A Historical Perspective of ECPA

An overview of ECPA reform and the evolution of the Fourth Amendment

ECPA Reform History

When ECPA was written, lawmakers intended ECPA to extend Fourth Amendment protections to all forms of communications over the Internet. At the time of passage, ECPA received broad bipartisan support in Congress and the Justice Department, as well as business and technology groups. President Ronald Reagan signed ECPA into law on Oct. 21, 1986.

ECPA was based on the technology of the times. In 1986, the Electronic Mail Association estimated there were only 10 million e-mail users. This was before most people had computers at home, before email was widely used and long before Facebook and Twitter. Moreover, email service providers offered limited storage and deleted messages on their servers to free up space. ECPA's authors assumed 180 days would provide sufficient protection to citizens; email older than that was considered abandoned.

> *"The law was written at a time when most electronic messages were not held in long-term storage at Internet service providers. Most early e-mail services offered only limited storage space, anyway. So Congress granted strict privacy protection to unopened mail that had been on a server for 180 days or less, roughly anything up to six months."* (Joelle Tessler, "Privacy Erosion: A 'Net Loss,'" *CQ Weekly*, 2/17/2006)

> *"When Congress wrote the law in 1986, its provisions made some sense. Few Americans used e-mail at all, and the e-mail services that existed stored messages for only as long as it took users to download and read them - not in perpetuity, as many do now. Ubiquitous cloud computing - in which people store their documents and other files not on their computing devices but on a server somewhere else - was also a far-off dream."* (Editorial, "Curtail the government's power to snoop," *Washington Post*, 1/18/2013)

In the nearly three decades since ECPA was signed into law, technology has evolved rapidly and transformed the way we live, work and store our private information. Yet despite these advancements, the law remains virtually unchanged. Emails, instant messages and other forms of digital communication less than 180 days old are protected under the Fourth Amendment, while government officials can gain access to private information older than 180 days without a warrant.

> *Kevin Werbach, Associate Professor at the Wharton School, University of Pennsylvania: "The Internet is no longer a nascent technology. There are over 2 billion people around the world online. In 1986, when ECPA was passed, there were no websites; in 1996 there were roughly 100,000; today there are over 100 million."*

> *Sen. Pat Leahy: "When we enacted the Electronic Communication Privacy Act in 1986, email is nothing like it is today." (NPR's All Things Considered, 11/29/2012)*

Recognizing the law was significantly outdated, Sen. Leahy introduced legislation to

modernize ECPA in 2011. The reforms would improve privacy protection for citizens and clarify legal standards for government agents to obtain digital information. Leahy's ECPA reforms cleared the Senate Judiciary Committee in late 2012, but never made it to the full Senate or House.

Electronic Mail And The Fourth Amendment

In 2010, the U.S. Circuit Court of Appeals ruled unanimously that email is constitutionally protected in *United States v. Warshak* – meaning citizens are entitled to a reasonable expectation of privacy when communicating online. As a result, government officials must usually obtain a search warrant before accessing email records stored by Internet Service Providers.

"Given the fundamental similarities between *email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection. … Email is the technological scion of tangible mail, and it plays an indispensable part in the Information Age," the ruling stated.*

This decision is significant because it marked the first time private emails received the same level of protection as letters and phone calls. In the past, courts have ruled citizens receive only limited privacy rights for information they share with third parties.

The Supreme Court has not addressed Warshak or heard any case regarding the question of e-mail privacy.