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Hearing before the U.S. House Judiciary Committee on H.R. 699, the “Email Privacy Act.”

December 1, 2015

Chairman Goodlatte, Ranking Member Conyers, and members of the Committee:

Thank you for the opportunity to testify on behalf of the Center for Democracy & Technology (CDT). CDT is a nonpartisan, nonprofit technology policy advocacy organization dedicated to protecting civil liberties and human rights, including privacy, free speech and access to information. We applaud the Committee for holding a hearing on the Electronic Communications Privacy Act (ECPA) and urge the committee to speedily pass H.R.699, the Email Privacy Act.

Every day, whistleblowers reach out to journalists (and members of this Committee), advocates plan protests against government injustice and ordinary citizens complain about their government. All of these activities are crucial to our democracy. They also all rely on our long-held constitutional guarantee of private communications, secure from arbitrary access by the government. This is true whether the communication happens in the form of a letter, a phone call or, increasingly, an email, text message or over a social network. But as our technology has changed, the legal underpinnings that protect our privacy have not always kept up.

The foundational value that ECPA reform seeks to uphold, as embodied by H.R.699, is the right to privacy for the content of our communications, even as technology evolves. In the face of an outdated statute, the courts have stepped in, creating key legal precedents and strong limits on access. But that patchwork is not enough on its own. It continues to lag behind technological change and harms smaller businesses that lack an army of lawyers. Reform efforts also face a concerted assault from civil agencies that seek to use statutory changes as a tool to gain new powers. A recent scandal involving improper investigations by the IRS into the tax exempt status of conservative organizations highlights the danger those new powers could create for Americans’ privacy.

The House has consistently sought to solve these problems through strong reform measures and more than 300 members have cosponsored the Email

Privacy Act. CDT continues to believe that a legislative solution – passage of H.R.699 – is the best way to advance a modest but critical privacy protection.

Support for privacy reform is deep and abiding. A majority of Republicans and Democrats in the House support it. More than one hundred technology companies, trade associations, and public interest groups have signed onto ECPA reform principles.<sup>1</sup> Signatories include nearly the entire tech industry, span the political spectrum and represent privacy rights, consumer interests, and free market values. Finally, the public is firmly behind reform. A recent poll shows 86 percent of voters support an update to ECPA.

## The Need for Reform

In 1986, when ECPA was written, few Americans owned computers and even fewer used email. Hard drives were small. Service providers offered little storage capacity and the storage they did sell was expensive. The World Wide Web didn't exist. Neither did cloud computing or broadband or social media or smartphones. The little data that was stored was kept on local computers.

Obviously that is not the world we live in today. Decades after the beginning of the Internet Age, we store a vast array of sensitive communications with third parties – emails, text messages, work documents, pictures of our children, and love letters. Under ECPA, they receive widely varying degrees of protection – most of which are inadequate and out of touch with consumer expectations.

These changes in technology – the rise of remote storage and cloud computing, and the digitization of almost all communications – have two main implications for ECPA. First, they create serious inconsistencies in how similar communications are treated and the reasonable expectation of privacy they deserve. Second, they have disrupted the fundamental balance created in ECPA between privacy rights, law enforcement interests and the needs of innovators.

## An Inconsistent Law

When trying to understand the conflicting standards and illogical distinctions that plague the current statute, it can be helpful to consider the technological reality at the time of the passage of ECPA.

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<sup>1</sup> *About the Issue: ECPA Reform*, DIGITAL DUE PROCESS,  
<http://www.digitaldueprocess.org/index.cfm?objectid=37940370-2551-11DF-8E02000C296BA163>.

In 1986, Congress created two categories of providers and accorded users of those services different levels of protection. Legislators defined an electronic communications service (ECS) as “any service which provides to users thereof the ability to send or receive wire or electronic communications.”<sup>2</sup> It was aimed at protecting the nascent use of email. Today, ECSs typically include any service that allows users to communicate with each other—whether by email, text message, social network or other means. Under ECPA, those communications are protected by a warrant only for the first 180 days after they are sent and are thereafter accessible with a subpoena. That 180-day rule is an outdated reflection of the fact that in 1986 hard drive capacity was incredibly expensive and no one contemplated long-term storage. The assumption was that if a user left an email on a server that long, it was abandoned and merited a lower privacy protection.

