

September 15, 2015

The Honorable Charles Grassley, Chairman
The Honorable Patrick J. Leahy, Ranking Member
Senate Committee on the Judiciary

Re: S. 356, the Electronic Communications Privacy Act Amendments Act of 2015

Dear Chairman Grassley and Ranking Member Leahy:

I write to urge Senators on the Judiciary Committee to support S. 356, the Electronic Communications Privacy Act Amendments Act of 2015. This amendment would require law enforcement officials to obtain a warrant before accessing the contents of private electronic communications, which is essential to preserve the Fourth Amendment's privacy safeguards in the face of evolving technology.

When it was enacted in 1986, the Electronic Communications Privacy Act (ECPA) was a cutting-edge piece of legislation that established rules for law enforcement access to private electronic communications. But, now, nearly 30 years later, it is clear that many of those rules have failed to keep pace with changes in technology. For example, ECPA has different rules for law enforcement access to emails depending on how old they are and where they are stored. Under ECPA, law enforcement officials are required to obtain a warrant only when an email is less than 180 days old, and do not have to obtain a warrant at all in order to access documents most people store online "in the cloud." Today, when everyone uses email for so many aspects of everyday life, and we have the ability to store seemingly unlimited amounts of information online through cloud services, the old rules of ECPA no longer make sense. These changes in technology were recognized by the U.S. Court of Appeals for the Sixth Circuit when it held in 2010 in *U.S. v. Warshak* that the Fourth Amendment protects email even if it is over 180 days old, and struck down the current ECPA standards for government access to email. Now it is time for Congress to act to reform ECPA and apply this constitutional standard uniformly throughout the country.

Based on my decades of experience both as a judge and in law enforcement, I believe that these reforms to ECPA would preserve the role of the Fourth Amendment without unduly hampering law enforcement. I have served as Chief of the Government Operations Section at the United States Department of Justice, as United States Attorney, as United States District Court Judge, and Chief Judge on the United States District Court for the Western District of Texas. I was then appointed by President Ronald Reagan to serve as the Director of the Federal Bureau of Investigation, a position I continued to hold under Presidents George H.W. Bush, and William J. Clinton. I have devoted much of my career to law enforcement and the fair and effective operation of our justice system.

Extending the warrant requirement to all email communications would not hamper criminal investigations; law enforcement officials would still be able to gain access to the content of electronic communications in appropriate cases where they meet the

Constitution's probable cause standard. A warrant requirement would benefit criminal investigations because it gives law enforcement officers clarity about how to obtain communications regardless of what jurisdiction they might be in. Moreover, the law will continue to provide an exception to the warrant requirement for situations in which there is a risk of death or serious injury before a warrant could be obtained. The law permits providers to share user information with the government absent a warrant if "the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person...requires disclosure without delay."¹ In situations not meeting this definition where time is still of the essence, all judicial districts make a magistrate judge available after hours for requests requiring immediate action.

Nor would these amendments to ECPA hamper investigations under the Foreign Intelligence Surveillance Act (FISA). S. 356 would not amend FISA in any way, and investigations of foreign intelligence information under FISA would not be affected. In fact, the FISA Amendments Act added a new method of acquiring intelligence "Notwithstanding any other provision of law," so it cannot be affected by any changes to ECPA.

I believe that reforming ECPA is necessary in order to ensure that constitutional safeguards continue to apply in the digital age. The ECPA Amendments Act would enable law enforcement to continue to conduct investigations, while having clarity about the rules in place. I urge Committee Members to support this legislation.

Very truly yours,



William S. Sessions

cc: Members of the Senate Judiciary Committee

¹ 18 U.S.C. § 2702(c)(4).