

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
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Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Committee On The Judiciary,
Hearing On "The Electronic Communications Privacy Act:
Promoting Security And Protecting Privacy In The Digital Age
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Today, the Committee holds an important hearing on the Electronic Communications Privacy Act (ECPA) -- one of the Nation's premier digital privacy laws. Four decades ago, Chief Justice Earl Warren wrote that "the fantastic advances in the field of electronic communication constitute a greater danger to the privacy of the individual." These words are as relevant today as they were then. For many years, ECPA has provided vital tools to law enforcement to investigate crime and to keep us safe, while at the same time protecting individual privacy online. As the country continues to grapple with the urgent need to develop a comprehensive national cybersecurity strategy, determining how best to bring this privacy law into the Digital Age will be one of Congress's greatest challenges.

American Innovation Has Outpaced Our Digital Privacy Laws

When Congress enacted ECPA in 1986, we wanted to ensure that all Americans would enjoy the same privacy protections in their online communications as they did in the offline world, while ensuring that law enforcement had access to information needed to combat crime. The result was a careful, bipartisan law designed in part to protect electronic communications from real-time monitoring or interception by the Government, as emails were being delivered and from searches when these communications were stored electronically. At the time, ECPA was a cutting-edge piece of legislation. But, the many advances in communication technologies since have outpaced the privacy protections that Congress put in place.

Today, ECPA is a law that is often hampered by conflicting privacy standards that create uncertainty and confusion for law enforcement, the business community and American consumers.

For example, the content of a single e-mail could be subject to as many as four different levels of privacy protections under ECPA, depending on where it is stored, and when it is sent. There are also no clear standards under that law for how and under what circumstances the Government can access cell phone, or other mobile location information when investigating crime or national

security matters. In addition, the growing popularity of social networking sites, such as Facebook and MySpace, present new privacy challenges that were not envisioned when ECPA was passed.

Simply put, the times have changed, and so ECPA must be updated to keep up with the times. Today's hearing is an opportunity for this Committee to begin to examine this important issue.

Principles For ECPA Reform

While no one would quibble with the notion that ECPA is outdated, the question of how best to update this law has no simple answer. In fact, there are many different -- and at times competing -- views about how best to update this law. This Committee will carefully examine each of these proposals. But, I believe that there are a few core principles that should guide our work.

First, privacy, public safety and security are not mutually exclusive goals. Meaningful ECPA reform can, and should, carefully balance and accomplish each.

Second, reforms to ECPA must not only protect Americans' privacy, but also encourage American innovation. America is the birthplace of the Internet and we should continue to lead in developing policies that address digital privacy. This not only leads to greater confidence in our laws, but encourages greater investment in new communications technologies.

Lastly, updates to ECPA must instill confidence in American consumers. If citizens are confident that their privacy rights will be protected online, they will be more comfortable using American communications technologies at home and at work.

I am pleased that we will hear from the General Counsel of the Department of Commerce, who has unique insights into the impact of ECPA on American innovation. I am pleased that we will also get the views of the Department of Justice, which relies upon ECPA to carry out its vital law enforcement and national security duties.

We also have an outstanding panel of expert witnesses to advise the Committee on the role of technology in protecting privacy in the 21st Century. I applaud the work of the Center for Democracy & Technology, Microsoft and other stakeholders in helping to build industry consensus on a core set of proposals to update ECPA.

I thank all of our witnesses for appearing today. I look forward to a good discussion.

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Concurring opinion, *Lopez v. United States*, 373 U.S. 427, 441 (1963)