No. 03-1383

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES,

Appellant,

v.

BRADFORD C. COUNCILMAN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF ON REHEARING *EN BANC* FOR SENATOR PATRICK J. LEAHY AS *AMICUS CURIAE* SUPPORTING THE UNITED STATES AND URGING REVERSAL

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INTEREST OF AMICUS

Senator Patrick J. Leahy is the original sponsor of the Senate version of the Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848, and currently the ranking Democratic Senator on the Senate Committee on the Judiciary. Senator Leahy has a long-standing interest in the protection of privacy and the promotion of the Internet. He worked closely with the Department of Justice to ensure strong privacy protection for electronic communications.

Pursuant to Fed. R. App. P. 29(b) and by the accompanying Motion for Leave to File, *amicus* respectfully requests that the Court accept and file this brief supporting the United States and urging reversal.

SUMMARY OF ARGUMENT

Congress passed ECPA to update the existing surveillance law framework for new technologies. Recognizing the threat to privacy posed by the continuous, systematic acquisition of electronic communications during their transmission, Congress extended existing prohibitions against the unauthorized "intercept[ion]" of wire and oral communications, enacted in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, §§ 801–804, 82 Stat. 211 (codified as amended at 18 U.S.C.A. §§ 2510-2522 (West 2000 & Supp. 2004)), to electronic communications. Congress intended for Title III to protect electronic communications, like telephone calls, during the entirety of the

transmission phase. ECPA's legislative history fully rebuts defendant's contention that electronic communications move in and out of Title III's umbrella depending on whether, at a precise moment in time, they are between or within the computers transmitting them to the user's mailbox.

ARGUMENT

I. The extension of Title III to electronic communications was the centerpiece of Congress's effort to harmonize treatment of new and old communications technologies under federal law, and reflected an intent to protect electronic communications, like telephone communications, through the entirety of the transmission phase.

ECPA reflected a broad, bipartisan effort to update federal surveillance law to take account of new communications technologies. Two features of ECPA are relevant to this case. First, ECPA extended Title III's protections against the unauthorized "intercept[ion]" of wire and oral communications to electronic communications. *See* ECPA § 101, 100 Stat. at 1848; 18 U.S.C. § 2511(1)(a) (2000). Second, ECPA created a new chapter of the criminal code, often referred to as the Stored Communications Act (SCA), prohibiting unauthorized access to communications held in "electronic storage" by a service provider. ECPA § 201, 100 Stat. at 1860; 18 U.S.C.A. §§ 2701, 2703(a) (West 2000 & Supp. 2004).

This case concerns the intersection of Title III's prohibition on unauthorized interception and the SCA's prohibition on unauthorized access to communications

held in electronic storage. Defendant's central contention, accepted by the district court and the panel majority, is that an electronic communication being transmitted to the recipient is largely unprotected by Title III. More precisely, Defendant contends that during any brief, intermittent storage that occurs during the transmission of the communication to the user's electronic mailbox, the communication cannot be "intercept[ed]" and is solely protected by the less restrictive provisions of the SCA. *See* Panel Brief for Defendant-Appellee at 36-40 (No. 03-1383). Under Defendant's theory, electronic communications are dramatically different from telephone communications: while a telephone communication is protected by Title III during the entirety of its transmission, protection of an electronic communication during transmission shifts between Title III and the SCA depending on whether, at a particular moment in time, the communication is between or within the computers relaying it.

Nothing could be more inconsistent with the legislative record of ECPA's passage. Accepting Defendant's position would essentially render ECPA's extension of Title III to electronic communications a dead letter. From the very beginning of the legislative process, Congress perceived the prospective acquisition of the contents of electronic communications during transmission to be particularly intrusive and to warrant regulation in largely the same manner as the prospective acquisition of the contents of telephone calls. That understanding was

shared by *all* participants to the legislative process—even the Department of Justice (DOJ), which opposed early versions of ECPA and which ultimately secured exceptions to certain of Title III's procedural requirements for law enforcement acquisition to electronic communications—and it never changed.

ECPA was the product of growing concern in Congress that new communications technologies, including electronic communications, were insufficiently protected by existing law.[1] On September 19, 1985, Senator Leahy and Representative Robert W. Kastenmeier introduced identical versions of the Electronic Communications Privacy Act of 1985, S. 1667 and H.R. 3378, in the Senate and House. The measures were explicitly designed to provide consistent legal treatment across different communications technologies. Senator Leahy highlighted the inconsistent treatment of voice and data transmissions as the central problem that the legislation was designed to address: "stream[s] of information

[1] As the Senate Judiciary Committee report accompanying ECPA notes, that concern was fueled by an exchange of letters between Senator Leahy and the Department of Justice (DOJ) in early 1984 concerning whether federal law prohibited the warrantless acquisition of electronic communications by law enforcement officials. S. Rep. No. 99-541, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3558. DOJ responded that federal law protects such communications only when a reasonable expectation of privacy exists, and conceded that "[i]n this rapidly developing area of communications . . . distinctions such as [whether an expectation of privacy does or does not exist] are not always clear or obvious." *Oversight on Communications Privacy: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 17 (1985).

transmitted in digitized form" were not "protected from illegal wiretaps, because our primary law failed to cover data communications." 131 Cong. Rec. 24365. As Representative Kastenmeier emphasized in his floor statement, a "technology-dependent legal approach does not adequately protect personal communications." *Id.* at 24396.

