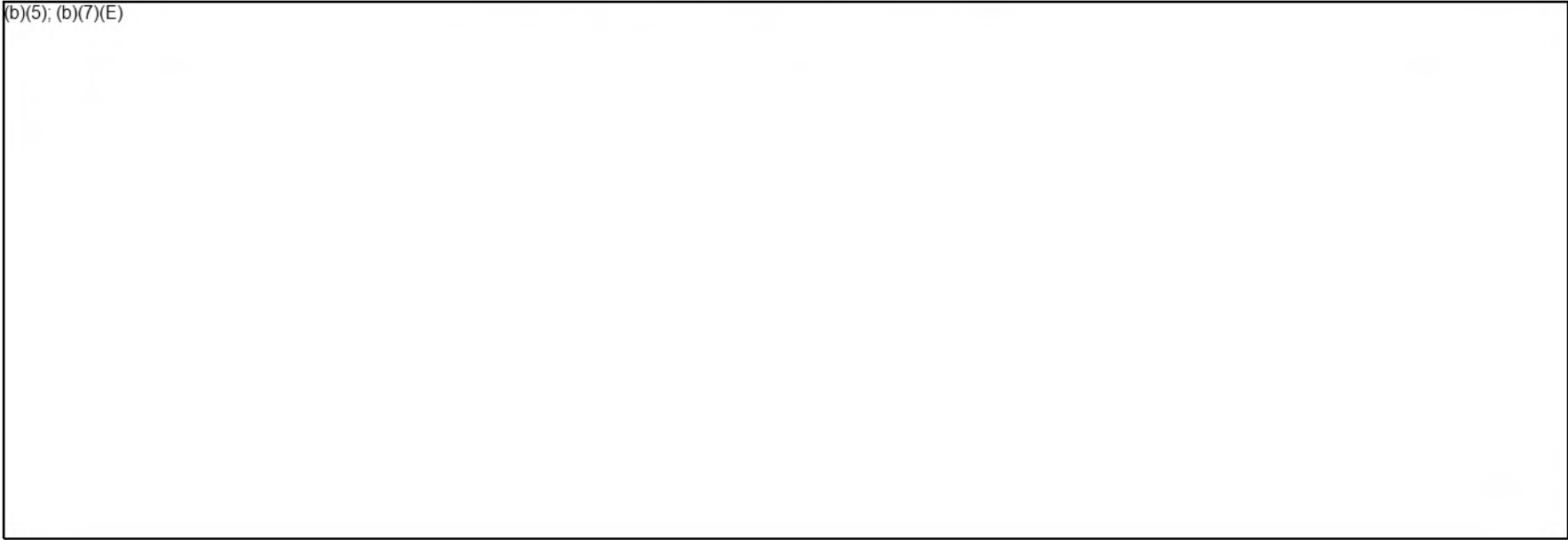
See Student Guide p. 47

Homeland Security Investigations (HSI)

Practice (cont'd)

7.

(b)(5); (b)(7)(E)



See Student Guide p. 47



Homeland Security Investigations (HSI)

Practice (cont'd)

8.

(b)(5); (b)(7)(E)

[Redacted content]

See Student Guide p. 48

Homeland Security Investigations (HSI)

Practice (cont'd)

9.

(b)(5); (b)(7)(E)