The second category of service under ECPA is a remote computing service (RCS), defined as “the provision to the public of computer storage or processing services by means of an electronic communications system.”<sup>3</sup> Today, this would likely cover a cloud-based service accessed solely by an individual user, such as a Dropbox account. Under ECPA, RCSs receive only the protection of a subpoena. In 1986, RCSs tended to be major companies handling data for other major companies. As such, records in RCS storage appeared more like business records, and hence lawmakers granted them subpoena protections.

These distinctions make little sense today. Emails and other content are stored indefinitely and data held by RCSs are clearly as private as those by ECSs. It is often hard to glean in which category a particular service belongs. If a user stores a document remotely so she can later edit the document, does it move from RCS to ECS storage when she permits others to edit it as well? It also leads to wildly uneven results. The same communication could be protected by a warrant if stored on a home computer, a subpoena when stored as a draft in an inbox, a Title III super warrant when in transit, a warrant for the first 180 days in an inbox and then a subpoena after that.<sup>4</sup>

Further, this one distinction only scratches the surface of the confusion over ECPA. Even basic questions over what type of stored records ECPA applies to can be confusing, given the limited definition of electronic storage. Nor does the statute contain basic protections like a suppression remedy for illegally obtained

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<sup>2</sup> 18 U.S.C. § 2510(15) (2012).

<sup>3</sup> *Id.* at § 2711(2).

<sup>4</sup> Orin S. Kerr, *A User’s Guide to the Stored Communications Act and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004).

information or reporting requirements for how often communications are shared with the government.

These problems have not gone unnoticed. Starting in 2007, CDT began working through its Digital Privacy and Security Working Group (“DPSWG”) to find common ground on a solution to some of ECPA’s problems. In 2010, we announced the formation of the Digital Due Process (DDP) coalition, consisting of nine companies and twelve trade associations, think tanks and advocacy groups. DDP supported four key principles for reforming ECPA – one of which was the “warrant for content” fix at the heart of H.R.699. DDP has blossomed today into a broad coalition of more than a hundred groups and companies, including major technology companies, advocacy organizations from the right and the left and grassroots organizations representing millions of members.<sup>5</sup>

Congress has recognized the need for reform, as well. The Senate Judiciary Committee voted out of committee legislation either identical or similar to H.R.699 in both 2012 and 2013. H.R. 699 is the most cosponsored bill in the House with more than 300 cosponsors including a majority of both the Republican and Democratic caucus.

The federal courts and the tech industry have also attempted to fill the void left by the lack of reform. In 2003, in *Theofel v. Farey-Jones*, the Ninth Circuit clarified confusion in the statute regarding when an email was in electronic storage and rejected the Justice Department’s distinction between opened and unopened e-mail.<sup>6</sup> Most significantly, in 2010, in *U.S. v. Warshak*, the Sixth Circuit ruled that people have a reasonable expectation of privacy in email content and that it should only be accessed with a search warrant.<sup>7</sup>

The *Warshak* decision was a watershed. While it technically only applied in the Sixth Circuit, the difficulty in determining where a particular user was located and the persuasiveness of the court’s reasoning led most, if not all, major technology companies to adopt a warrant standard for all stored content. Even more significantly, it cast into question the constitutionality of a significant portion of the statute and made the need for reform even more urgent.

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<sup>5</sup> For a full list, see *Who We Are*, DIGITAL DUE PROCESS, <http://digitaldueprocess.org/index.cfm?objectid=DF652CE0-2552-11DF-B455000C296BA163>.

<sup>6</sup> *Theofel v. Farey-Jones*, 359 F.3d 1066 (9<sup>th</sup> Cir. 2003).