The bills sought to respond to these concerns about inconsistent protection of communications technologies by extending Title III's prohibition on "intercept[ion]" from wire and oral communications to electronic communications. The bills themselves could not have more clearly reflected their sponsors' concerns about the need for parity of treatment between telephone and electronic communications. The bills would have accomplished the extension of Title III by substituting the phrase "electronic communication" for the phrase "wire communication" throughout Title III, and subsuming wire communications within the definition of "electronic communication." *See* S. 1667, 99th Cong., 1st Sess. § 101 (1985).

The subsequent development of the legislation shows that the understanding that Title III supplied the appropriate framework for protecting electronic communications during transmission was shared by all participants and never changed. Following the introduction of S. 1667 and H.R. 3378, subcommittees of the Senate and House Committees on the Judiciary held hearings on S. 1667 and H.R. 3378 in late 1985 and early 1986. *See Electronic Communication Privacy:*

Hearing on S. 1667 Before the Subcomm. on Patents, Copyrights and Trademarks, Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1987) (*Senate Hearing*); *Electronic Communications Privacy Act: Hearings on H.R. 3378 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1986) (*House Hearings*). Congress had commissioned a study of electronic surveillance and new technology by the Office of Technology Assessment, and the results of that study were publicly released during the House Hearings. *See House Hearings* at 42-73.

The conclusions of the study were broadly consistent with the premises of S. 1667 and H.R. 3378: that gaps in federal law left new technologies inadequately protected. *See* U.S. Congress, Office of Technology Assessment, *Federal Government Information Technology: Electronic Surveillance and Civil Liberties* 3 (1985) (*OTA Report*). With respect to electronic communications, the study identified multiple phases during which the privacy of such communications could be compromised, including "at the terminal or in the electronic files of the sender, *while being communicated*, in the electronic mailbox of the receiver, when printed into hardcopy, and when retained in the files of the electronic mail company for administrative purposes." *Id.* at 48 (emphasis added). OTA devised various policy options for Congress. Importantly, each of the policy options involving legislative change envisioned robust, Title-III-type protection for the transmission stage. *See*

id. at 51 (describing "an amendment to Title III that would protect all data communications transmitted over wire" as the likely vehicle for transmission-phase protection); *id.* at 52 (suggesting that protection of the transmission stage could be left to resolution of existing efforts to eliminate Title III's requirement that an interception entail "aural" acquisition of a communication).

The main opposition to the bills at the hearings came from the Department of Justice (DOJ). In particular, DOJ expressed concern that the proposed legislation would amount to "a complete overhaul of the structure of title III" and would "impair the effectiveness of [that] statute." *House Hearings* at 213 (testimony of James Knapp, Deputy Assistant Attorney General, Criminal Division, U.S. Dep't of Justice). Despite its opposition to drastic terminological and other revisions of Title III, however, DOJ acknowledged that, during transmission, electronic communications should be accorded several of Title III's protections. With respect to "interception of *prospective transmissions of the substance of a communication*," DOJ recognized that "[t]he level of intrusion . . . is *greater than situations in which the data is merely stored*." *Id.* at 229-30 (emphasis added). Accordingly, DOJ stated, "the transmission . . . should enjoy some of the protections of title III."[2] *Id.* at 214. In particular, DOJ suggested that

[2]DOJ's position in the House Hearings in early 1986 did evolve somewhat from its position in the November 1985 Senate Hearing, where DOJ expressed the categorical view that all electronic mail should be treated like first-class mail and

electronic communications should be provided "all the protections afforded under Rule 41 [of the Federal Rules of Criminal Procedure, governing the availability of search warrants], plus specificity of the facility, the type of information sought to be intercepted, minimization provision, and a directive that the order only be for a specified duration up to 30 days." *Id.* at 214-215.

