

April 16, 2013

Steven Miller
Acting Commissioner of Internal Revenue
1111 Constitution Avenue NW
Washington, DC 20224

Dear Acting Commissioner Miller:

We welcomed your testimony earlier today before the Senate Finance Committee regarding the U.S. Internal Revenue Service's (IRS) authority under the Electronic Communications Privacy Act (ECPA). However, we remain troubled by press reports, indicating that until today, your agency claimed the authority to obtain citizens' private electronic communications, including emails, without a warrant. We believe these actions are a clear violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. Accordingly, we urge the IRS to provide further details and a timetable for its plans to update policies to adhere to Americans' constitutional rights.

We understand that the IRS had previously based the legality of its conduct on the outdated ECPA. Under the ECPA, law enforcement claims the right to search emails that have been opened or that are over 180 days old with a mere subpoena or Section 2703(d) court order—neither of which requires the government to meet the more substantive probable cause requirement of a warrant.

The ECPA was enacted in 1986 long before the Internet we have today even existed. Today, millions of Americans use the Internet for all facets of life. It defies common sense that some emails should receive fewer legal protections than a letter filed in a drawer at home. The gap between Americans' reasonable expectations of privacy and where the law stands underscores the importance of updating the ECPA.

In 2010, the Sixth Circuit Court of Appeals made real progress to meaningfully protect Americans' fundamental constitutional rights in the digital age. In *U.S. v. Warshak*, the court ruled that law enforcement must first obtain a warrant before accessing emails and that a provision of the ECPA is unconstitutional to the extent it fails to provide such protection. *Warshak* made clear that the Fourth Amendment protects the content of emails, regardless of their age.

We were pleased to hear in your testimony today that the IRS would follow *Warshak* and update its policies accordingly. And yet real questions remain concerning the extent and timing of changes to IRS policy in light of *Warshak*. According to recently uncovered IRS documents, the IRS seems to disregard the *Warshak* decision. In fact, the IRS continues to note that a warrant is not required for emails older than 180 days in the Internal Revenue Manual presently available online.

The IRS' response to *Warshak* falls particularly short when measured against the efforts of some in private industry. Following the *Warshak* decision, Google, Microsoft, Yahoo and Facebook have voluntarily taken the view that law enforcement must obtain a warrant before accessing private electronic communications. If these companies can abide by the Fourth Amendment, then the IRS can as well.

Congress is working hard to reform the ECPA. As the legislative process unfolds, we urge the IRS to confirm that it will immediately establish a warrant requirement when it wants to obtain email and other electronic personal correspondence from service providers covered under the ECPA. Accordingly, we ask the IRS to provide a timeline for updating all manuals, opinions, and other forms of guidance to remove any ambiguity about IRS' authority under the ECPA. Americans must be assured their privacy rights are protected.

Sincerely,

Mark E. Udall
United States Senator

Mark Begich
United States Senator

Mike Lee
United States Senator

Jon Tester
United States Senator

Joe Manchin
United States Senator

Angus King
United States Senator

Mark Pryor
United States Senator

Ron Wyden
United States Senator

Rand Paul
United States Senator

Mary Landrieu
United States Senator

Chris Coons
United States Senator

Pat Roberts
United States Senator