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Via e-mail to margaret_whiting@judiciary-sem.senate.gov
Margaret Whiting
United States Senate
Committee on the Judiciary
Subcommittee on the Constitution
Washington, D.C. 20510-6275

Dear Ms. Whiting:

I am writing in response to two written questions from Senator Brownback with regards to my testimony before the Subcommittee on June 25, 2008, on the subject of border searches.

1. "In his closing statement, Chairman Feingold indicated that your testimony contemplated a surveillance state, based on your statement that, '[g]iven the possibility of surveillance of phones and the Internet, "old fashioned" smuggling across the border, by storing files on a laptop, might prove a safer and more attractive alternative for such communication provided the persons doing so could be assured that the computer would not be subject to the possibility of random and suspicionless search.' I'd like to give you the opportunity to respond to this characterization of your testimony."

I was surprised by this statement from Chairman Feingold and his insinuation that I approved of all of the Bush Administration's tactics in the War on Terror ("I also think this issue has to be placed in the larger context of this administration's ongoing assault on Americans' privacy. There was a statement in Mr. Cunningham's written testimony ..."). In fact, my written testimony indicates the need for restraint and balance in this area. I specifically distinguished searches of laptops from their seizure:

> Seizures of such devices are another matter altogether. The border exception justifies the search, not the seizure, of items that cross the border. In order to seize an item, the government must have probable cause that the item is, or contains, contraband. If a Customs officer finds child pornography on a laptop, for example, he or she would be justified

> in seizing the computer since it contains contraband and persons do not have a right to retain contraband. I am aware of no authority that would permit the government, without probable cause to believe it contains contraband, to keep a person's laptop or to copy the contents of its files.

Moreover, because of the privacy concerns at issue with laptop searches, I suggested the need for oversight, established procedures, training, and supervision:

> During oral argument in *Flores-Montano*, it came to light that Customs keeps a record of all border searches that its agents conduct and the reasons, if any, for each particular search. If this is the still the case, the records should provide Congress with enough information to determine whether laptop searches are being conducted in a abusive or racially discriminatory manner. . . . If such records are no longer being kept, it might be advisable for the practice to be restarted.
>
> The Executive Branch can take administrative and rule-making steps, in addition to record-keeping, to ensure that privacy intrusions are kept to a minimum. For example, at the traveler's request, an examination of a computer should occur away from public view. Only officers who have received appropriate training should be allowed to conduct searches, in order to minimize the possibility of irreparable damage to, or erasure of, files and the hardware itself. A rule requiring searches to be conducted in the presence of a supervisor would also be prudent.

My testimony, therefore, was a far cry from calling for a "surveillance state."

Regarding the specific portion of my written testimony that Chairman Feingold quoted, my statement was not intended to argue for the creation of a "surveillance state." Rather, my point was that terrorists might use laptops and other electronic storage devices to bring messages or plans into the country if they knew that there would be a lower risk of detection than through, for example, phone calls, e-mails, or instant messages. The fact is that surveillance of Internet traffic and telephone communications can legally occur through wiretaps and other electronic intercepts. I expressed no opinion in my written testimony about the legality or desirability of specific forms of surveillance or whether the Executive Branch may employ such methods without judicial review. (In fact, my personal view is that, in the absence of severely exigent circumstances, any surveillance of telephone conversations or Internet traffic should first be preceded by a warrant, obtained from either a judge of the Foreign Intelligence Surveillance Court or any another Article III judge. I was troubled when the *New York Times* reported, in late 2005, of an Executive Order authorizing National Security Agency wiretaps without FISC approval. In my view, the FISA process works well and provides a necessary check against overzealous government conduct.)

2. "In your written testimony, you indicate that travelers entering the United States have a lowered expectation of privacy in the objects and papers they bring with them, in some part because those objects and papers may have been subjected to search—and even extensive search—by the country they are leaving. In response to questioning from Chairman Feingold, Ms. Gurley testified that the United States should not base its border search policies on the examples of countries like North Korea and Uzbekistan. Is it your understanding that only totalitarian nationals like these conduct proactive border searches?"

No. In fact, before mentioning North Korea and Uzbekistan, Ms. Gurley testified that Canada, like the United States, has a practice of searching laptop computers at the border. Indeed, in *United States v. Romm*,[1] the defendant's child pornography was initially found during an entrance search by Canadian officials. A brief examination of the laptop indicated that its Internet browser's "history" folder contained the images in question. After Canada refused the defendant entry, he was returned to the United States where our customs officials searched his laptop, found ten images of child pornography, and made a formal arrest. Without the proactive work of Canadian law enforcement, the defendant—who had a criminal history of sex offense convictions—may never have been caught. This example demonstrates that the United States is not alone in this area and that even respected democracies, like Canada, take steps to protect their borders.

There is a broader point here, however. A basic question in this area is: how much of a reasonable expectation of privacy does a person have while traveling internationally? An international journey will, by definition, require contact between the traveler and at least two countries, the origin nation and the destination nation, each of which has a right to conduct its own entrance and exit search. An American traveler should therefore recognize that even if the United States adopted a relaxed border search policy, he and his possessions would still be subject to search by the other countries with which he had contact. A prudent traveler, concerned for the privacy of his person and belongings, would limit the sensitive information he carries while traveling abroad. Indeed, the U.S. Department of State, on its website,[2] cautions travelers against bringing unnecessary papers or objects on international trips. It also advises travelers to check with the foreign country's embassy to determine which items are prohibited by local law.

My point is *not* that we should mirror the policies and practices of totalitarian nations. Rather, all countries conduct both entrance and exit searches as a matter of course. Therefore, a change in U.S. border search policy would not, by itself, diminish the privacy intrusions that travelers would face.

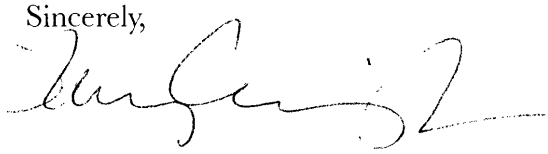
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[1] 455 F.3d 990 (9th Cir. 2006).

[2] http://travel.state.gov/travel/tips/tips_1232.html

Thank you for the opportunity to submit these written answers into the record. Please advise me if you require anything additional.

Sincerely,



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