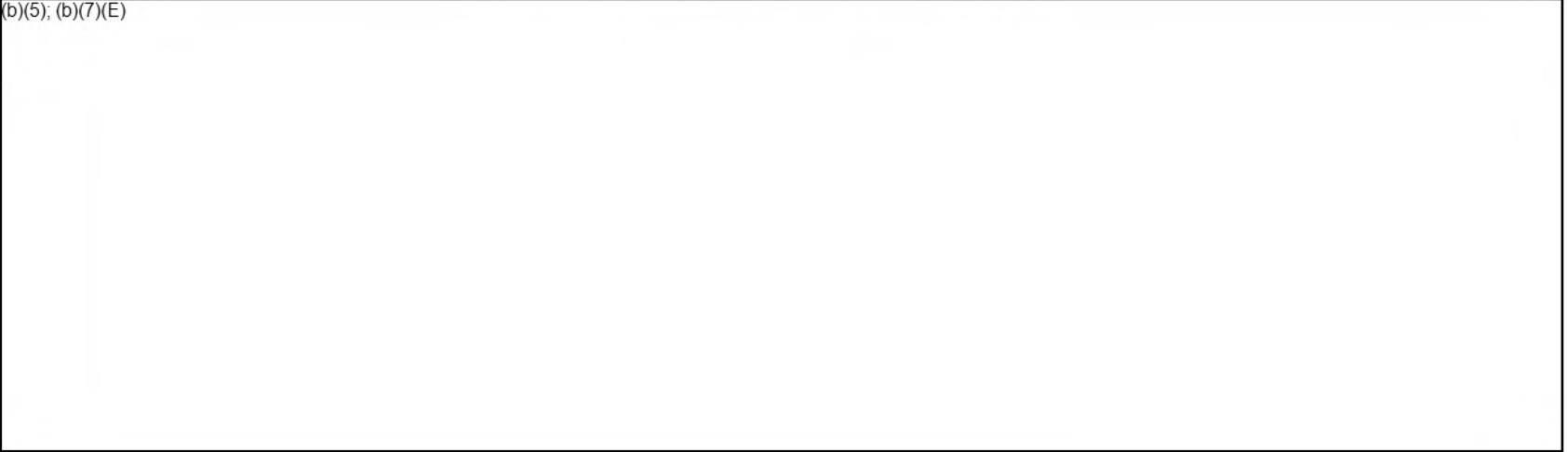
See Student Guide p. 48



Homeland Security Investigations (HSI)

Practice (cont'd)

10. (b)(5); (b)(7)(E)



See Student Guide p. 48

Homeland Security Investigations (HSI)

Summary

(b)(5); (b)(7)(E)



Protecting the Borders Against Illicit Trade, Travel, and Finance



Forging a New Legacy

Homeland Security Investigations Electronic Surveillance Training Program (ICE-SAT) ICE Academy

Terminal Performance Objective

Given a set of case-related facts and access to a Technical Enforcement Officer (TEO)/ Designated Technical Agent (DTA), demonstrate the ability to prepare for and conduct an electronic surveillance in support of an investigation following the techniques and procedures in accordance with the HSI Technical Operations Handbook.

Homeland Security Investigations (HSI)

Enabling Performance Objectives

- Distinguish between all-parties consent, consensual and non-consensual monitoring
Determine DOJ, DHS and HSI policies and procedures for the interception and/or recording of consensually monitored verbal communications
Identify HSI policies and procedures for issuance and control of electronic surveillance equipment and evidence
Use basic functions of selected electronic surveillance equipment, including covert

(b)(7)(E)

Homeland Security Investigations (HSI)

Review of the Past

- In Physical Surveillance – discussed: Importance of planning
Surveillances objectives dictate the methods
Electronic surveillance as another method of gaining information
In Legal instruction – covered: Authorities for electronic surveillance
Considerations for electronic surveillance

Homeland Security Investigations (HSI)

Main Ideas

- Primary focus – various types of electronic surveillance equipment, specifically

(b)(7)(E)

(b)(7)(E)

Basic

operation of surveillance

equipment Applications in the investigation of
criminal activities



Homeland Security Investigations (HSI)

Agenda

- Use the Technical Operations Handbook as guide
Areas that may result in procedural or legal errors
Consensual and non-consensual monitoring
DOJ and HSI policies and procedures
Basic function/operation of surveillance equipment
Applications in the investigation of criminal activities
Demonstration of use of surveillance equipment
Practice using surveillance equipment

Homeland Security Investigations (HSI)

Non-Consensual Monitoring

Willful intercept or attempt to intercept any wire or oral non-consensual communications without a court order – criminal offense

- Penalty – maximum 5 years of imprisonment

No parties to the conversation have consented to the monitoring – also referred to as:

- “Wiretap” “Title III intercept”

Homeland Security Investigations (HSI)

Consensual Monitoring

At least one party has consented; consenting party is directly or indirectly working for the Government – UC agent or informant

(b)(5); (b)(7)(E)

All party consent – recorded conversation

“Interception”/“monitoring” – aural acquisition by electronic, mechanical, or other

(b)(5); (b)(7)(E)



Homeland Security Investigations (HSI)

Establish Prior Consent

Consent can be established and documented by at least two methods:

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Consensual Monitoring Approval Process

