

November 21, 2012

The Honorable Patrick J. Leahy  
Chairman  
The Honorable Charles Grassley, Ranking Member  
Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Leahy and Senator Grassley:

We, the undersigned former prosecutors and judges, write in support of Senator Leahy's amendment to H.R. 2471. We oppose any attempt to weaken this amendment and do not support a carve-out for civil investigations. This amendment would provide for a much needed judicial check on when the government can access our private digital information. It would require law enforcement to obtain a warrant based on probable cause for the content of private electronic communications. As former prosecutors and judges, we recognize that law enforcement officers are at the front lines every day protecting this Nation and its people from crime. However, we do not believe that developments in technology should override our traditional constitutional principles, especially the Fourth Amendment.

Private communications sent via the United States Postal Service continue to receive traditional Fourth Amendment protection. We see no difference between these communications, or communications that are stored in a desk drawer, and electronic communications sent via a third-party service provider. In fact, neither does the Sixth Circuit Court of Appeals, which has held that warrantless law enforcement access to email stored by a third-party provider for over 180 days is unconstitutional. The law must be updated to fall in line with required constitutional protections for our private communications. Senator Leahy's amendment achieves this constitutional standard.

Requiring law enforcement to obtain a warrant from a court does not prevent law enforcement from doing its job. In fact, it would place law enforcement officers on more solid ground when they access private electronic communications, and make it more likely that important evidence of crime is not thrown out in criminal cases. Law enforcement agencies have cited various concerns in the past about what this amendment would do to their ability to act quickly in emergency situations or to protect children from exploitation or abuse. Their fears are unfounded as Senator Leahy's bill does not amend exceptions found in current law regarding emergencies involving danger of death or serious injury. Likewise, Senator Leahy's amendment does not amend current law that requires a third-party provider to hand over to the government any information involving evidence of child pornography, child abuse, and/or child exploitation. These current exceptions will be maintained and unaffected by the Leahy amendment.

Similarly, concerns that electronic information could be destroyed or otherwise erased by the third-party provider are already addressed by current law that allows law enforcement to compel

providers to preserve evidence if the government fears the information will be destroyed or tampered with. Nothing in the Leahy amendment would change this either.

As you know, the Electronic Communications Privacy Act has not been amended in over 25 years. Technology has rapidly advanced and we must not allow these advances to trump our constitutional rights. As Justice Sotomayor recently noted in her concurring opinion in *United States v. Jones* (the GPS case), it may be time to reconsider statutory protections for our private electronic communications in this new digital world.

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice Alito notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. 132 S. Ct. 945, 957 (2012).

As Justice Sotomayor correctly notes, significant changes are needed to adequately protect individuals' digital privacy. The Leahy amendment is a first step in this direction. The amendment would maintain law enforcement's ability to access transactional records and records pertaining to other subscriber or customer information without a warrant. This exception, while arguably too broad, does provide law enforcement with the flexibility it seeks: the ability to use this kind of information to investigate potential crimes and build probable cause to obtain a warrant for the actual content of the electronic communications.

We urge you to support Senator Leahy's amendment to H.R. 2471 and oppose any effort to weaken its protections or create an exception for civil investigations. It is time for the law to catch up with technology and protect our fundamental Fourth Amendment rights. This amendment is a significant step in the right direction.

Sincerely,

**Rick Berne**, Assistant U.S. Attorney, Eastern District of New York (1976-1978); Assistant U.S. Attorney, Northern District of California (1978 – 1980)

**G. Brian Brophy**, District Attorney, Dane County, Wisconsin (1999)

**James J. Brosnahan**, Assistant U.S. Attorney, Arizona and California (1961-1966)

**Zachary W. Carter**, U.S. Attorney, Eastern District of New York (1993-1999)

**W. Thomas Dillard**, Assistant U.S. Attorney, Eastern District of Tennessee (1967-1976, 1978-1983); U.S. Attorney, Northern District of Florida (1983-1986)

**Thomas Anthony Durkin**, Assistant U.S. Attorney, Northern District of Illinois (1978-1984)

**John P. Flannery II**, Assistant U.S. Attorney, Southern District of New York (1974-1979)

**Lawrence S. Goldman**, Assistant District Attorney, New York County (1966-1971)

**Saul A. Green**, U.S. Attorney, Eastern District of Michigan (1994-2001)

**Rodger A. Heaton**, U.S. Attorney, Central District of Illinois (2005-2009)

**Richard G. Hirsch**, Deputy District Attorney, Los Angeles County, California (1967-1971)

**Michael Hroziencik**, Deputy District Attorney, San Mateo County, California (1996-2003)

**Erlinda Ocampo Johnson**, Assistant U.S. Attorney (2000-2006)

**Glenn B. Kritzer**, Assistant U.S. Attorney, Eastern District of New York (1977-1979), Southern District of Florida (1980-1982)

**Fern M. Laethem**, Assistant U.S. Attorney, Eastern District of California (1979-1980); Deputy District Attorney, Sacramento, California (1976-1979)

**John G. Martin**, Assistant District Attorney and Deputy Bureau Chief, New York County D.A. (1984-2003); Assistant U.S. Attorney, Eastern District of New York (2003-2008)

**A. Melvin McDonald**, U.S. Attorney, District of Arizona (1981-1985)

**Sam D. Millsap, Jr.**, District Attorney, Bexar County, Texas (1982-1987)

**Jerome F. O'Neill**, U.S. Attorney, District of Vermont (1981); First Assistant U.S. Attorney, District of Vermont (1975-1981)

**Stephen M. Orlofsky**, U.S. District Judge, District of New Jersey (1996-2003); U.S. Magistrate Judge, District of New Jersey (1976-1980)

**Christian E. Picone**, Assistant State's Attorney, McLean County, Illinois (1995-2000)

**Ismail Ramsey**, Assistant U.S. Attorney, Northern District of California (1999-2003)

**David W. Shapiro**, Federal Prosecutor, Eastern District of New York (1986-1992), District of Arizona (1992-1995), Northern District of California (1995-2002)

**William I. Shockley**, Assistant U.S. Attorney (1981-2006)

**Alan Silber**, Assistant Prosecutor, Essex County, NJ (1968-1973); Chief of the Economic Crimes Unit (1970-1973)

**Jane Simkin Smith**, Assistant U.S. Attorney, Eastern District of New York (1980-1986)

**Neal R. Sonnett**, Assistant U.S. Attorney and Chief, Criminal Division, Southern District of Florida (1967-1972)

**Peter J. Tomao**, Assistant U.S. Attorney, Eastern District of New York (1982-1997); Trial Attorney, U.S. Department of Justice (1977-1982)

**Keith E. Uhl**, Assistant U.S. Attorney, Southern District of Iowa (1972-1975); Special Prosecutor, U.S. Department of Justice (1975-1976)

**Kira Anne West**, Assistant U.S. Attorney, Southern District of Texas-Houston Division (1990-1999)

**Ron Woods**, U.S. Attorney, Southern District of Texas (1990-1993)

cc: Members of the Senate Judiciary Committee