

September 18, 2012

The Honorable Patrick Leahy, Chairman
The Honorable Chuck Grassley, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: Law Enforcement Perspectives on ECPA Reform

Dear Chairman Leahy and Ranking Member Grassley,

We write on behalf of professionals in state and local law enforcement agencies nationwide to express concern about proposed revisions to the Electronic Communications Privacy Act (ECPA). It is our job to protect American citizens at home, generate and investigate leads after crimes have been committed, and work to see justice done for victims of crime. While we appreciate the committee's desire to update the law to reflect new technological and communications realities, we do not believe that the ECPA reform proposal under consideration by the committee has been adequately studied to determine its impact on our ability to perform our mission.

Since Congress passed the Electronic Communications Privacy Act in 1986, our society has experienced a revolution in electronic communication that has made all of us – including those who commit crimes – more connected and more productive. As cell phones, online social network interactions, texts, and emails have become standard modes of communication, law enforcement has witnessed profound changes in the nature of crime scene evidence. According to CTIA – The Wireless Association, there are more wireless subscriber connections in the United States than there are citizens, and there are more than 2.3 trillion SMS text messages sent annually, an increase of 1,300 percent from 158 billion just six years ago. In 2011 more than 52 billion MMS messages were sent. There are more than 1 billion Facebook posts daily. According to Twitter's CEO there are more than 400 million Tweets per day as of June, 2012.

It should not be surprising, then, that the crime scene of the 21st century is filled with electronic records and other digital evidence. In fact, today's electronic communications devices are silent witnesses to the vast majority of crimes. Whether we are dealing with rapes, murders, human trafficking, child sexual exploitation, kidnapping, drug gangs, retail theft, organized criminal conspiracies, or car break-ins, electronic communications records often hold the key to solving the case. They also hold the key to ruling out suspects and exonerating the innocent. Our ability to access those records quickly and reliably under the law is fundamental to our ability to carry out our sworn duties to protect the public and ensure justice for victims of crime.

Communications service providers, online social media, and e-commerce companies complain that laws on the books lag behind technological realities and lead to customer and compliance uncertainties. At the same time, the law enforcement community strongly believes that laws, policies, protocols, and practices related to the process of law enforcement evidence retrieval from communications service

providers are out-of-date and increasingly insufficient moving forward. Any effort to revise ECPA should involve detailed and careful consideration of the consequences of proposed changes on the ability of law enforcement investigators to conduct their work efficiently and effectively on behalf of American citizens. Congress should also consider how investigative timelines can be shortened through enhancements in collaboration between law enforcement and communications service providers to ensure citizens' privacy while enabling law enforcement accountability and effectiveness.

For example, subpoenas are generally answerable in 7 to 14 days and disclosure by mail or electronic response is made by the provider in lieu of production in court. Providers routinely process the demand by queuing it up in the order of receipt in their court order compliance systems. Providers often indicate that the best possible response time is *weeks* – not days. This should not be the case with a search warrant. Speedy execution of a warrant is rendered meaningless if a provider does not act expeditiously in response to receipt of the warrant, especially when no officer is required to be present during the execution. Congress should consider requiring accelerated response to a search warrant along with a clear acknowledgement to law enforcement by the provider that the warrant has been received and is in the initial stage of its execution.

In addition, since the proposed elevated standard of access establishes probable cause that evidence of a crime is likely to exist in the location to be searched, the government should be able to "freeze" the location to be searched as we might well do when executing a warrant on a physical location. In the case of electronic evidence, we are searching areas of a computer dedicated to retaining stored communications records - a search of "virtual" space. The law should ensure that evidence sought with appropriate legal process has not been destroyed by a network process or some other purging mechanism that falls short of intentional destruction of evidence.

When lives are on the line, when seconds count, law enforcement needs lawful access to electronic communications records without undue delay. This is especially important in online child exploitation cases when the amount of legal process that must be issued to identify perpetrators is often greater than that required in other types of cases. Changes to ECPA that could jeopardize timely access would mean that fewer leads could be chased down, a child missing for hours could turn into a child missing for days, and the dedicated men and women in U.S. law enforcement could be unduly restrained from accessing information necessary to prevent or solve crimes while criminals are free to exploit the latest electronic communications technologies.

In consideration of the above issues, we respectfully suggest that the committee consider the following questions before acting on any ECPA reform proposal:

- 1) What is the problem that must be fixed by the amendments to ECPA that have been proposed? Has there been a demonstrated pattern of overreach or privacy intrusions by governments at any level that must be remedied by an enhanced standard? Arguments in favor of the elimination of the "180-Day Rule" for stored email content have been clearly laid out. However, this is a narrow issue in terms of amending the Stored Communications Act. The current proposal would extend the same protections to all other forms of "private" electronic

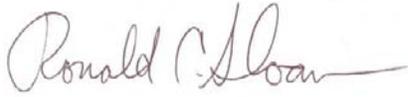
communications. This fact strikes law enforcement stakeholders as a far-reaching expansion of protections which necessitates a probing debate involving law enforcement practitioners.

- 2) If a confusing patchwork of case law has led to uncertainty for providers, then why is **elevating** the standard of access to probable cause for all electronic communications records the appropriate solution? **Harmonizing** the current standards of access could provide enhanced certainty for providers without unduly restraining the ability of law enforcement to access electronic communications records in a timely fashion to solve crimes and save lives. Legal scholars have offered the public and certain courts well-reasoned legislative paths to achieve clarity, certainty, alacrity and protection of privacy, and these options should be fully explored.
- 3) Given the exponential growth of electronic communications in society, the exploitation of electronic communications technologies by criminals to plan and carry out crimes, and the simple reality that electronic communications records are essential in today's criminal investigations, shouldn't any consideration of changes to ECPA include a comprehensive look at how law enforcement works with communications service providers to obtain records, whatever the standard of access might be?
- 4) How can changes to the law ensure that certain widely used forms of electronic communications that are not consistently retained by network service providers are preserved when law enforcement anticipates that evidence of a crime is likely to be found in a search authorized by a warrant?
- 5) The proposed 3-day notification requirement appears to be an arbitrary length of time. What is the rationale for this amount of time? What if the provider's response is incomplete and LE has received some of the response but is awaiting searches of other parts of the provider's systems?
- 6) Given the fact that the majority of crime and criminal investigations in the United States occur at the state and local levels, shouldn't any amendments to ECPA being contemplated by the committee – especially including the delayed notification provision – be thoroughly studied for their potential effects on the timeliness of investigations, added administrative burden, and added cost to state and local law enforcement?

Given these issues, we strongly urge the committee to reconsider acting on the ECPA reform proposal until a more comprehensive review of its impact on law enforcement investigations is conducted. We also encourage a thorough review of constructive measures to enhance service provider responsiveness to legitimate law enforcement process requests to ensure that investigative timelines are as short as possible.

We understand that technological innovation and electronic communications progress will always tend to outpace the law. And while law enforcement will rigidly adhere to whatever standard of access to electronic evidence Congress deems appropriate – just as we do today – we will continue to encourage Congress to take into full consideration our concerns about ECPA reform proposals as practitioners who are sworn to protect the public and uphold the law.

Sincerely,



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Scott Burns
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Cc: Members of the Senate Judiciary Committee