



January 9, 2017

Senator Chuck Grassley, Chairman
Senator Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Dear Chairman Grassley and Ranking Member Feinstein:

We write to you regarding the nomination of Senator Jeff Sessions to become the next Attorney General of the United States. The Electronic Privacy Information Center (EPIC) was established in 1994 to focus public attention on emerging privacy and civil liberties issues.¹ Over the years, EPIC has pursued a wide range of matters with Attorneys General of both Democratic and Republican administrations and we have frequently submitted statements to this Committee.²

Although EPIC takes no position for or against the nominee, a careful examination of Senator Sessions' record regarding the privacy rights of Americans raises serious questions about his selection as Attorney General.

Senator Sessions has Supported the Warrantless Surveillance of the American People.

Senator Sessions has consistently supported warrantless surveillance of the American people, which is contrary to our Constitutional heritage and the plain text of the Fourth Amendment. He called President George W. Bush's warrantless wiretapping program "a reasonable assertion of executive power."³ He voted against the 2015 USA FREEDOM Act,⁴

¹ EPIC, *About EPIC* (2016), <https://epic.org/epic/about.html>.

² See, e.g., EPIC v. FBI, 865 F. Supp. 1 (D.D.C. 1994) (concerning FBI director wiretapping surveys); EPIC v. DOD, 241 F. Supp. 2d 5 (D.D.C. 2003) (concerning the Total Information Awareness program); EPIC v. FBI, 72 F. Supp. 3d 338 (D.D.C. 2014) (concerning the agency's "Next Generation Identification" program); The Future of Drones in America: Law Enforcement and Privacy Considerations: Hearing Before the S. Comm. on the Judiciary, 113th Cong. 7–8 (2013) (statement of Amie Stepanovich, EPIC); Letter from EPIC to the S. Comm. on Judiciary (Sept. 9, 2005), <https://www.epic.org/privacy/justices/roberts/0905letter.pdf> (concerning the nomination of Roberts, J., to the Supreme Court).

³ <http://www.sessions.senate.gov/public/index.cfm/news-releases?ID=EF0E3EF3-7E9C-9AF9-7929-CE644CD56A2E>.

⁴ 161 Cong. Rec. S3444 (daily ed. June 2, 2015).

which was broadly supported by the Senate and which ended the NSA’s bulk collection of the domestic telephone records of American telephone customers.⁵ He opposed Apple in its dispute with the FBI over forced iPhone decryption.⁶ He supported the use of secret National Security Letters (NSLs) in the 2005 Patriot Act reauthorization, saying that the NSL standard, which requires no judicial approval, was actually “too high.”⁷ This raises troubling concerns about his willingness to comply with the requirements of the Fourth Amendment and ensure adequate oversight for the extraordinary surveillance powers of the federal government.

Senator Sessions failed to support bipartisan efforts to modernize the Electronic Communications Privacy Act (ECPA). In fact, he sought to amend ECPA to require internet service providers and telephone companies to monitor the contents of their subscribers’ communications. Under existing law, service providers are allowed to disclose the contents of communications to law enforcement in emergency situations.⁸ Senator Sessions argued in 2013 that these disclosures should be mandatory—a standard that could create an affirmative duty for service providers to monitor communications or risk liability.⁹

Senator Sessions has also promoted measures that would make it easier to track Americans within the United States. In 1996, Senator Sessions co-sponsored an amendment to the Illegal Immigration Reform and Immigrant Responsibility Act “to facilitate information sharing between federal and local law enforcement officials related to an individual's immigration status.”¹⁰ He also supported measures to expand the collection of the unique biometric identifiers of Americans. Senator Sessions proposed amendments to the 2004 Intelligence Reform and Terrorism Prevention Act (IRTPA) that would have removed the sunset provisions in the Patriot Act and required fingerprints to be included on all U.S. passports.¹¹

Senator Sessions has favored methods of mass surveillance that have since been discredited. He wrote in 2006 that the Section 215 bulk metadata program, now discontinued, “yielded invaluable intelligence that has helped prevent attacks and uncovered terrorist plots.”¹² But the Privacy and Civil Liberties Oversight Board (PCLOB) found that “the Section 215 program has shown minimal value in safeguarding the nation from terrorism.”¹³ The PCLOB

⁵ EPIC, *Senate Passes FREEDOM Act, Ends NSA Bulk Collection* (June 2, 2015), <https://epic.org/2015/06/senate-passes-freedom-act-ends.html>.

⁶ Chris Strohm, *Apple-FBI Row Spurs Senate Bill on Encrypted Data Access*, Bloomberg (Feb. 23, 2016), <https://www.bloomberg.com/politics/articles/2016-02-23/apple-fbi-row-spurs-senate-move-to-force-encrypted-data-access>.

⁷ USA Patriot And Terrorism Prevention Reauthorization Act of 2005—Conference Report, 151 Cong. Rec. S13560 (Dec. 14, 2005).

⁸ 18 U.S.C. § 2702(b)(8).

⁹ S. Rep. No. 113-34, at 12–19 (2013).

¹⁰ 108 S. Amdt. 1138, <https://www.congress.gov/amendment/110th-congress/senate-amendment/1158>.

¹¹ 103 Cong. Rep. S10239–41 (daily ed. Oct. 1, 2004) (proposing S. Amdts. 3780, 3871, 3872).

¹² <http://www.nationalreview.com/article/418675/why-should-terrorists-be-harder-investigate-routine-criminals-jeff-sessions>.

¹³ Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence*

could not identify “a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation.”

Senator Sessions has shown a Disregard for Privacy and Free Speech Rights.