While recognizing that acquisition of electronic communications during the transmission phase was sufficiently intrusive to warrant extension of most of Title III's key protections, DOJ strenuously argued that Congress should treat electronic communications differently from wire communications in three respects: by eliminating a requirement that federal investigators seeking an order to intercept electronic communications acquire the approval of a high-level DOJ official; by making an interception order available for any federal felony, not merely those federal felonies specifically enumerated under Title III; and by declining to extend Title III's statutory exclusionary rule to electronic communications. *Id.* at 215, 232. Following the hearings, the proposed legislation was revised to account for

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not receive any of Title III's heightened protections. *Senate Hearing* at 53-54 (testimony of James Knapp). As the testimony makes clear, however, DOJ did not have in mind a continuous, prospective acquisition of multiple communications during transmission. Rather, it described scenarios in which law enforcement officials might seek a single communication that had already occurred. *Id.* at 77 ("[Y]our typical wiretap involves an order to cover conversations that could be going on for a period of time . . . . In a search warrant for electronic mail, you are talking about a search warrant for a specific conversation. It is self-minimizing.").

DOJ's concerns about destabilization of Title III. *See* S. Rep. No. 99-541, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3558. The extension of Title III's prohibition on interception to electronic communications remained the centerpiece of the proposed legislation, however, and none of the changes suggested that that protection would extend only intermittently during the transmission phase.

The new versions, H.R. 4952 and S. 2575, simply proposed adding electronic communications to Title III's existing prohibition on interception of wire and oral communications, rather than making wire communications a subset of electronic communications. *See* H.R. 4952, 99th Cong., 2d Sess. § 101 (1986). In accordance with the views of DOJ, the bills treated electronic communications differently from wire and oral communications in the three ways DOJ had proposed at the hearings. *See id.* § 105 (proposed 18 U.S.C. § 2516(3)); *id.* § 101(e) (proposed § 2518(10)(c)). Congress passed the Title-III-related provisions of ECPA in this form with minor changes not relevant here. *See* ECPA §101, 100 Stat. at 1848, 1860.

This discussion of the legislative record is illuminating in several respects. First, absolutely nothing in the legislative record supports the view that electronic communications in transmission, prior to delivery to the user's mailbox, pass in and out of Title III's protection. The committee reports and the floor consideration

of the legislation confirm that, despite the changes made to accommodate DOJ's concerns, the centrality and breadth of the extension of Title III's interception prohibition to electronic communications in transmission were never in question. The reports of the House and Senate Judiciary Committees emphasized the need to fully protect electronic communications against unauthorized interception. *See* H.R. Rep. No. 99-647, at 34-35 (1986); S. Rep. No. 99-541, at 3, *reprinted in* 1986 U.S.C.A.A.N. at 3557. The bills' proponents consistently highlighted this feature of ECPA on the floors of the House and Senate. *See* 132 Cong. Rec. 14886 (1986) (statement of Rep. Kastenmeier) (recognizing need to prohibit interception "comprehensive[ly]" as the "first principle" guiding ECPA); *see also id.* at 14601 (statement of Senator Leahy); *id.* at 27633 (statement of Senator Leahy).

Second, the position of the DOJ, an opponent of early versions of ECPA, provides telling evidence of all parties' shared view that the prospective acquisition of electronic communications during transmission would be intrusive and that Title III's basic protections should apply. If communications in transmission move in and out of Title III's protection, then law enforcement officials could access those communications under the lesser (search warrant) standard of the SCA at any one of many points of storage along the transmission path. *See* 18 U.S.C.A. § 2703(a) (West 2000 & Supp. 2004). Under this theory, the procedural provisions of Title

III are of virtually no relevance, for the SCA provides a ready alternative—indeed, in light of Title III's requirement of exhaustion of other investigative methods, *see* 18 U.S.C. § 2518(1)(c) (2000), a *mandatory* alternative—to Title III's procedures. It is difficult to see why DOJ would have fought so strenuously for exceptions to Title III's requirements if, all the while, a far simpler route to the acquisition of contents of electronic communications was available.

In short, the legislative record thoroughly rebuts the proposition that Title III contains the gaps that the district court and panel majority found here.

II. Congress's establishment of a separate framework protecting communications in "electronic storage" does not cast doubt upon Title III's protection of electronic communications during the entire transmission phase.

In addition to extending Title III's prohibition on interception to electronic communications, ECPA created a separate chapter of the criminal code, now known as the SCA, protecting communications in "electronic storage" with the provider of an electronic communication service. *See* 18 U.S.C.A. §§ 2701, 2703(a) (West 2000 & Supp. 2004). ECPA defined "electronic storage" to include "any temporary, intermediate storage incidental to the transmission" of the communication. *Id.* § 2510(17). Nothing in Congress's establishment of this framework casts doubt upon Title III's protection of electronic communications during the entire transmission phase.

Defendant seizes upon the establishment of a separate set of protections in the SCA for communications in "electronic storage" to argue that, with respect to electronic communications, the SCA and Title III are mutually exclusive: that an electronic communication in brief storage at any point along the transmission path to the recipient's mailbox is protected under the SCA, or not at all. Panel Brief for Defendant-Appellee at 27-30, 36-40. The purported textual basis for that contention—that Congress included electronic storage in the definition of wire communications but excluded it from the definition of electronic communications— is fully rebutted by other participants in this case. *See* Supp. Brief for the Center for Democracy and Technology *et al.* at 6-12 (No. 03-1383). Even if Title III and the SCA are mutually exclusive, however, Defendant's argument founders for another reason: it reflects a fundamental misunderstanding of Congress's intent in providing this protection against unauthorized access to stored communications.