<sup>7</sup> *United States v. Warshak*, 631 F.3d 266 (6<sup>th</sup> Cir. 2010).

## The Balance in ECPA

At the time of its passage, the goal of ECPA was to preserve “a fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement,”<sup>8</sup> and to support the development and use of new types of technologies and services.<sup>9</sup> Congress wanted to encourage the innovation represented by these new technologies and realized that would not be possible if the privacy of users was not protected.<sup>10</sup>

ECPA accomplished that goal by creating a familiar framework – a high level of protection for the content of communication and a lower protection for business records or abandoned communications. Notably, this framework was prescient in recognizing that 3<sup>rd</sup> parties could and would hold sensitive information that merited warrant protection.

Since this initial balance was struck, we have seen a technological revolution and the result has been a statute that is now much less protective of privacy and hinders innovation.

A short (and probably incomplete) list of the communications content that I store with third parties today includes:

- Work and personal email,
- Text messages,
- More than a decade of photographs,
- Music,
- My passwords to all my online accounts,
- Social networking posts – many of which are shared with very few people,
- Notes – both personal and work,
- Personal contacts,
- My calendar,
- Hundreds of books, and
- Home videos and movies.

The striking thing about this list is how pedestrian it is. Most Americans could create a similar list; some would likely be able to add many more categories. Yet all of this is protected under a legal framework that is dramatically out of date.

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<sup>8</sup> H.R. REP. NO. 99-647, at 19 (1986).

<sup>9</sup> S. REP. NO. 99-541, at 5 (1986) (noting that legal uncertainty over the privacy status of new forms of communications “may unnecessarily discourage potential customers from using innovative communications systems”).

<sup>10</sup> *Id.*; H.R. REP. NO. 99-647, at 19.

Protections are largely reliant on a handful of court decisions and technology companies with strong government access policies.

The need for reform of ECPA to support innovation is equally striking. This Committee is familiar with the importance of cloud computing. Businesses all over the world are looking to cloud-based services for their information management needs in order to save money on equipment and to achieve better computing reliability and data security. Cloud-based services allow companies to expand their computing capacity quickly, which is particularly valuable for start-up businesses and entrepreneurs. Such services give employees the flexibility to share information and collaborate. The global Software-as-a-Service (SaaS) market is expected to reach \$106 billion by next year.<sup>11</sup> American companies have been the global leaders in this area, and it has been an engine for U.S.-based innovation, economic growth and job creation.

Currently, ECPA does not provide a solid legal foundation to continue this growth. When businesses contract out to cloud providers, there is a strong argument under ECPA that those cloud providers are offering the services of an RCS and hence the information they store is only protected by a subpoena. Contrast that with the full protection of a warrant offered when someone saves information on her own personal computer. As Fred Humphries, Vice President of U.S. Government Affairs at Microsoft said, “Our goal is simple: the law should treat data stored in the cloud as closely as possible to data that we previously stored in our homes or in our offices.”<sup>12</sup>

At the same time, law enforcement’s ability to collect information has grown astronomically. It’s not just access to the content of communication. Everything we do online – and increasingly offline through our mobile devices – also produces metadata. Our location, with whom we are communicating, our friends and social networks – all of it is accessible to law enforcement under a variety of legal standards, most of which are lower than a warrant backed by probable cause. While increased protections for metadata are not part of H.R.699, it is important to keep this cornucopia of new information in mind when considering any reform effort. The reality is that we currently live in a golden age of surveillance where the government has access to copious amounts of

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<sup>11</sup> Louis Columbus, *Roundup of Cloud Computing Forecasts and Market Estimates, 2015*, FORBES (Jan. 24, 2015), <http://www.forbes.com/sites/louiscolumnbus/2015/01/24/roundup-of-cloud-computing-forecasts-and-market-estimates-2015/>.