The freedom of Americans to explore a wide range of political, religious, and cultural views is central to our Constitutional heritage. Yet, in 2005 hearings on oversight of the Patriot Act, Senator Sessions mocked the concerns of librarians who opposed government access to library borrower records, calling their views “almost amusing” and comparing them to “Woodstock myths”:

Now, they complain, and [Attorney] General Gonzales notes that perhaps the most controversial part is the part about the libraries. That is almost amusing. I mean, some of the things that have come out of the national Library Association, in my view, have been utterly extreme. It sounds like Woodstock myths, out of Woodstock or something.¹⁴

In the same hearing, FBI Director Robert Mueller correctly stated, “We are sensitive to the concerns of the Library Association. . . . And so the balance is fairly struck, I believe, in terms of the desire of librarians and others to protect the sanctity of the library.” Yet Senator Sessions made it clear that he had a different opinion about the privacy of Americans who obtain information from public libraries:

Senator SESSIONS. A library does not have any sanctity. Why does a library have sanctity that your medical records do not have?

Director MUELLER. Well, a number of areas have been looked upon as being special.

Senator SESSIONS. They think it is sanctified, I will admit. I just disagree that it deserves special protection.¹⁵

To be clear about the significance of this exchange: this was the nominee to be the next Attorney General of the United States telling the Director of the FBI that he was wrong to be concerned about the privacy of Americans who seek information from libraries.

Senator Sessions has Opposed Oversight of Government Surveillance.

Contrary to the essence of balance of powers, Senator Sessions has sought to limit oversight of the surveillance programs that he simultaneously seeks to expand. For example, he

Surveillance Court 15 (2014), https://www.pclab.gov/library/215-Report_on_the_Telephone_Records_Program.pdf.

¹⁴ Oversight of the USA PATRIOT Act: Hearings before the S. Comm. on the Judiciary, 109th Cong. 27 (2005).

¹⁵ *Id.* at 28.

sought to strip out key oversight provisions in the law that created the Office of the Director of National Intelligence and the PCLOB. Those recommendations were made specifically by the 9/11 Commission and anticipated the problems that would subsequently emerge. Senator Sessions sought to eliminate privacy and civil liberties officers from intelligence community agencies.¹⁶ Senator Sessions also tried to strip the PCLOB of subpoena power and the authority to supervise agency programs, effectively hamstringing the Board's ability to conduct effective oversight.¹⁷

It is vital that the nominee make clear his support for effective oversight across the federal government.

Senator Sessions Opposes Government Transparency.

Our democratic form of government relies on transparency and the ability of citizens to understand the decisions that the government takes on our behalf. As James Madison once said:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.¹⁸

This year open government advocates celebrated the 50th anniversary of the Freedom of Information Act with passage of the FOIA Improvement Act of 2016. The FOIA Improvement Act "ensure[s] that future administrations place an emphasis on openness and transparency."¹⁹ One of the Act's hallmarks is a sunset provision that limits the government's ability to withhold draft documents.

Senator Sessions questioned the sunset provision out of a concern "that 'full and frank communication' may be chilled by the knowledge that all such communications could become a matter of public record."²⁰ It is clear, however, that the Justice Department has cited FOIA exemptions to withhold legal memos²¹ that should never be kept secret. The Committee should determine whether Senator Sessions still favors this form of "secret law." Also concerning is

¹⁶ 108 S. Amdt. 3801, <https://www.congress.gov/amendment/108th-congress/senate-amendment/3801/text>.

¹⁷ 108 Cong. Rec. S10047-48 (daily ed. Sept. 30, 2004) (statement of Sen. Dick Durbin).

¹⁸ Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 *The Writings of James Madison* 103 (Gaillard Hunt, ed. 1910).

¹⁹ Patrick Leahy, *Leahy, Cornyn Bill Strengthening FOIA Passes Senate Unanimously* (Mar. 15, 2016), <https://www.leahy.senate.gov/press/leahy-cornyn-bill-strengthening-foia-passes-senate-unanimously>.

²⁰ S. Rep. No. 114-4, at 16 (2015).

²¹ Brief of *Amici Curiae* EPIC and Seven Open Government Organizations in Support of Appellants and Urging Reversal, *N.Y. Times v. U.S. Dep't of Justice*, 756 F.3d 100 (2d Cir. Apr. 22, 2013) (No. 13-0422-cv), <https://epic.org/amicus/foia/new-york-times/EPIC-et-al-Amici-Brief.pdf>.

Senator Sessions' 2004 proposed amendment that sought to eliminate the PCLOB's public reporting and public hearing requirements.²²

In the years ahead, Americans will face growing threats to their privacy rights, their civil rights, and the freedoms established in the Constitution of the United States. The Attorney General of the United States must safeguard the public in a manner consistent with the rule of law and our Constitutional heritage.

We are not certain that Senator Sessions is the right person to be next Attorney General of the United States. His support for government surveillance of the American people and his opposition to oversight of the government are at odds with our country's longstanding commitments to privacy, civil liberties, and open government. Especially at a time when Americans have opposed the expansion of warrantless surveillance,²³ we ask the Senate Judiciary Committee to exercise great care in ensuring that the next Attorney General will safeguard the freedoms valued by the American people.

We appreciate your consideration of EPIC's views, and we would welcome the opportunity to provide additional information to the Committee.

Sincerely,

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EPIC President and Executive Director

Alan Butler
EPIC Senior Counsel

Catriona Fitzgerald
EPIC Policy Director

James T. Graves
EPIC Law and Technology Fellow

²² 108 S. Amdt. 3801, <https://www.congress.gov/amendment/108th-congress/senate-amendment/3801/text>.

²³ George Gao, *What Americans Think About NSA Surveillance, National Security and Privacy*, PEW RESEARCH CTR. (May 29, 2015), <http://www.pewresearch.org/fact-tank/2015/05/29/what-americans-think-about-nsa-surveillance-national-security-and-privacy/>.