

November 21, 2016

Dear Majority Leader McConnell, Minority Leader Reid, Speaker Ryan, and Minority Leader Pelosi:

We, the undersigned civil society organizations, trade associations, and companies write to strongly support the Review the Rule Act (S.3475; H.R.6341), which would delay the implementation of changes to Rule 41 of the Federal Rules of Criminal Procedure until July 1, 2017. The rule change, which is currently set to go into effect on December 1, 2016, will significantly expand the government's ability to conduct remote access searches of electronic storage devices, colloquially referred to as hacking, to further its investigations.

The consequences of this rule change are far from clear, and could be deleterious to security as well as to Fourth Amendment privacy rights. Government hacking, like wiretapping, can be much more privacy invasive than traditional searches. It can also cause unique harms: for example, the government could use malware that would have the collateral effect of damaging its target or affecting unrelated third parties in unexpected ways. In addition, the malware itself could get into the hands of malicious hackers. But because judges often authorize these warrants without requiring the government to specify the tactics and techniques that will be used, we simply do not know the full extent of the government's searches. Yet Congress has never considered whether these tactics should be authorized, let alone laid out specific rules and protections to ensure that individual privacy is protected when the government uses these "network investigative techniques," as they are called. As a result, we are concerned that internet users' security could be inadvertently undermined.

The bottom line is that the rule change would increase the use of government hacking by removing jurisdictional requirements. This would create three problems: First, it would invite forum shopping. Second, it could be abused to obtain a single warrant to search millions of targets, raising a host of constitutional concerns. Finally, the rule change would allow a judge to issue a warrant that would permit law enforcement to search the computers of hundreds of entirely innocent crime victims without their consent.

In June, Senators Leahy and Lee raised these concerns in a letter to Senate Judiciary Chairman Grassley, and requested that he schedule a hearing on the pending change to Rule 41.ⁱ Additionally, last month, Senator Wyden and Congressman Poe, joined by 21 members of the Senate and House of Representatives, wrote to Attorney General Lynch asking important questions about how the Department of Justice will implement the changes to Rule 41, and what actions it will take to address the concerns the changes raise.ⁱⁱ Neither letter has received a substantive response and no hearing has been scheduled.

Congress should immediately bring the Review the Rule Act up for a vote and pass it so that the rule change does not result in a significant expansion in government hacking before members can conduct the oversight needed to determine if it is an appropriate investigative technique, and if so, what rules and protections should be in place.

Thank you for your consideration.

Sincerely,

Access Now
Advocacy for Principled Action in Government
American Association of Law Libraries

American Civil Liberties Union
American Library Association
Association of Research Libraries
Bill of Rights Defense Committee/Defending Dissent Foundation
Center for Democracy & Technology
Computer & Communications Industry Association
Constitutional Alliance
Demand Progress
Electronic Frontier Foundation
Fight for the Future
FreedomWorks
Google
Government Accountability Project
Human Rights Watch
Internet Association
Internet Infrastructure Coalition
National Association of Criminal Defense Lawyers
New America's Open Technology Institute
OpenTheGovernment.org
Reform Government Surveillance
Restore the 4th
R Street Institute
World Privacy Forum

ⁱ Letter from Senator Leahy and Senator Lee to Senator Grassley, Chairman of the Senate Judiciary Committee (Jun. 30, 2016) (on file with author), *available at* <https://www.politicopro.com/f/?id=00000157-106b-d8f1-a9ff-5fef8a560001>.

ⁱⁱ Letter from Senator Wyden and Congressman Poe, et al, to Att'y Gen. Lynch (Oct. 27, 2016), <https://www.wyden.senate.gov/download/?id=586322BE-A957-4C97-94C3-23CD8219DE1F&download=1>.