<sup>12</sup> Microsoft Corporate Blogs, *A day of action to demand ECPA reform*, MICROSOFT (Dec. 5, 2013), <http://blogs.microsoft.com/on-the-issues/2013/12/05/a-day-of-action-to-demand-ecpa-reform/>.

information about all of us. H.R.699 is just a level set in one area, returning privacy protections to the content of communications while we continue to see erosions in many others.<sup>13</sup>

Law enforcement has not denied the need for reform in this area. At a hearing last year, FBI Director James Comey said about ECPA, “There is an outdated distinction. For email, over 180 days, I think, under the 1980s statute is treated as something that you could in theory obtain without a search warrant. We don't treat it that way. We go get a search warrant from a Federal judge no matter how old it is. So a change wouldn't have any effect on our practice.”<sup>14</sup> Similarly, in a past hearing on reforming the ECPA, the Department of Justice agreed “that there is no principled basis to treat email less than 180 days old differently than email more than 180 days old. Similarly, it makes sense that the statute not accord lesser protection to opened emails than it gives to emails that are unopened.”<sup>15</sup> Given this acknowledgement that a problem exists – and the reality that there is a constitutional infirmity in the statute protecting all stored communications – it is frustrating that some in law enforcement continue to resist commonsense reform.

## The Legislation

The Email Privacy Act (H.R.699) does not fix all the problems described above, but it does remedy the constitutional infirmity identified by *Warshak* and provides a strong, consistent and easily administered legal protection for the content of communications.

The key to the protections in H.R.699 can be found in Section 3. It amends ECPA so that the disclosure of the content of email and other electronic communications by an ECS or RCS is subject to one clear legal standard – a search warrant issued based on a showing of probable cause. The provision eliminates the confusing and outdated “180-day” rule. Section 3 also requires

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<sup>13</sup> For more on the golden age of surveillance, see Peter Swire, *Going Dark or a Golden Age for Surveillance?*, CDT.ORG (Nov. 28, 2011), <https://cdt.org/blog/%E2%80%98going-dark%E2%80%99-versus-a-%E2%80%98golden-age-for-surveillance%E2%80%99/>.

<sup>14</sup> *Oversight of the Federal Bureau of Investigation: Hearing before the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong. 69 (2014) (statement of the Hon. James B. Comey, Dir., Fed. Bureau of Investigation).

<sup>15</sup> *ECPA Part 1: Lawful Access to Stored Content: Hearing before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong. 4 (2013) (statement of Elana Tyrangiel, Acting Assistant of Attorney General, Dep't of Justice Office of Legal Policy).

that the government notify the individual within either 3 or 10 days if their information was disclosed.

Section 3 also reaffirms current law to clarify that the government may use an administrative or grand jury subpoena in order to obtain certain kinds of electronic communication records from a service provider, including a customer's name, address, session time records, length of service information, subscriber number and temporarily assigned network address, and means and source of payment information.

Lastly, the section contains a rule of construction regarding government access to internal corporate email. It states that nothing in the bill precludes the government from using a subpoena to obtain email and other electronic communications directly from a company when the communications are to or from an officer, agent or employee of a company.

Section 4 permits delayed notice under the same standard as current law. A court may extend the delay periods for a period of up to an additional 180 or 90 days at a time (depending on whether an investigation is criminal or civil). Law enforcement may also obtain an order barring providers from disclosing the existence of a warrant.

H.R.699 also grants new authority to assist the government in their investigations. In cases where there has been a delay, Section 4 requires that service providers notify the government in advance when that time period expires and they intend to notify a customer about the warrant. Current law requires no such advance notice. The purpose of this provision is to ensure that the government has an opportunity to protect the integrity of its investigation and, if warranted, to ask a court to delay the notification, before such notice is given. It also doubles the period for which notice to a user of law enforcement access to communications content can be delayed. Finally, it adds civil discovery subpoenas to the list of subpoenas that can be used to compel disclosure of subscriber identifying information, placing all subpoenas on the same footing.

