

April 23, 2013

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

Re: S. 607, the Electronic Communications Privacy Act Amendments Act of 2013

Dear Chairman Leahy and Ranking Member Grassley:

I write to urge Senators on the Judiciary Committee to support S. 607, the Electronic Communications Privacy Act Amendments Act of 2013. 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, more than 26 years later, it is clear that many of those rules have failed to keep pace with the 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.

My background in the federal judiciary and in law enforcement leads me to conclude that these reforms to ECPA would help preserve the role of the Fourth Amendment in the digital age without unduly hampering law enforcement. Law enforcement officials would still be able to gain access to the content of electronic communications in appropriate cases where they can show probable cause. I have served as Chief of the Government Operations Section at the United States Department of Justice, as United States Attorney and 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; rather, 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. Nor would these amendments to ECPA hamper investigations under the Foreign Intelligence Surveillance Act (FISA). S. 607 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.

For all of these reasons, I am working with The Constitution Project as part of the Digital Due Process (DDP) coalition seeking to reform ECPA. S. 607 would implement one of DDP’s principles: requiring the government to obtain a warrant in order to access the content of electronic communications. The DDP coalition now has over 75 members, comprised of both privacy advocacy groups from across the political spectrum – including The Constitution Project – and a wide range of technology companies including Google, AT & T and IBM. These technology companies support reforming ECPA to provide clarity on the standards that apply when they respond to government requests for data, and a level playing field for developing new technologies and services.

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,

A handwritten signature in cursive script, appearing to read "William S. Sessions".

William S. Sessions

cc: Members of the Senate Judiciary Committee