January 9, 2017

Senator Charles Grassley, Chairman, Senate Judiciary Committee
Senator Dianne Feinstein, Ranking Member, Senate Judiciary Committee

Re: Nomination for Attorney General of Senator Sessions

Dear Chairman Grassley and Ranking Member Feinstein:

We are writing to express our concerns about the privacy record of the President-Elect's nominee for Attorney General of the United States, Senator Jeff Sessions. Senator Sessions has been a leading proponent of expanding the government's surveillance of ordinary Americans at the expense of civil rights and civil liberties. He has spent his 20-year career in the Senate arguing for broad, often unchecked surveillance powers in intelligence investigations, even though those investigations pose unnecessarily invasive risks to privacy. Senator Sessions has staunchly defended the USA Patriot Act's most controversial and privacy invasive provisions, calling the Act "a restrained piece of legislation."[1] He has advocated for broader surveillance powers than the intelligence community (IC) itself has asked for and opposed the USA Freedom Act, which the IC supported.

Senator Sessions's own statements, excerpted below, demonstrate an inclination to gloss over differences between criminal and foreign intelligence investigations; a lack of respect for the right to privacy, freedom of speech, freedom of association, and freedom of the press; and a desire to use American companies to warrantlessly spy on Americans.

I. Senator Sessions's record demonstrates an inclination to gloss over differences between criminal and foreign intelligence investigations.

Senator Sessions defended the USA Patriot Act, particularly bulk collection under Section 215 (which Congress outlawed once the program was exposed), as merely extending to intelligence agencies the same investigatory powers that law enforcement has in criminal investigations.

- "I believe everything in that bill [the USA Patriot Act] was consistent with then-existing criminal law techniques that were used every day by prosecutors in the counties of America, in the U.S. Attorney's Offices, which I was for almost 15 years. And I do not believe that there is anything there that we should be apologizing for."[2]

[1] *Oversight of the USA PATRIOT ACT: Hearings Before the S. Comm. On the* Judiciary, 109th Cong. 26–28 (2005).

[2] *Hearing on the Report of the President's Review Group on Intelligence and Communications Technologies Before the S. Comm. On the Judiciary*, 113th Cong. 28 (2014).

- "The Patriot Act basically is a restrained piece of legislation that focuses on a number of loopholes and gaps in our law. Many times situations arise . . . where the DEA can go out and issue administrative subpoenas in a drug case, the Food and Drug Administration can go into businesses and search everything in the business and get all kinds of documents, but an investigator investigating somebody trying to kill millions of Americans cannot do it. So what we did was try to give the same proven constitutional powers that existed in other investigations to people investigating terrorism and to break down the walls that had been created between intelligence agencies that made it far more difficult to share that information."[3]

- "Most people would agree it should not be more difficult to investigate a terrorist plot than check fraud. As the National Academy of Sciences noted in its recent report, Section 215 of the Patriot Act simply 'allow[s] the [Foreign Intelligence Surveillance Court] to require production of documents and other tangible things determined relevant to national security investigations, much like other courts do in criminal and grand jury investigations.'"[4]

This stance is particularly noteworthy because intelligence investigations pose special and extreme risks to privacy. They are secret, rarely if ever tested in court, and result in the collection of much more information. Because of these differences in the nature of investigations, it is appropriate that intelligence gathering authorities, such as Section 215 of FISA and national security letter provisions, are limited in scope and are subject to more oversight than the corresponding criminal authorities.

II. Senator Sessions has repeatedly made statements and supported policies that devalue and erode freedoms of association and of the press.

Senator Sessions does not acknowledge the significant First Amendment and privacy interests in protecting library records from warrantless surveillance. From a Senate hearing transcript:

- Sessions: "You tell me a principled reason why you could subpoena someone's medical records, their bank records, their telephone records, but not subpoena their library records. Is there one?"

  Director Mueller: "I do not believe so…."

[3] *Oversight of the USA PATRIOT ACT: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 28 (2005).

[4] Jeff Sessions, *Why Should Terrorists be Harder to Investigate Than Routine Criminals*, National Review (May 20, 2015), http://www.nationalreview.com/article/418675/why-should-terrorists-be-harder-investigate-routine-criminals-jeff-sessions.

Sessions: "Thank you. And I know that they are entitled to every kind of constitutional protection, a library is, that anyone else is. But I do not think a library deserves a special protection over any other business. A library does not have any sanctity. Why does a library have sanctity that your medical records do not have? They think it is sanctified, I will admit. I just disagree that it deserves special protection."[5]

Senator Sessions opposed the USA Freedom Act, which ended the bulk collection of phone records by the NSA under Section 215 and was supported by the intelligence community. Director of National Intelligence James Clapper said that the USA Freedom Act "preserves the essential operational capabilities of the telephone metadata program and enhances other intelligence capabilities needed to protect our nation and its partners."[6] Senator Sessions defended bulk collection of Americans' telephone records despite consistent evidence that the program never discovered or disrupted a terrorist plot. In doing so, Senator Sessions mischaracterized the dragnet collection of phone records under 215 as equivalent to the targeted collection of phone records with subpoenas in the criminal context.

- " A local district attorney can obtain [phone records] in a routine criminal case. . . . [by] issu[ing] a grand-jury subpoena . . . . But legislation known as the USA Freedom Act would prevent our intelligence officers from obtaining information in this manner *at all*. . . . In short, the USA Freedom Act would make it vastly more difficult for the NSA to stop a terrorist than it is to stop a tax cheat."[7]

Senator Sessions opposed a federal reporter's shield bill that would protect journalists from having to reveal their confidential sources when subpoenaed, and demonstrated that he believes government secrecy should trump the public's right to know about the government's activities.