H.R.699 is also noteworthy for what it does not do. It does not impact national security powers under the Foreign Intelligence Surveillance Act – a rule of construction in Section 6 makes this clear. It does not affect the traditional exceptions that allow law enforcement to access communications without a warrant – exigency, consent and the other exceptions found in 18 U.S.C. § 2702. Nor does it interfere with the existing process that allows providers to work with the National Center for Missing and Exploited Children to identify and help prosecute child pornography under 18 U.S.C. § 2258A.



This simple change to the law – treating searches of an individual’s inbox the same way we treat searches of her home – is profoundly important to personal privacy and American business while not unduly interfering with law enforcement’s ability to protect public safety.

## Issues of Special Note

Opponents of H.R.699 have identified three areas of concern – access by civil agencies, the handling of emergencies and notice to subjects of an investigation. I will address each in turn.

### Civil Investigation Carve Out

In a letter to the Senate Judiciary Committee in April 2013, the Chair of the Securities and Exchange Commission (SEC) stated that a warrant requirement would block the SEC from obtaining digital content from service providers.<sup>16</sup> The SEC reiterated this desire for new authority to access the content of individuals’ emails at a September 2015 hearing before the Senate Judiciary Committee.<sup>17</sup> The SEC is a civil agency and lacks authority to issue warrants, relying instead on subpoenas for investigations. The SEC argued that ECPA reform should allow civil agencies to obtain digital content from service providers without a warrant. However, the SEC’s request for new authority is unnecessary and troubling.

The scope of this request is very broad. While the SEC has only requested that all federal civil law enforcement agencies be granted the power to compel emails and other content from service providers,<sup>18</sup> ECPA’s provisions have always applied to all government – including state and local agencies. But even if this authority was somehow limited to federal agencies, it would mean that the Internal Revenue Service (IRS), Environmental Protection Agency (EPA), Consumer Financial Protection Bureau (CFPB), and potentially many more agencies would have a new authority to demand a target’s emails from service providers without going directly to the target of an investigation.

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<sup>16</sup> See Letter from the Hon. Mary Jo White, Chair, Securities and Exchange Comm’n, to Sen. Patrick Leahy, Chair, Sen. Judiciary Comm. (Apr. 24, 2013), *available at* <https://www.cdt.org/files/file/SEC%20ECPA%20Letter.pdf>.

<sup>17</sup> See *Reforming the Electronic Communications Privacy Act: Hearing Before the S. Comm. On the Judiciary*, 114<sup>th</sup> Cong. (2015) (statement of Andrew Ceresney, Dir., Div. of Enforcement, U.S. Sec. Exch. Comm’n), *available at* <http://www.judiciary.senate.gov/imo/media/doc/09-16-15%20Ceresney%20Testimony.pdf>.

<sup>18</sup> Letter from the Hon. Mary Jo White, *supra* n. 16, at 3.

An effective and time-honored method to access these types of communications in civil investigations already exists. Civil agencies can already obtain digital content with a subpoena issued directly to the target of the investigation – such as a user who sent or received emails. Civil agencies can enforce these subpoenas on individuals in court, and courts can order the user to disclose the data sought under the subpoena.<sup>19</sup> In addition, ECPA already allows civil agencies to issue preservation orders – without court approval – that direct service providers to prevent deletion of information from a user’s account, thereby preventing destruction or alteration of evidence, while a motion to compel is being pursued.<sup>20</sup> ECPA reform would not change any of these existing powers for civil agencies. In reality, what the SEC is seeking is a new authority. Andrew Ceresney, Director of the SEC Division of Enforcement, stated unequivocally at the September Senate hearing that the SEC has never sought content from service providers since *U.S. v. Warshak* was decided in 2010.<sup>21</sup>

Ceresney has also stated incorrectly that the new power the agency seeks will provide a greater level of protection than under a warrant.<sup>22</sup> A warrant is the “gold standard” for privacy protection in the U.S., which is why it is embedded in the Fourth Amendment of our Constitution. The most invasive kind of searches, such as a search of your home or your personal belongings (including your letters), must generally be conducted with a warrant. The warrant itself is very narrow in scope: the government must prove to a judge or magistrate that there is probable cause to believe that specific evidence related to a crime is currently in the specified place to be searched. Other places and items, unless in plain view during the search, cannot be touched.

