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# ABSTRACT

**Computer & Communications Industry Association**

## GOVERNMENT ACCESS TO DATA

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- *Current law in government privacy does not provide the protections that people reasonably anticipate. Data kept with third parties is treated differently than that kept on a personal computer, and pervasive geolocation data is not protected against at all.*
- *The Electronic Communications Privacy Act reflects a communications reality that is nearing three decades old. To properly protect citizens' data in the 21<sup>st</sup> Century, ECPA must be reformed. The Digital Due Process Coalition's recommendations provide a blueprint for this much needed process.*
- *Any expansion of the reach of the Communications for Law Enforcement Act that would force all software enabling communications over the Internet to provide a hook for law enforcement would be burdensome on small business, destructive of privacy protections, harmful to cybersecurity, and a barrier to innovation.*

**Background:** Having balanced rules regarding law enforcement access to citizens' data is vitally important to the growth of the Internet. Consumers will only participate in online industry if they believe that the data they expose is safe, not just in the hands of the companies that they deal with, but also from overreach by the government. The statutory and constitutional rules governing this sort of access by government, however, are out of date and do not reflect modern expectations of privacy. The inconsistencies in the law also lead to confusion and hesitancy on the part of companies that have to comply with it, and the law enforcement officials who have to operate within it. Many have come to believe that updating the law is of the utmost importance.

**CCIA's Position:** CCIA believes that the time has come to modernize our interpretation of the Fourth Amendment and amend the Electronic Communications Privacy Act to account for the ways technology is used today. Congress should take up ECPA reform, and follow the suggestions of the Digital Due Process Coalition, of which CCIA is a member. DDP has taken the time to analyze ECPA in light of current uses of technology, and make a list of four broad recommendations for the reform of the law. CCIA endorses these recommendations and urges Congress to adopt them as soon as possible

CCIA also believes that Congress should refrain from any expansion of the Communications Assistance for Law Enforcement Act that would mandate certain technical infrastructure from Internet communications companies. Such a burdensome and unnecessary mandate would squash innovation, harm privacy, and damage cybersecurity efforts without providing an appreciable benefit to law enforcement.

### ***Policy Considerations:***

#### **Electronic Communications Privacy Act Reform**

In the late 1970s and early 1980s, it became evident that the Supreme Court's interpretation of the Fourth Amendment did not in general extend to information handed over to a third party (this is still true today, although some appeals courts are beginning to question the approach). Noticing that individuals and companies were beginning to hand over personal computer data to others for storage or processing reasons, Congress passed the Electronic Communications Privacy Act in 1986 to lay down a set of regulations governing the legal process required by the government in order to obtain this data that a citizen had delivered to a third party.

Some of the decisions that Congress made in implementing ECPA made sense given the technology at the time, but have aged poorly as new uses for the Internet and computers have come about. As an example, the level of process that law enforcement needs to obtain access to an email depends on how old the email itself is. The DDP recommendations would, most pertinently, require a probable cause warrant before government could obtain private data held by third parties. The recommendations would also create the same requirement for geolocation information, which currently is not explicitly regulated and is the subject of confusion for magistrate judges and law enforcement authorities.

#### **Avoiding New Mandates in the Communications Assistance for Law Enforcement Act**

The original CALEA was written to mandate that large telecommunications companies implement engineering solutions that made it feasible and easy for law enforcement to execute duly acquired wiretap warrants. Before the law, police would have to go to targets' homes and place a physical piece of equipment on a phone line. Due to modern technologies such as peer-to-peer networking and voice over IP communication, law enforcement is having a problem in capturing some online communications, a phenomenon they've referred to as "going dark." In response, the government would like Congress to expand CALEA to place requirements on smaller companies that facilitate communication over the Internet. While the government has not made any detailed requests of Congress, they have appeared at a number of hearings to emphasize the problem and to ask for a solution in general.

CCIA is opposed to any expansion of CALEA that would place broad requirements on all Internet firms that provide a platform for user communication. Such a requirement would be a huge privacy problem, negatively affect trust on the part of consumers, harm cybersecurity efforts, and damage innovation in the marketplace. Making the Department of Justice the arbiter of what novel ideas get implemented on the Internet would ensure that prospective entrepreneurs would either think better of the idea or simply go abroad to launch their company elsewhere.

***Current Status:*** Momentum is slowly beginning to build in Congress for a reform of ECPA. Senator Ron Wyden has been working on a draft of a bill that would provide protections for geolocation information, and spoke about the bill at a CATO event in February 2011. In addition, the Senate Judiciary Committee held a hearing on the topic on April 6<sup>th</sup> at which representatives of the Department of Justice and the Department of Commerce testified. Members of DDP continue to hold meetings on Capitol Hill to develop support for the needed reforms.

While a number of hearings have been held on the issues surrounding CALEA and the "going dark" problem, as of now no legislative proposals have been presented, and the government has not given any indication of what enhanced mandates they may require. CCIA signed on to a letter with a number of other organizations expressing our doubts about the potential for new mandates. This is an area that bears careful watching.