

Statement of
Representative Jared Polis (CO-02)
Before the
Committee on the Judiciary
United States House of Representatives
December 1, 2015
H.R. 699, the Email Privacy Act

Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee:

Thank you for convening this important hearing on H.R. 699, the Email Privacy Act. The Email Privacy Act is the most cosponsored bill in Congress awaiting floor action, and the problem it addresses is one of the most pressing constitutional concerns of our modern age: How can we stop the advancement of technology from eroding our fundamental right to privacy?

In the broadest possible terms, the obvious answer is that we need to update our laws. Many of the laws governing the use of the technology Americans most frequently use today were written long before any of that technology existed or was even conceived of. Congress simply cannot purport to protect Americans' constitutional rights while leaving the federal government to enforce laws designed for a world that doesn't exist anymore.

Today, the law governing many of our online privacy rights is the Electronic Communications Privacy Act (ECPA) of 1986. In 1986, for the vast majority of Americans, "electronic communications" meant a phone call placed from a landline. In 1986, Apple had just released the Macintosh Plus – a cutting-edge personal computer that provided users with an entire megabyte of memory. Today, iPhone 6 users walk around with 16,000 times that amount in their pockets. In 1986, the "World Wide Web" was years away from taking off. Today, that term is already a relic of the past.

As a result of Congress's failure to keep up with the pace of technology, every American's email can be subject to warrantless searches thanks to a 29-year-old legal loophole. Under ECPA, the government has the ability to search through any digital communications stored on a third-party server – such as your emails and instant messages – without a warrant, as long as they are more than 180 days old. In 1986, this loophole may have seemed reasonable because individuals simply didn't leave their emails stored on a server for months at a time. That kind of digital storage space just didn't exist, so authorities considered emails not deleted after six months to be abandoned. In 2015, however, consumers routinely store emails digitally for months or even years at a time.

Most Americans have no idea that a law written 29 years ago allows the government to open their old emails without probable cause. And when they find out, they're shocked – because that

reality is simply impossible to square with the basic liberties guaranteed in our Constitution. It simply makes no sense that our homes, cars, and mailboxes are protected from unwarranted government searches but the government can sift through our email inboxes with impunity.

Congress has the power to change that. The Email Privacy Act has 304 cosponsors in the House – a bipartisan, veto-proof supermajority of Members of this body – and far-reaching support across all sectors of the economy and across the political spectrum, from groups like the Heritage Foundation and the American Civil Liberties Union to tech startups, Fortune 500 companies, and Chambers of Commerce.

There are some federal officials calling for special carve-outs and lower burdens of evidence in order to access Americans' old emails. I urge the committee to resist these efforts to undermine the bill for several reasons.

First, the sheer volume of support for this bill suggests that Americans and their representatives in Congress overwhelmingly support the legislation as written and do not believe electronic correspondence should be subject to a lower standard of evidence than physical documents when it comes to government searches.

Second, the authors of ECPA clearly did not anticipate a future in which Americans have access to nearly unlimited storage space that allows us to store our emails on the cloud in perpetuity. In asking for a special carve-out from warrant requirements, these federal agencies are asking for broad new search authorities that go far beyond the intent of the 1986 legislation and that would significantly undercut the intended reforms of the Email Privacy Act.

Third, the federal officials asking for these broad new authorities have not put forward compelling evidence that the 180-days loophole has served a legitimate law-enforcement purpose.

And finally, it is impossible to square a lower standard of evidence for emails older than 180 days with the Constitution's 4th amendment protections against unreasonable search and seizure. There is simply no constitutional basis for exempting digital correspondence from our privacy laws, and there is no compelling safety or crime-prevention reason for doing so either.

The 180-days loophole is a longstanding problem with a simple, bipartisan, broadly popular, noncontroversial solution at the ready. With 304 cosponsors in the House, the Email Privacy Act is the most-cosponsored bill of the 114th Congress not to receive a floor vote. I urge the Committee to favorably report H.R. 699 so that it can finally get a vote on the House floor, where I am confident it would pass with overwhelming bipartisan support.

Thank you.