One of the most troubling parts of the SEC proposal is that it does not specify the standard that must be met before conducting a search, but suggests the subpoena standard is the standard the SEC would want to use if its proposal were implemented.<sup>23</sup> Under this standard, the government would only need to prove that the customer records sought are relevant to an investigation. Because it requires such a low standard of review, the subpoena is by far the easiest

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<sup>19</sup> See, e.g., *FTC v. Sterling Precious Metals, LLC*, 2013 U.S. Dist. LEXIS 50976 (S.D. Fla. Apr. 9, 2013).

<sup>20</sup> 18 U.S.C. § 2703(f). Evidence preservation orders can be issued at early stages of an agency’s inquiry, even before launching a formal investigation.

<sup>21</sup> *Reforming the Electronic Communications Privacy Act: Hearing Before the S. Comm. On the Judiciary*, 114<sup>th</sup> Cong. (2015).

<sup>22</sup> See Statement of Andrew Ceresney, *supra* n. 17, at 5.

<sup>23</sup> See *id.* Ceresney’s testimony proposed a system in which the subscriber or customer would have “the opportunity to challenge” the request for data at a judicial proceeding, where they could raise concerns such as “privilege” or “relevancy.”

instrument for the government to use. It is also the broadest in scope, because a large number of communications can be considered “relevant” to an investigation.

This problem is compounded by the fact that the predicate to begin a civil investigation is much broader than a criminal investigation. Simply put, many more actions are violations of civil law versus criminal law. For example, under the SEC’s proposal, the government could obtain personal electronic communications relevant to misfiling tax returns or violating the health code. In addition to this problem, subpoenas can also be directed not only at people subject to the investigation, but also to any witnesses with relevant information. Finally, information gathered as part of a civil process could be shared for use in a parallel criminal investigation – creating a major backdoor to the protections in the bill.<sup>24</sup>

The recent scandal involving the IRS’s inappropriate investigation of Tea Party organizations provides a vivid example of the dangers of agency overreach. Between 2010 and 2012, the IRS began to specifically target applications for tax-exempt status that came from organizations with names that included words such as “Tea Party,” “Patriots,” or “9/12”.<sup>25</sup> In response to these applications, the IRS sent lengthy, time-consuming questionnaires, requesting that the applicants answer questions such as, “Please provide copies of all your current web pages, including your blog posts. Please provide copies of all your newsletters, bulletins, flyers, newsletters or any other media or literature you have disseminated to your members or others. Please provide copies of stories and articles that have been

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<sup>24</sup> For example, Form 1662 of the Securities and Exchange Commission, which is designed to be used with all SEC civil subpoenas, expressly states:

The Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate. Whether or not the Commission makes its files available to other governmental agencies is, in general, a confidential matter between the Commission and such other governmental agencies.

SECURITIES AND EXCHANGE COMMISSION, SEC 1662 (09-14),  
<http://www.sec.gov/about/forms/sec1662.pdf>.

<sup>25</sup> Treasury Inspector General for Tax Administration, “Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review,” 6 (May 14, 2014), *available at*:  
<https://www.washingtonpost.com/blogs/wonkblog/files/2013/05/201310053fr-revised-redacted-1.pdf>.

published about you.”<sup>26</sup> Other questionnaires asked that the organizations provide a resume for each of their past and present directors, officers, and key employees,<sup>27</sup> as well as a list of what books their members were reading and printouts of their Facebook posts.<sup>28</sup> Failure to answer these questions resulted in the rejection of the organization’s application for tax-exempt status.