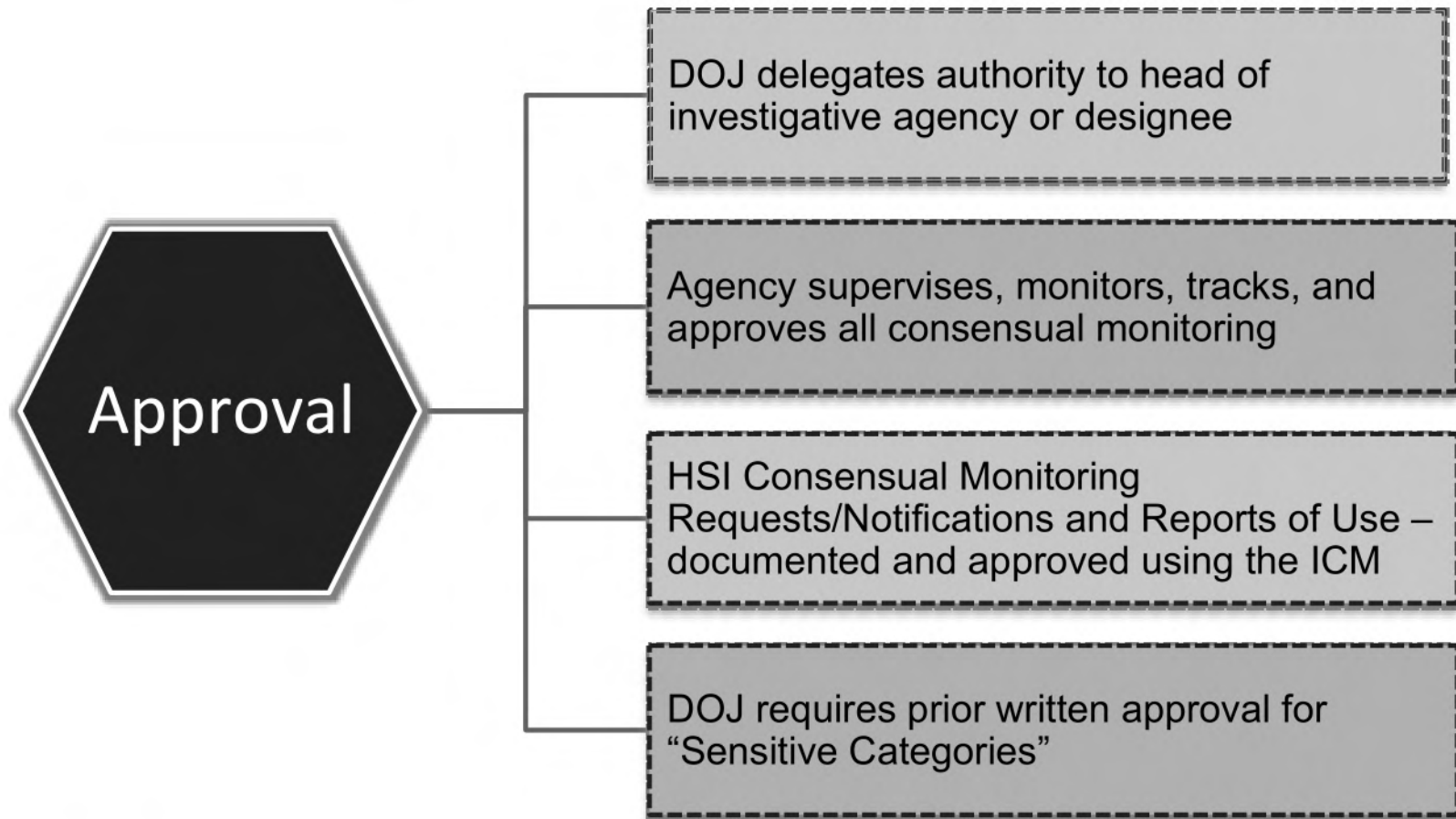
(b)(5); (b)(7)(E)

