

Statement of

The Honorable Chuck Grassley

United States Senator
Iowa
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Statement of Ranking Member Chuck Grassley
U.S. Senate Committee on the Judiciary
The Electronic Communications Privacy Act:
Government Perspectives on Protecting Privacy in the Digital Age
Wednesday, April 6, 2011

Chairman Leahy, thank you for calling this hearing today to examine the Electronic Communications Privacy Act. This hearing provides us the opportunity to hear the government's view on the need to reform this law, which also includes the Stored Communications Act and the criminal pen register and trap and trace statute.

This hearing comes on the heels of a September 2010 hearing that this committee held on the same topic. At that hearing, the Departments of Justice and Commerce both testified about the need for our laws to keep pace with technological developments. Both witnesses agreed that technology has changed significantly since Congress passed the law in 1986, but neither witness offered a proposal to amend the law. The hearing focused largely upon changes sought by private sector businesses and interest groups that have formed a coalition seeking to reform the law by expanding privacy protections.

I agree that we in Congress need to work to ensure that our laws are up to date and do not negatively impact business innovation and development. We also need to address legitimate privacy concerns.

I also believe we need to hear from the law enforcement community to ensure that we don't limit their ability to obtain information necessary to catch criminals and terrorists who use electronic communications to further their crimes. This statute, just like the PATRIOT Act, has specific meanings and definitions and any amendment requires careful consideration to ensure that we do not create loopholes that make it harder for law enforcement to do their jobs and allow criminals and terrorists to operate with impunity.

Today's hearing offers us an opportunity to follow-up with both departments. It is my understanding that no legislative proposal has been put forward or has been endorsed by the administration. Instead, the witnesses will point out areas where changes could be made to bring clarity to the law.

I'm interested to hear from the Department of Justice regarding what changes they view as necessary and what they feel will harm investigations. I also want to hear from the Department

of Commerce what changes they feel are necessary to ensure that we remain competitive in a global economy and how reforming our privacy laws could enhance business opportunities. That said, there is clearly a tension between the two points and that was how we arrived at the current law. The 1986 statute was a carefully crafted compromise in Congress that struck the balance between privacy and law enforcement access. Replicating that balance will be the key to any possibility of successful legislation.

The proposed changes put forth by the Digital Due Process Coalition are the only guidepost we have to start this discussion. After an initial read, I have some concerns about how this proposal will impact the way the Department of Justice currently operates. That coalition has proposed increasing the standard of proof for obtaining certain information from electronic communications providers.

This proposal seeks to increase current law to an across the board requirement that criminal investigators obtain a warrant based upon probable cause before obtaining electronic communications. Under this proposal, this standard would apply to both content and non-content information, including subscriber information and location information.

Given that the Supreme Court has long held that an individual has no reasonable expectation of privacy in information that he or she provides to a third party, this change raises a number of questions. First, how far should Congress go in creating new privacy protections for third party held documents?

The coalition proposal wants to apply new protections to electronic and wire communications, but where does it stop? Should it go further and apply to bank records for instance? Should it also include hotel records or rental car records?

Further, the proposal raises other questions about how the department would be able to quickly operate on fast moving investigations such as terrorism, violent crime, drug trafficking, and child pornography crimes. Obtaining a search warrant takes more time to obtain than a subpoena for records. How will this impact cases where time is of the essence?

Further, how would the federal courts handle the increased volume of search warrant applications? Would this require an increase in the number of federal judges in the judiciary? What about magistrate caseloads? These are important questions we should consider before we take action to amend this law.

In addition to the questions that arise in response to the proposed changes to the Electronic Communications Privacy Act, we should also discuss some other issues that are substantially related. First, we should consider what additional privacy restrictions should be placed upon providers. In the written testimony, the Department of Justice states that there are no restrictions on providers for disclosing non-content information to third parties. Should we consider adding such a restriction?

Another area of concern is the growing problem referred to by FBI Director Mueller as "going dark". This involves not the legal authority of law enforcement to obtain electronic records or communications, but the ability of service providers to provide law enforcement real-time access

to communications for wiretap purposes. Director Mueller has testified that a growing gap exists in the ability to collect information after a court order is obtained.

I think that if we are considering amending standards to obtain this information, we should simultaneously be working to ensure that these same providers are granting law enforcement the necessary access.

We have a lot to discuss and I look forward to asking the witnesses some questions.