

Statement of

The Honorable Russ Feingold

United States Senator

Wisconsin

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Opening Statement of U.S. Senator Feingold

At the Senate Judiciary Committee

Subcommittee on the Constitution Hearing on

"Laptop Searches and Other Violations of Privacy Faced by Americans

Returning from Overseas Travel"

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Good morning, and welcome to this hearing of the Constitution Subcommittee entitled "Laptop Searches and Other Violations of Privacy Faced by Americans Returning from Overseas Travel." We'll be hearing this morning from a panel of experts who can help us explore the legal and practical implications of this important issue.

If you asked most Americans whether the government has the right to look through their luggage for contraband when they are returning from an overseas trip, they would tell you yes, the government has that right. But if you asked them whether the government has a right to open their laptops, read their documents and e-mails, look at their photographs, and examine the websites they have visited, all without any suspicion of wrongdoing, I think those same Americans would say that the government absolutely has no right to do that. And if you asked them whether that actually happens, they would say, "not in the United States of America."

But it is happening. Over the last two years, reports have surfaced that customs agents have been asking U.S. citizens to turn over their cell phones or give them the passwords to their laptops. The travelers have been given a choice between complying with the request or being kept out of their own country. They have been forced to wait for hours while customs agents reviewed and sometimes copied the contents of the electronic devices. In some cases, the laptops or cell phones were confiscated, and returned weeks or even months later, with no explanation.

Now, the government has an undeniable right and responsibility to protect the security of our borders. The Supreme Court has thus held that no warrant and no suspicion is necessary to conduct, quote, "routine searches" at the border. But there is a limit to this so-called "border search exception." The courts have unanimously held that invasive searches of the person, such as strip searches or x-rays, are "non-routine" and require reasonable suspicion. As the Supreme Court has stated, these searches implicate "dignity and privacy interests" that are not present in routine searches of objects.

So the constitutional question we face today is this: When the government looks through the contents of your laptop, is that just like looking through the contents of a suitcase, car trunk, or purse? Or does it raise dignity and privacy interests that are more akin to an invasive search of the person, such that some individualized suspicion should be required before the search is conducted?

This administration has argued in court that a laptop can be searched without any suspicion because is no different from any other, quote, "closed container." I find that argument disingenuous, to say the least. The search of a suitcase - even one that contains a few letters or documents - is not the same as the search of a laptop containing files upon files of photographs, medical records, financial records, e-mails, letters, journals, and an electronic record of all websites visited. The invasion of privacy represented by a search of a laptop differs by an order of magnitude from that of a suitcase.

Ultimately, though, the question is not how the courts decide to apply the Fourth Amendment in these uncharted waters. I guarantee you this: neither the drafters of the Fourth Amendment, nor the Supreme Court when it crafted the "border search exception," ever dreamed that tens of thousands of Americans would cross the border every day, carrying with them the equivalent of a full library of their most personal information. Ideally, Fourth Amendment jurisprudence would evolve to protect Americans' privacy in this once unfathomable situation. But if the courts can't offer that protection, then that responsibility falls to Congress. Customs agents must have the ability to conduct even highly intrusive searches when there is reason to suspect criminal or terrorist activity, but suspicionless searches of Americans' laptops and similar devices go too far. Congress should not allow this gross violation of privacy.

Aside from the privacy violation, there is reason for serious concern that these invasive searches are being targeted at Muslim Americans and Americans of Arab or South Asian descent. Many travelers from these backgrounds who have been subject to electronic searches have also been asked about their religious and political views. As we'll hear today, travelers have been asked why they chose to convert to Islam, what they think about Jews, and their views of the candidates in the upcoming election. This questioning is deeply disturbing in its own right. It also strongly suggests that border searches are being based at least in part on impermissible factors.

The disproportionate targeting of this group of Americans does not mean that other Americans are exempt. The Association of Corporate Travel Executives has surveyed its members, and seven percent of business travelers who responded to the survey had experienced seizures of their laptops or other electronic equipment. That's an incredible number, when you consider how many Americans are required to undertake overseas business travel today and the amount of confidential business information stored on their laptops. As we'll be hearing today, the problem is large enough to have a real impact on the way Americans do business.

Americans have tried to find out from DHS what its specific policies are on searching and seizing electronic equipment at the border. Two non-profit organizations filed a Freedom of Information Act request in October 2007 to get DHS to turn over its policies. Eight months later, DHS has not complied with that request. My own questions for Secretary of Homeland Security Michael Chertoff on this issue, which I submitted to him in early April after his appearance at an oversight hearing held by the full Judiciary Committee, have not been answered, despite my specific request that they be answered before this hearing.

I asked DHS to send a witness to testify today. DHS responded that its preferred witness was unavailable on the day of the hearing. I asked DHS to send a different witness, but DHS declined. I felt it was so important to have a DHS witness here that I wrote a letter to Secretary Chertoff last week urging him to reconsider. That letter will be made part of the hearing record. I would put the Secretary's response in the record, as well, but he has not responded.

DHS did provide written testimony. That testimony, which incidentally was submitted over 30 hours later than the committee's rules require, provides little meaningful detail on the agency's policies and raises more questions than it answers - questions that no one from DHS is here to address.

Needless to say, I'm extremely disappointed that DHS would not make a witness available to answer questions today. Once again, this administration has demonstrated its perverse belief that it is entitled to keep anything and everything secret from the public it serves and their elected representatives, while Americans are not allowed to keep any secrets from their government. That's exactly backwards. In a country founded on principles of liberty and democracy, the personal information of law-abiding Americans is none of the government's business, but the policies of the government are very much the business of Congress and the American people.

In any event, I look forward to hearing from the witnesses who did accept my invitation to testify today, so we can begin to explore this important issue in more detail.