

## **ECPA Reform Will Not Impede National Security or Investigations of International Terrorism**

Our nation has two parallel sets of laws on government surveillance: one for criminal investigations, and one for national security investigations, including the investigation of international terrorism and other crimes affecting national security. The Digital Due Process (DDP) coalition's recommendations for ECPA reform do not touch the rules for national security and international terrorism.

- ECPA reform will not affect intelligence investigations.
  - ECPA reform legislation based on the DDP principles will not touch the authority for National Security Letters (NSLs).
  - The Foreign Intelligence Surveillance Act has its own set of rules for government access to email and documents stored in the "cloud." ECPA reform legislation will not change those rules in any way.
- FISA authorities can be used to obtain both the contents of emails of a foreign terrorist and associated addressing data, and ECPA reform legislation would not amend FISA.
- The Patriot Act and court decisions have made it clear that information collected using FISA authorities can be used in criminal prosecutions and ECPA reform would not change that.
- The FISA Amendments Act added a new method of acquiring intelligence "Notwithstanding any other provision of law," so it cannot be affected by any changes to ECPA.

Proponents of ECPA reform support language stating explicitly that ECPA reform does not affect national security surveillance under FISA. For example, Chairman Leahy included language in his manager's amendment taken verbatim from an amendment proposed by Sen. Grassley:

- "Nothing in this title [of the bill] or an amendment made by this title shall be construed to apply the warrant requirement for contents of a wire or electronic communication authorized under this title or an amendment made by this title to ... the Foreign Intelligence Surveillance Act ... or any other provision of Federal law."

### **The structure and language of ECPA is very different from that of FISA**

There are crucial differences between ECPA and FISA, which ensure that changes to ECPA will not affect FISA:

- The ECPA term "electronic communication" nowhere even appears in FISA.
- FISA has its own separate definition of "wire communication," which is different from ECPA's definition of "wire communication" and its own definition of the "contents" of a communication, which is different from the ECPA definition.
- FISA authorizes "acquisitions," ECPA authorizes "disclosures."
- The term "electronic surveillance" is a linchpin concept in FISA, but is not used at all in ECPA. Moreover, the FISA definition of "electronic surveillance" hinges on the "reasonable expectation of privacy," which is a constitutional concept and ECPA reform would not address the constitutional question of when such an expectation arises.

For all these reasons, it is clear that ECPA reform does not affect FISA or national security.