

# Should social media decide entry to the US?

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Certain visitors to the United States are now being asked by the government (specifically U.S. Customs and Border Protection, or CBP, an agency within Department of Homeland Security) to volunteer their online information for popular social media sites like Facebook, Twitter, Instagram, LinkedIn and more.

Currently, the inquiry is limited to visitors entering under the Visa Waiver Program (VWP).

Normally, any person who wishes to travel to the U.S. must first appear at a U.S. consulate in their home country and apply for a visa. Travel to the U.S. is possible only if the visa is approved. Upon arriving at a U.S. entry port, such person is examined again by CBP and allowed or disallowed entry.

VWP entrants, however, are permitted to arrive at a U.S. port without a visa and the attendant prior scrutiny by a U.S. consulate. They are citizens of countries with whom we have an agreement to permit travel without

applying for and obtaining a visa first. These entrants go through an automated check for eligibility (ESTA).

The rationale behind requesting VWP entrants to volunteer their social media information is sound in that CBP is charged with protecting U.S. entry ports — air, water and land. It is imperative for the agency to have access to every bit of relevant information, to weed out any potential miscreants.

But, almost equally sound are some of the objections being raised.

It is important to examine the current laws before evaluating the CBP regulation.

Visitors to the U.S., until they enter the country and get past the port of entry, have limited rights. They don't have the full protection of the U.S. Constitution. For instance, visitors have no right to counsel during most instances of inspection at the borders. CBP officers have the power to summarily and expeditiously remove a visitor (or return that person to their home country) for a wide variety of reasons, including not having proper documentation, misrepresentation, and suspected complicity in subversion or terrorism. An expedited removal imposes a five-year bar against entering the U.S. Recognizing the need for caution, recently the Congress has tightened the security aspects of VWP by requiring selected classes of citizens of VWP countries to apply for and obtain a visa.

CBP officers also possess the statutory “power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this Act which would be disclosed by such search.”

To protect against unjust decisions, CBP provides a corrective tool in a system called TRIP, or the Traveler Redress Inquiry Program. This is one of the tools we, as counsel, routinely use to prevent recurring interrogation based upon false assumptions made by the CBP and to reverse denial of admission or actual removal of a visitor. TRIP allows us to provide contextual, explanatory and corrective information, which is then included as a part of a visitor's official immigration record for the reference of CBP officers inspecting future entries.

Clearly, under the scheme of laws and policies that have existed even prior to the current addition, CBP officers possessed a broad range of powers and all visitors possessed limited rights. It is already quite common for luggage to be searched, documents found in the luggage to be read and lines of questioning to be developed based upon the discovered information.

The uniqueness of social media information lies in several factors not otherwise encountered in discovering information through a search of a person and their personal effects. Social media is not “in the possession” of an entrant, and contrary to the statute its disclosure does not require any suspicion of wrongdoing. Nevertheless, it is publically available information and the information is requested to be volunteered. Then again, unlike a letter found in the luggage, social media information can impinge broadly as well as deeply upon the right of expression (which is really not available explicitly at the U.S. border) and also exposes all of a person’s social network to scrutiny.

More specifically, the objections to this inquiry have been aptly summarized in a letter to the CBP written by the Center for Democracy & Technology, noting that this inquiry would “invade individual privacy and imperil freedom of expression while being ineffective and prohibitively expensive to implement and maintain.” They further elaborate that CBP social media information collection is:

- Highly invasive: “an open-ended inquiry into ‘online presence’ would give DHS a window into applicants’ private lives.”
- A pretext for intelligence gathering.
- Likely to create disproportionate risks: Because of language and cultural barriers, Arab and Muslim communities are likely to be disproportionately affected. Their online postings are susceptible to a greater degree of misapprehension than those of others.
- Ineffective for screening applicants: Social media may neither be accurate or represent full self-disclosure. The really bad guys are not going to surrender culpatory information.
- Prohibitively expensive. Automated processing of this data would require sophisticated capabilities in machine learning and complex network analytics that will be expensive beyond the government estimates. Add to that the inevitable cost of human review and analysis, which “would render the proposal prohibitively expensive, with no conclusive benefits to the mission of DHS.”

The center's objections are eminently worthy of deliberation, but as in much of regulation, we need to balance equities that are central to the problem. On the one hand is our interest in encouraging genuine visitors to come to the U.S. for tourism and commerce, and on the other is preventing harm to our people and property. Our balancing act requires an acknowledgement that there is no such thing as a perfect regulation. We can only hope to strike a compromise that does not offend our deep sensibility regarding safety.

In striking the proper balance, there is one factor unique to VWP entrants that may be the tipping point in favor of the CBP action: they are not vetted by the consulates before they arrive at a U.S. port.

CBP cannot reasonably be expected to make an assessment in the few seconds they usually spend in a primary inspection at the port of entry. As noted earlier, citizens of countries other than VWP countries must first apply for and obtain a visa at a U.S. consulate (usually) in their home country. These consulates are presumably well-equipped to evaluate an applicant in the context of the local practices and customs. Thus, the rest of the world goes through a vetting process first at the consulate and then again at the port by the CBP. Because the VWP applicants are allowed to skip visa applications, their inspection occurs only once, at the port of entry. Therefore, asking them to volunteer additional information appears more reasonable than asking people who have gone through the visa process.

The VWP program participants are given an important privilege to expedite their travel. Correspondingly, the U.S. government may legitimately expect greater cooperation.

In the final analysis, dealing effectively with the VWP subset of almost a million entrants who enter the U.S. each day may well require some extra measures. Keeping in view the equities, asking to volunteer publicly available information seems reasonable on its face. The well established use of social media by subversive elements is incontrovertible. We will need to change our own defensive tactics accordingly. The test of reasonableness and efficacy will ultimately have to await full implementation and actual use.

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