



April 12, 2016

Chairman Bob Goodlatte
House Judiciary Committee
United States House of Representatives

Ranking Member John Conyers
House Judiciary Committee
United States House of Representatives

Dear Chairman Goodlatte and Representative Conyers,

NACDL is writing to offer its qualified support for the Manager's Substitute Amendment to the Email Privacy Act (H.R. 699). As amended, the Act updates the Electronic Communications Privacy Act (ECPA), the law that sets standards for government access to private internet communications, to reflect internet users' reasonable expectations of privacy with respect to emails, texts, notes, photos, and other sensitive information stored in "the cloud."

NACDL still prefers the clean version of this bill. The manager's amendment removes key provisions of the bill as introduced, most notably the provision requiring notice from the government to the customer when a warrant is served on a provider, and does not compensate with any back end protections. Notice is a critical safeguard to the due process rights of anyone being investigated and/or charged in the criminal system. In the absence of notice, any person in a trial, hearing, or proceeding should have the right to move to suppress any electronic information obtained or retained in violation of its provisions. In addition, there is no requirement to purge records that are obtained but not used in a prosecution or other judicial proceeding.

Even with these reservations, NACDL appreciates that the bill would update the wildly out of date rules pertaining to email communications, specifically ECPA's arbitrary "180-day rule," which permits email communications to be obtained without a warrant after 180 days. The Act would also reject the Department of Justice interpretation of ECPA that the act of opening an email removes it from warrant protection. These reforms would also ratify the Sixth Circuit's decision in *U.S. v. Warshak*, which held that email content is protected by the Fourth Amendment and that law enforcement access requires a probable cause warrant. Moreover, the changes reflect current practices: DOJ and FBI policies already require law enforcement officials seeking content to obtain a search warrant, and many service providers will not relinquish their users' content without one. However, it does impose a warrant-for-content rule with limited exceptions. We are particularly pleased that the Manager's Substitute does not

carve out civil agencies from the warrant requirement, which would have expanded government surveillance power and undermined the very purpose of the bill.

For these reasons, we offer our qualified support for the bill as amended by the Manager's Substitute.

Sincerely,

A handwritten signature in black ink, appearing to read "E. G. Morris". The signature is written in a cursive style with a large, stylized initial "E" and "G".

E. G. "Gerry" Morris
NACDL President