Although it appears that the IRS’s targeting of conservative groups was limited to these lengthy questionnaires,<sup>29</sup> the IRS probably could have used its administrative subpoena authority, as well, because that authority is extremely broad. I.R.C. § 7602 authorizes the IRS to issue a summons for the purpose of “determining the liability of any person for any internal revenue tax.”<sup>30</sup> Such summonses may be issued to an organization for the purpose of determining exempt status or tax liability, upon authorization by the EP/EO key district director.<sup>31</sup> The summons may request any information that “may be relevant” to an investigation.<sup>32</sup> In addition, the IRS may issue such summonses to a wide variety of people (not just the subjects of an investigation) including any other person the examiner “may deem proper.”<sup>33</sup>

If the IRS had the power that the SEC proposal recommends be granted to all federal agencies, they would have been able to go beyond gathering information directly from the target of their investigation. The IRS would have been able to go

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<sup>26</sup> Chris Good, *Weirdest IRS Questions for the Tea Party: Views, Donors, and Etymology*, ABC NEWS (May 14, 2013), <http://abcnews.go.com/blogs/politics/2013/05/weirdest-irs-questions-for-the-tea-party-views-donors-and-etymology/>.

<sup>27</sup> *Id.*

<sup>28</sup> David Nather, Tarini Parti and Byron Tau, *IRS wants you to share everything*, POLITICO (May 14, 2013), <http://www.politico.com/story/2013/05/the-irs-wants-you-to-share-everything-091378>.

<sup>29</sup> The IRS investigations may have been limited to questionnaires because a 1993 guidance document found on their website advises that summons authority should only be used when “1) information is vital to the investigation; 2) the taxpayer or third-party summoinee is unreasonably refusing to cooperate; and 3) the information cannot be easily obtained from other sources.” George Johnson and Marvin Friedlander, “Summons and Enforcement,” 1993 EO CPE Text, <https://www.irs.gov/pub/irs-tege/eotopicg93.pdf>.

<sup>30</sup> 26 U.S.C. § 7602(a).

<sup>31</sup> Johnson and Friedlander, *supra* n. 29, at 3; *see also Church of Spiritual Tech. v. U.S.*, No. 581-88T, slip op. at 21 n.34 (Cl. Ct., reissued June 29, 1992) (finding that the IRS was permitted to summon a former officer of the Church while considering the Church’s exemption application).

<sup>32</sup> 26 U.S.C. § 7602(a)(1).

<sup>33</sup> *Id.* at § 7602(a)(2).

to court and enforce an order allowing them to go directly to the Internet Service Provider in order to access relevant email and other information stored in the cloud. While under the proposal the subject of the investigation would have been able to contest that order in court, the reality is that relevance is a very broad standard that is extremely difficult to challenge. In addition, it's clear from the questions they asked conservative groups that the IRS has a very expansive idea of what was proper for them to investigate.

Given the *Warshak* decision, CDT believes the SEC proposal amounts to an unconstitutional solution to a nonexistent problem – one aimed at getting an unprecedented level of access to Americans' email inboxes.

### **Changing Rules for Emergency Exceptions**

Under ECPA, electronic communications providers cannot give content and sensitive user information to the government absent a court order, subpoena or warrant. However, the law does contain an exception so that in an emergency situation involving danger of death or serious bodily harm, the provider may disclose content and user records to law enforcement absent the legal process that would otherwise be required.<sup>34</sup> Because these requests receive no independent judicial oversight, providers have discretion to assess whether the request is proper and should be fulfilled absent the required legal process. As ECPA reform legislation continues to gather strong support, some have called for a new provision that would change this rule to mandate compliance with any emergency request for user data or content. Such a change is unnecessary, and would raise significant privacy and security problems.

Although most emergency requests are appropriate and receive speedy compliance, there are enough instances where requests are deemed improper that misuse of the emergency authority should not be ignored. Providers' authority to evaluate the legitimacy of these requests is a crucial check against this type of abuse. For example, in 2014, Google rejected 94 out of 342 requests.

