

**Senate Judiciary Committee
Subcommittee on Privacy, Technology and the Law
Hearing on “What Facial Recognition Technology Means for
Privacy and Civil Liberties”
July 18, 2012**

**Questions for the Record from U.S. Senator Al Franken
for Ms. Jennifer Lynch**

- 1. I think it is really important to recognize that whatever the Supreme Court thinks about the Fourth Amendment, Congress is free to go above that and pass a law that does more to protect civil liberties. Can you explain how the Constitution really works as a floor, not a ceiling, when it comes to civil liberties?**

Response from Jennifer Lynch:

It is a well-recognized legal premise that Congress can legislate privacy and civil liberties protections beyond those explicit in the text of the Constitution. This ensures that the Constitution works as a floor and not a ceiling.

Two examples demonstrate this premise. First, in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Supreme Court held that the First and Fourth Amendments provided no special protection against the search and seizure of materials in the possession of the press. In so doing, the Court noted, “Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure[.]” *Id.* at 567. In response, Congress passed the Privacy Protection Act, 42 U.S.C. §2000aa *et seq.*, protecting holders of pre-publication material from searches and seizures as well as mandating the development of internal federal guidelines designed to minimize the invasiveness of other types of third party searches. *See* S. Rep. No. 96-874, at 4-5 (1980), reprinted in 1980 U.S.C.C.A.N. 3950, 3951. In passing the legislation, Congress recognized that the Supreme Court had “issued an open invitation to Congress to draw statutory lines where the Constitution did not apply[.]” S. Rep. No. 96-874, at 5, noting “this legislation was prompted by *Zurcher v. Stanford Daily* . . . [which] held that the Fourth Amendment does not confer any special protections against search and seizure for the possessor of documentary evidence who is not himself a suspect in the offense under investigation.” *Id.* at 4. The Privacy Protection Act increased journalists’ protection against governmental searches by providing a new statutory private right of action for damages for conduct that violates the Act. 42 U.S.C. § 2000aa-6(a).

Second, Congress passed the Wiretap Act, 18 USC § 2510 *et seq.*, in direct response to the Supreme Court’s decisions in *Katz v. United States*, 389 U.S. 347 (1967), and *New York v. Berger*, 388 U.S. 41 (1967), both of which discussed Fourth Amendment limitations on law enforcement recording of and eavesdropping on communications. The Wiretap Act incorporated the *Berger* opinion’s proposed limitations on wiretaps, *see Berger*, 388 U.S. at 59-60, and laid out specific rules that govern wiretapping, including the evidence necessary to obtain a wiretap order, limits on a wiretap’s duration, reporting

requirements, and a notice provision. *See, e.g.,* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 851-52 (2004). Since the law was passed, a person's privacy rights in his communications on phones and electronic devices (and law enforcement's ability to listen in on and wiretap those communications) have been governed primarily by statute rather than case law and the Constitution. *Id.* at 850.