- "This week, the Committee will consider legislation to shield journalists from being compelled to testify or produce any documents in investigations relating to certain protected information. I believe this information will do considerable—this legislation as written will do damage to our national security. There are reasons, very good reasons, that nations have to maintain a certain amount of secrecy, and I

[5] *Oversight of the USA PATRIOT ACT: Hearings Before the S. Comm. On the* Judiciary, 109th Cong. 26–28 (2005).
[6] Letter to Sen. Leahy and Sen. Lee from Loretta Lynch, U.S. Attny Gen., and James Clapper, Dir. Of Nat'l Intel. (May 11, 2015), https://cdt.org/files/2015/05/DNI-AG-USA-FREEDOM-2015-Support-Letter.pdf.
[7] Sessions, *supra* note 4.

think we need to be aware of that, and I hope to ask you questions about that. . . . it is a very sensitive matter to inquire of a free news person in America . . . . It just almost is not done unless it has to be done for some very significant reason*. I am not sure that is always wise*, but I think to err has been on the side of protecting the media if there has been any error in recent years for the most part."[8]

Senator Sessions questioned the validity of legal challenges to surveillance programs

- "And some private lawsuit out here against companies for millions of dollars, filed by lawyers who could be lawyers associated with groups associated with terrorism, is not the way to give oversight to a program like this, I don't think. Would you agree with that?"[9]

III. Senator Sessions does not believe that Americans have a right to privacy in any sensitive information about them that companies store. He wants the government to be able to collect sensitive personal information from third parties without any privacy protections.

Senator Sessions takes an absolutist view of the third-party doctrine—that people have no expectation of privacy in any records held by third parties. This extreme view is in opposition to the evolving views of the Supreme Court. Justice Sotomayor's widely cited concurring opinion in *United States v. Jones* questioned whether "it may be necessary to reconsider" the third-party doctrine, which 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."[10] Rather than advocating a role for Congress in filling the privacy gaps left by the third-party doctrine, Senator Sessions supports companies voluntarily turning over their customers' personal information with no process and no notice.

- "[R]ecords held in a bank are not your records, they are the bank's records. . . . Dragnet, Joe Friday and company. . . . used to go out to the motel and get the records to see if old Billy checked in. And they would give it to them. Now because of the laws and lawyers, banks and everybody often demand subpoena or some sort of official document before they will turn it over because they don't want to be sued by somebody and have to defend the case whether they win or lose. But the principles are pretty much the same here. You have a diminished expectation of privacy [in] records held by independent third parties.[11]

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[8] *Oversight of the Federal Bureau of Investigation*: *Hearing Before the S. Comm. On the Judiciary*, 111th Cong. 4–10 (emphasis added).

[9] 153 Cong. Rec. 15709, 15750 (2007).

[10] United States v. Jones, 565 U.S. 417 (2012) (Sotomayor, J., concurring).

[11] *Reauthorizing the USA PATRIOT ACT: Ensuring Liberty: Hearing Before the Subcomm. On Admin. Oversight and the Courts, S. Comm. On the Judiciary*, 111th Cong. 27–28 (2009).

- "Now, there is a question about, under certain circumstances, the ability to forbid disclosure. It used to be banks and hotels and motels would produce documents and the agent or the local police detective would ask them not to tell the person because they were conducting an investigation, and they would not. My understanding from my experience in prosecuting is that more and more lawyers have told these banks and motels and other businesses that they can or should report any subpoena of the person's record. And this could have a very damaging impact on a very sensitive investigation, could it not?"[12]

Senator Sessions supported immunity for third parties that violate the law in turning over records to the government without a proper court order, denigrated efforts to vindicate the rights of those whose records were turned over, and complained that those efforts caused a public debate.

- "So I do not know how we got to a place where we are supporting an effort by some to allow these companies, these good corporate citizens, to be sued. I know it is being driven by a lot of leftist, the 'blame America first' folks who seek to undo every single thing that is done to protect America from attack by foreign adversaries. They go through it. They attempt to find anything that can be complained about, and we end up having a big debate on these issues."[13]

Senator Sessions sponsored an amendment to the Electronic Communications Privacy Act that would require companies to turn over records without a court order, or any oversight at all, when law enforcement claims there is an emergency, even when the company had determined there was none.

- "Law enforcement investigators, who have the training and experience in such matters, should be making the determination as to what constitutes an emergency situation—not an untrained employee of a service provider. An emergency exception that allows law enforcement professionals to determine the existence of an emergency and requires service providers to disclose the requested information is a potential fix that might help address some law enforcement concerns and might help recalibrate ECPA so that there is better balance between privacy and public safety."[14]

[12] 153 Cong. Rec. 15709, 15750 (2007).

[13] *Id.*

[14] S. Rep. No. 113-34, at 12-19 (2013) (additional views from Grassley and Sessions).

We urge you to carefully investigate Senator Sessions's record on privacy and seek assurances that he will not pursue policies that undermine Americans' privacy and civil liberties.

Sincerely,

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Constitutional Alliance
Constitution Project
Electronic Frontier Foundation
Liberty Coalition
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New America's Open Technology Institute
Restore the Fourth
Voting Rights Forward

cc: Members of the Senate Judiciary Committee