The government has previously abused its ability to engage in emergency requests. A 2010 Department of Justice Inspector General report stated that the Inspector General “found repeated misuses of [the FBI’s] statutory authority to obtain telephone records through NSLs or the ECPA’s emergency voluntary

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<sup>34</sup> See 18 U.S.C. §§ 2702(b)(8), (c)(4).

disclosure provisions.”<sup>35</sup> Based on this, the Inspector General report recommended Congress consider “appropriate controls” on the FBI’s ability to obtain records in emergency situations. With mandatory compliance and no judicial oversight, such abuses could become more frequent.

Right now, emergency requests are very rare. America’s largest Internet and electronic communications companies only receive a small number of requests. For example, Google only received 342 emergency requests<sup>36</sup> and Microsoft only received 475 requests<sup>37</sup> throughout all of 2014. In comparison, Google received 20,280 subpoenas and search warrants and Microsoft received 12,364 similar requests during that same year.

In the event that a provider denies a request for an emergency disclosure without legal process, the government still has options available. Law enforcement can revise its request to obtain content or data if appropriate justification has not been provided. Additionally, government entities may also seek information through ECPA’s mandatory disclosure provisions without delay. In all judicial districts, a magistrate is available for after-hours requests that require immediate action, and Rule 41 of the Federal Rules of Criminal Procedure stipulates for telephonic search warrants to be obtained at all hours.

Requiring providers to comply with any emergency request would also endanger data security by interfering with providers’ ability to assess the validity of requests. Data thieves regularly attempt to take customer information by posing as law enforcement and demanding that data be provided pursuant to an emergency. Congress criminalized this activity because of the serious threat it poses.<sup>38</sup> Providers must have the capability to ensure that requests are not fraudulent and prevent disclosure of user data to unauthorized third parties. Mandating disclosure in response to all emergency requests and removing discretion to appeal for clarification, additional information, or a more secure method of disclosure would undercut providers’ ability to protect users’ sensitive information.

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<sup>35</sup> See OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS 268 (Jan. 2010), available at <https://oig.justice.gov/special/s1001r.pdf>.

<sup>36</sup> See *Google Transparency Report: Security and Privacy*, GOOGLE, <http://www.google.com/transparencyreport/userdatarequests/US/>.

<sup>37</sup> See *Microsoft Law Enforcement Requests Report*, MICROSOFT, <https://www.microsoft.com/about/corporatecitizenship/en-us/reporting/transparency/>.

<sup>38</sup> See 18 U.S.C. § 1039 (2012).

The current system for disclosure of user information and content pursuant to emergency requests absent a court order works effectively. It protects both public safety and user privacy and security, and should not be changed.

## Notice

Americans' email accounts often contain the most sensitive, private aspects of their lives – from purchase orders and health information to love letters and political or religious communications – and often date back years. For today's digital natives, it may end up as a permanent record of their entire lives. A covert search of a citizen's inbox by the government – even when pursuant to a warrant – is one of the most invasive possible. Like a covert search of a person's home, it directly contradicts the values at the heart of the Fourth Amendment, and must only be done out of absolute necessity. That is why notice of an investigation is so crucial.

Without notice, users subject to a search are unable to protect their constitutional rights including the ability to challenge the validity of a warrant. They cannot protect the rights associated with their email such as attorney client privilege. Nor can they assert the other rights allowed to a defendant under the Federal Rules of Criminal Procedure.<sup>39</sup> In addition, notice enables users to correct cases of mistaken identity that may otherwise subject them to a wrongful search.

At the same time, the Email Privacy Act preserves existing exceptions to the notice requirement. Mirroring current law, in H.R.699 a court may grant a request for delayed notification upon finding that notification of the existence of a search could result in a threat to the life or physical safety of an individual, flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or otherwise seriously jeopardizing an investigation or unduly delaying a trial. Although these exceptions are important to protect investigations in extraordinary circumstance, notice must be the norm in law enforcement investigations. Without knowledge of an investigation, a defendant is hamstrung in asserting their constitutional rights and accountability is greatly reduced.

## Conclusion

We thank the Committee for holding a hearing on this important issue and urge you to act swiftly to mark-up H.R.699, the Email Privacy Act.

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<sup>39</sup> FED. R. CRIM. P. 41.