Taking a closer look



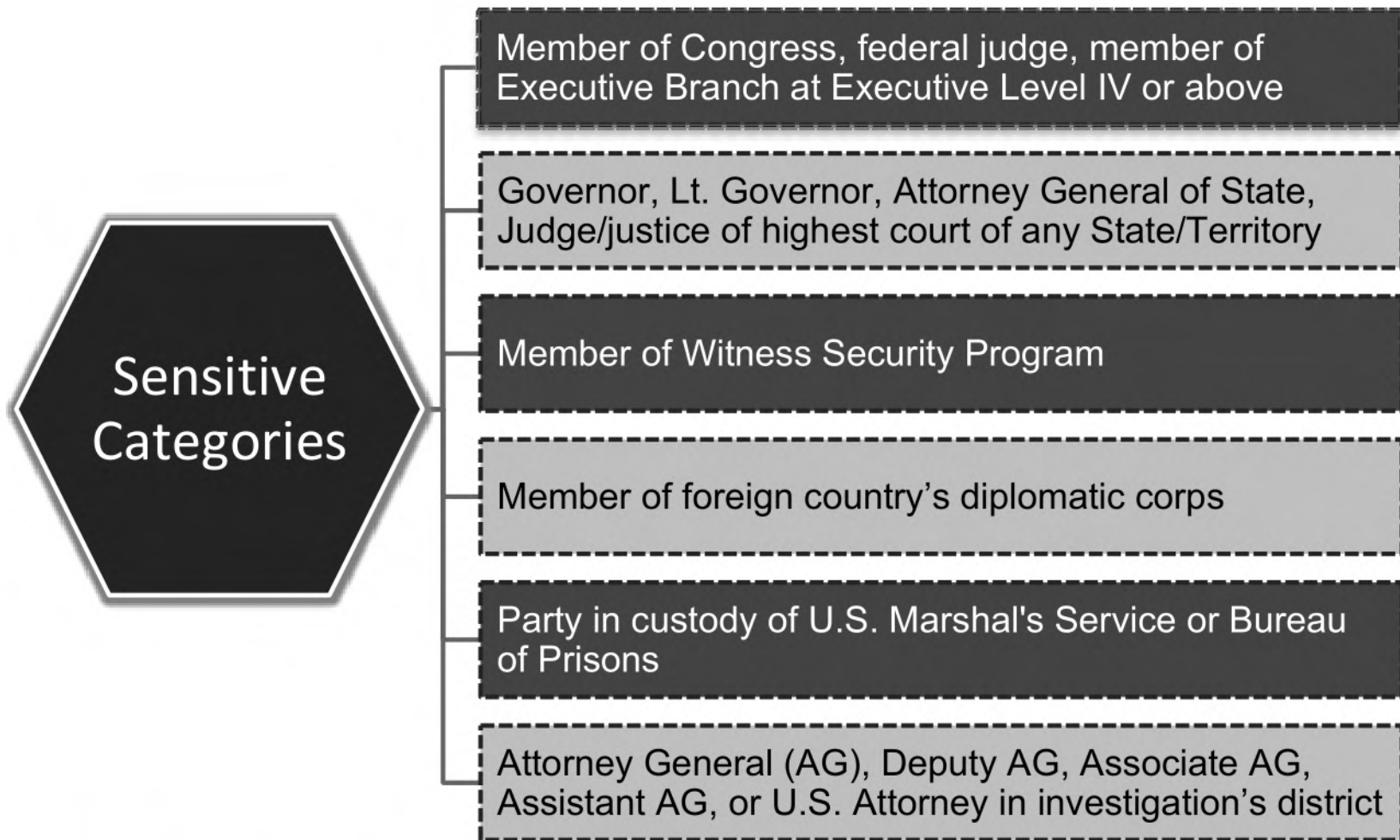
Homeland Security Investigations (HSI)

