WASHINGTON
LEGISLATIVE OFFICE

February 6, 2017

Re: Vote YES on H.R. 387, the Email Privacy Act

Dear Representative,

On behalf of the American Civil Liberties Union (ACLU) we urge you to vote YES on H.R. 387, the Email Privacy Act, which is scheduled to be considered under suspension of the rules today. An identical version of this bill *unanimously* passed the House last year.

This bill contains critical provisions necessary to ensure that Americans' adoption of modern technologies—like email and cloud storage—does not mean that they must sacrifice Fourth Amendment privacy protections. Specifically, the bill would impose a warrant requirement for access to electronic content (with limited exceptions), consistent with the Sixth Circuit's decision in *U.S. v. Warshak*.[1] This rule is consistent with the current policies of the FBI[2] and major service providers, which generally require a warrant before consumers' content information can be turned over to law enforcement officials.

Such a requirement is critical to update our privacy laws to reflect current technology. The warrant requirement in H.R. 387 would end the outdated "180-day rule" in the Electronic Communications Privacy Act (ECPA), which permits law enforcement to access email communications older than 180 days without a warrant. Similarly, the bill will also require a warrant for opened emails—rejecting the Department of Justice's interpretation that ECPA does not require a warrant in such instances.

While we support the current version of H.R. 387, we were disappointed that the version of the bill voted out of the House Judiciary Committee last year gutted a key privacy protection contained in the original bill, co-sponsored by 314 members of this chamber. Specifically, the bill eliminated individuals' basic right to be notified if the government requests access to electronic content information.[3] The result is that Americans will have no guarantee that they would even know when the government accesses their most sensitive content information—be they intimate photos, financial documents, or even personal emails. Absent notice, individuals will be unable to raise

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[1] United States v. Warshak, 769 F.3d 372 (6th Cir. 2014).
[2] Rep. Susan DelBene, *Rep. DelBene Questions FBI Director James B. Comey*, YOUTUBE (June 11, 2014), https://www.youtube.com/watch?v=OkIe6t7bHi4&feature=youtu.be.
[3] H.R. 699, 114th Cong. § 3(b) (2016).

legal challenges or pursue remedies in cases in which the government wrongly accesses their information.[4]

Required government notice is not a novel concept; some state ECPA statutes and federal statutes (such as the Wiretap Act) require notice in cases in which the government seeks information through third parties. In today's world, where third parties increasingly hold individuals' information, such notice is critical to ensure that Americans' Fourth Amendment rights are adequately protected. Indeed, such notice also acts as an important check against government overreach and abuse. We urge members to work to reinstate these provisions as this bill advances or remedy these deficiencies in future legislation.

In addition, we also urge members to support additional reforms, as part of the final version of H.R. 387 or in future legislation, which would:

- Create a statutory suppression remedy: If a law enforcement official obtains non-electronic information illegally, that information usually cannot be used in court proceedings. Unfortunately, the proposed ECPA bill, unlike some state ECPA proposals, would not apply that same standard to illegally-obtained electronic information at the federal level. Without clarity on suppression, an individual could be harmed by illegal conduct, but have no statutory remedy—a gross injustice that would be at odds with criminal procedural remedies in other contexts. Accordingly, we support amendments that would prohibit use of unlawfully obtained information in any criminal or administrative proceedings.

- Require a probable cause warrant for location information: Virtually all Americans use electronic devices, such as cell phones, that may track their every move. Unfortunately, however, H.R. 387 would fail to update ECPA to protect location information adequately. Indeed, the Department of Justice has taken the position that a warrant is not required to obtain certain types of location information—a position that is at odds with the sensitivity with which the Supreme Court and the public view location information[5]. To remedy this deficiency, we support amendments that would require a warrant in cases in which the government seeks access to real-time or historical location information.[6]

Notwithstanding these proposals, we recognize that even the current version of H.R. 387 represents an improvement over today's outdated and inadequate law. Thus, we support H.R. 387, and urge members to work to remedy its deficiencies.

If you have any questions, please feel free to contact Legislative Counsel Neema Singh Guliani at 202-675-2322 or nguliani@aclu.org.

Sincerely,

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[4] H.R. 387 would grant providers the discretion to provide notice to customers if their information is requested, unless served with a court order requiring delayed notice.

[5] See Riley v. California, 134 S. Ct. 2473, 2490 (2014) (citing 2013 MOBILE CONSUMER HABITS STUDY (CONDUCTED BY HARRIS INTERACTIVE), JUMIO (2013), *available at* http://pages.jumio.com/rs/jumio/images/Jumio%20-%20Mobile%20Consumer%20Habits%20Study-2.pdf) ; United Sates v. Jones, 132 S. Ct. 945, 954 (2012)

[6] The ACLU supported H.R. 491, the Geolocation Privacy and Surveillance Act, in the last Congress, which would require a law enforcement to obtain a warrant to access location information, unless specific exceptions apply.

Faiz Shakir
Director

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Legislative Counsel