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The Honorable Bob Goodlatte
Chairman, House Judiciary Committee 2138
Rayburn House Office Bldg. Washington,
D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee 2138
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Dear Chairman Goodlatte, Ranking Member Conyers, and members of the committee,

The American Civil Liberties Union (ACLU)[1] is pleased that the House Judiciary Committee is holding a markup of H.R. 699, the Email Privacy Act.

The ACLU strongly supports H.R. 699 and urges the Committee to pass the original proposed version – co-sponsored by 314 House members and 29 members of the committee. 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, such as the requirement that the government provide notice and obtain a warrant before it accesses electronic content information.

We are disappointed that the proposed manger's amendment[2] would eliminate critical privacy protections contained in the original version of the bill– such as the basic right to be notified if the government requests access to electronic content information.[3] The result is that Americans would 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 would be unable to raise 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

[1] For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.
[2] Amendment in the Nature of a Substitute, H.R. 699, 114th Cong. (2016).
[3] H.R. 699, 114th Cong. § 3(b) (2016).
[4] The manager's amendment would grant providers the discretion to provide notice to customers if their information is requested, unless served with a court order requiring delayed notice.

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. Thus, we urge members of the committee to work to ensure that required government notice is included in the final version of H.R. 699.

In addition, the ACLU supports amendments that would strengthen the bill by:

- Including a 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.

- Requiring 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. 699 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 urge the committee to adopt 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 weakened version of the bill proposed in the manager's amendment represents an improvement over the current outdated and inadequate law. Thus, we would support even a weakened version of the bill as modified by the manager's amendment, with the hopes that such deficiencies could be remedied as the bill advances.

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

Sincerely,

Karin Johanson
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Legislative Counsel

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[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 supports H.R. 491, the Geolocation Privacy and Surveillance Act, which would require a law enforcement to obtain a warrant to access location information, unless specific exceptions apply.