Consensual Monitoring



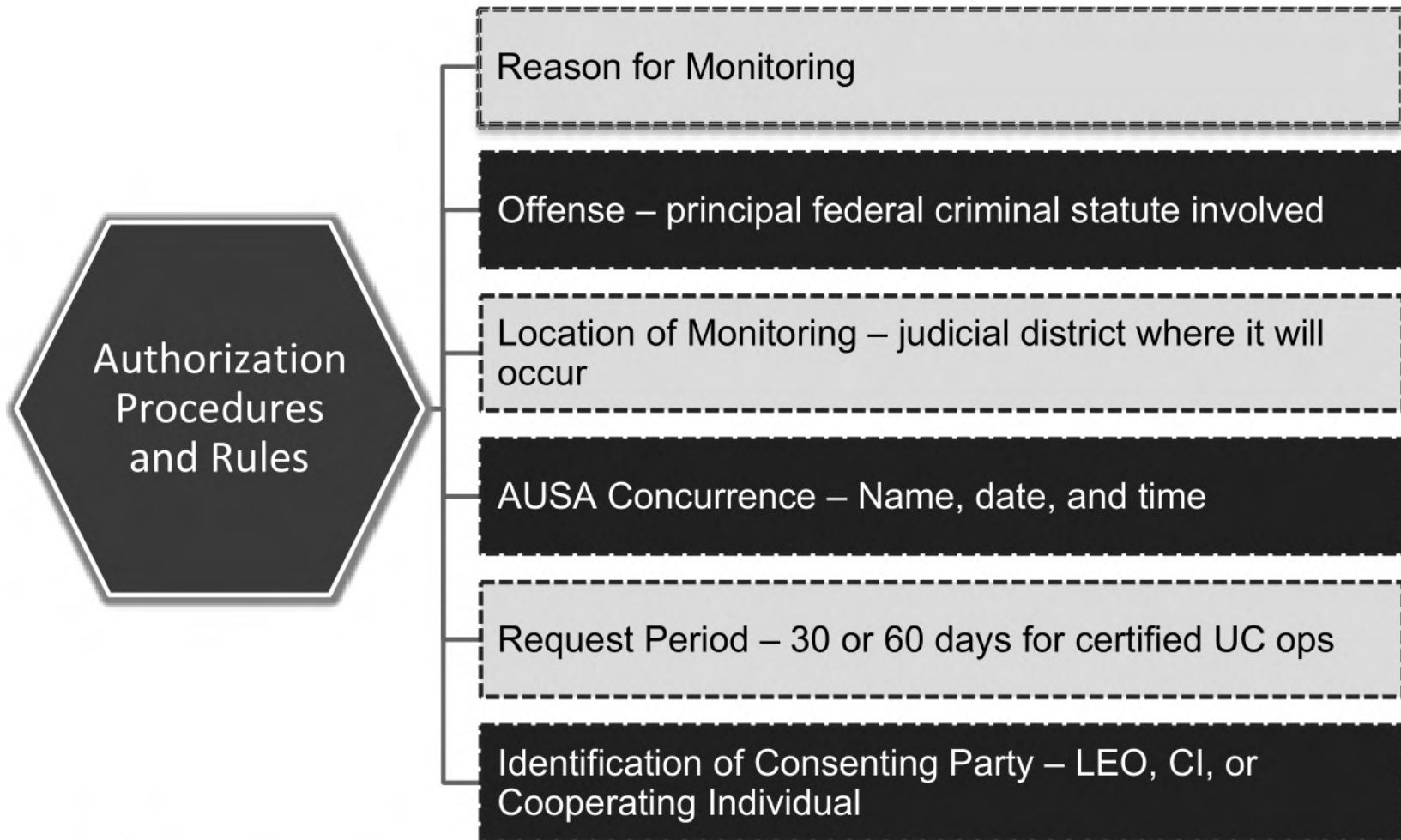
Homeland Security Investigations (HSI)

Consensual Monitoring



Homeland Security Investigations (HSI)

Consensual Monitoring



Homeland Security Investigations (HSI)