As the Court is aware, e-mail is relayed from a sender to the recipient's mailbox via a number of intermediary computers that may temporarily store a message—a model sometimes referred to as "store-and-forward." Importantly, however, among the many discussions of transmission and storage during the ECPA hearings, there is no reference to the possibility that intermittent storage

during the transmission phase makes a message any less in transmission, and thus Title III-protected, than it otherwise would be. Defendant suggests that intermittent storage during the transmission process is precisely the kind of storage Congress had in mind when it defined electronic storage as storage "incidental to the transmission" of a communication. *See* Panel Brief for Defendant-Appellee at 39 (No. 03-1383). Defendant, however, fundamentally misunderstands the significance of the "incidental to the transmission" language. That language was added to the electronic storage definition to eliminate overlap between ECPA and existing and proposed computer crime statutes, a subject of concern throughout the hearings on H.R. 3378 and S. 1667. *See, e.g.*, *House Hearings* at 22-23, 90; *Senate Hearing* at 94-95. As a summary of the changes from H.R. 3378 to H.R. 4952 prepared as the House Judiciary Committee reported H.R. 4952 to Chambers stated, H.R. 4952 sought to eliminate this "[i]nadvertent overlap" by linking the SCA's unauthorized access prohibition to the transmission process. H.R. 4952, the summary explained, "is substantially modified so that it does not reach computer hacking. . . . The amendment [covers unauthorized access] while a communication is being stored *as part of the communication process.*" *Senate Hearing* app. 156 & n.* (emphasis in original). In other words, the inclusion of storage "incidental to transmission" in the electronic storage definition was not designed to provide

shifting Title III and SCA protection for communications during transmission; it was simply designed to distinguish the SCA from ordinary computer crime statutes covering unauthorized system access unrelated to the communications process.

The legislative history further shows that what Congress certainly did intend by protecting stored communications was to guard against unauthorized access to communications at a point where they were perceived to be particularly vulnerable: in the user's mailbox on the provider's system. As noted earlier, the OTA study commissioned by Congress provided an organizing structure for Congress's consideration of how to update the surveillance law framework for new technologies. The OTA Report's identification of the multiple stages during which the privacy of an electronic communication would be vulnerable treated transmission and storage as distinct phases, with the concept of "storage" referring principally to storage *in the mailbox maintained by the provider on the user's behalf*, or storage *in the provider's files for administrative purposes*. *See OTA Report* at 48 (distinguishing between the vulnerability of communications "while being communicated" and communications "in the electronic mailbox of the receiver"). OTA's approach was consistent with the testimony of industry representatives, who likewise distinguished between "transmi[ssion]" of a communication "to the electronic mailbox," and "stor[age]" of the communication

"in the mailbox, waiting for the recipient to pick it up." *Senate Hearing* at 121 (testimony of Philip M. Walker on behalf of e-mail industry). Industry representatives argued that communications were particularly vulnerable to acquisition in the provider's servers, because private hacking into such systems was perceived to be easier than acquiring a communication at points along the transmission path. *See id.* at 121-22. As the committee reports indicate, Congress well understood the need to protect against this sort of unauthorized access so that providers would not be deterred from offering new services and potential customers would not be deterred from using them. *See, e.g.*, S. Rep. No. 99-541, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 3559; H.R. Rep. No. 99-647, at 19.

In short, protection for stored communications was designed to address concerns about the security of providers' systems, not to disrupt or supplant the transmission phase protection achieved by extending Title III to electronic communications.

CONCLUSION

This case involves conduct that Congress clearly intended to be covered by Title III. The Court should reject the novel reading of ECPA advanced by appellee and reverse the district court's dismissal.

Respectfully submitted,

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*Application for Admission to Practice before the First Circuit pending. Alexandra Minoff, law clerk in the EPIC Internet Public Interest Opportunities Program, contributed to this brief.

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of November, 2004, I caused two copies of the foregoing Brief *Amicus Curiae* of Senator Patrick J. Leahy and the accompanying Motion for Leave to File Brief *Amicus Curiae* to be served by electronic mail and first-class mail on counsel for appellant, counsel for appellee, and counsel for *amici curiae* Center for Democracy and Technology *et al.* at the addresses below, and that, pursuant to Fed. R. App. P. 25(a)(2)(B)(i), said Brief was filed by dispatching an original, ten paper copies, and one disk copy with the accompanying Motion via overnight courier to the Clerk of the Court:

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