Consensual Monitoring



(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

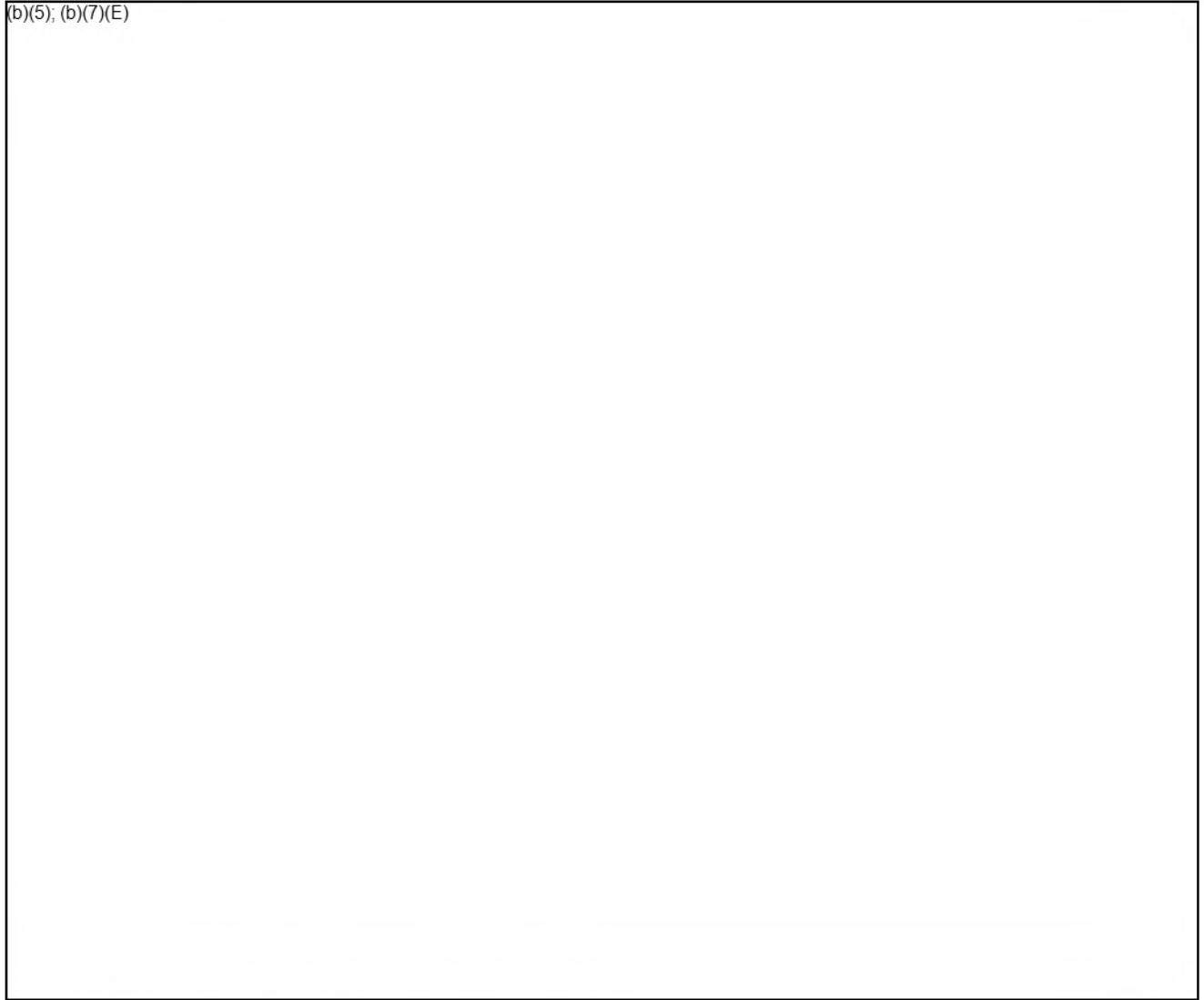
Consensual Monitoring

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Telephone Intercepts

(b)(5); (b)(7)(E)



Homeland Security Investigations (HSI)

Electronic Surveillance Equipment

INCLUDE

DOES NOT INCLUDE

(b)(5), (b)(7)(E)

Homeland Security Investigations (HSI)

Technical Support for Criminal Investigations

Designated Technical Agent

- ❖ SA who supports criminal investigations through electronic surveillance and techniques

DTA

Technical Enforcement Officer

- ❖ Primary LEO who supports through use of electronic surveillance equipment and techniques Primary responsibility is gathering of evidence in furtherance of criminal prosecutions

TEO



Homeland Security Investigations (HSI)

Storage and Issuance

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

About Using Another Agency's Equipment

(b)(5); (b)(7)(E)

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2148

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2149

Withheld pursuant to exemption

(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2150

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Homeland Security Investigations (HSI)

Planning the Operation

(b)(5); (b)(7)(E)

Page 2152

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2153

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(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2154

Withheld pursuant to exemption

(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

Page 2155

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Homeland Security Investigations (HSI)

Discussion and Demonstration #1

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Homeland Security Investigations (HSI)

Discussion and Demonstration #2

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Discussion and Demonstration #3

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Homeland Security Investigations (HSI)

Practice

(b)(5); (b)(7)(E)

Homeland Security Investigations (HSI)

Summary

- Electronic surveillance – essential investigative tool
New electronic technology enhances SAs' ability to conduct successful surveillances
Specific guidelines – for use, procurement, storage
Willful intercept of wire or oral non-consensual communications without court order = possible imprisonment
Engage TEO/DTA early in planning stage



Protecting the Borders Against Illicit Trade, Travel, and Finance

US Immigration and Customs Enforcement OFFICE OF TRAINING AND DEVELOPMENT

ICE Academy



ELECTRONIC SURVEILLANCE 11400

Student Guide

HSI Special Agent Training

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