



ISPs Take Note: Court Rules E-mails Have Full 4th Amendment Protection

December 15, 2010

The U.S. Court of Appeals for the 6th Circuit has just issued a trail-blazing opinion that is good news for anyone who has ever sent an e-mail – and that needs to be carefully read and adhered to by all Internet service providers (ISPs).

We [noted six months ago](#) that ISPs have been all too ready to satisfy prosecutors' requests for access to customer e-mails stored on their servers. We said that prosecutors are routinely using subpoenas, rather than search warrants, to obtain e-mails from ISPs, and that subpoenas can be issued under a much lower standard than the probable cause standard used for search warrants. They require, rather than probable cause, only a reasonable possibility that the materials or testimony sought will produce information relevant to the general subject of the investigation.

The ISPs' attitude, we said, meant that anyone who uses the Internet risks intrusion from unlawful government surveillance practices.

Now, in a [thoughtful and unanimous opinion](#) in *United States v. Warshak*, the 6th Circuit has written a ringing affirmation of the principle that e-mail must be treated like a letter or a phone call under the Fourth Amendment. Prosecutors can get hold of a suspect's or witness's e-mail from an ISP, but only if they first go before a judge and obtain a search warrant.

In *Warshak*, the U.S. attorney obtained 27,000 private e-mails sent to and from the defendant, Steven Warshak, after a warrantless search directed at Warshak's ISP. Warshak was convicted of a great many fraud and money-laundering-related counts and challenged his conviction, seeking a ruling that the e-mails should have been excluded from evidence, among other arguments.

The appeals court wrote, "If we accept that an e-mail is analogous to a letter or a phone call, it is manifest that agents of the government cannot compel a commercial ISP to turn



over the contents of an e-mail without triggering the Fourth Amendment. An ISP is the intermediary that makes e-mail communication possible. E-mails must pass through an ISP's servers to reach their intended recipient. Thus, the ISP is the functional equivalent of a post office or a telephone company. As we have discussed above, the police may not storm the post office and intercept a letter, and they are likewise forbidden from using the phone system to make a clandestine recording of a telephone call—unless they get a warrant, that is.”

The court noted that “e-mail requires strong protection under the Fourth Amendment; otherwise, the Fourth Amendment would prove an ineffective guardian of private communication, an essential purpose it has long been recognized to serve.” An e-mail is no less private, by tradition and practice, than a letter or phone call.

In the *Warshak* case, the court declined to exclude the e-mails from evidence, finding that the prosecutors had acted in good faith reliance on provisions of the Stored Communications Act.

But as a matter of broad constitutional principle, the 6th Circuit has set forth a convincing case that e-mails are entitled to Fourth Amendment protection. The Supreme Court has not ruled on the issue, but even in the absence of a high court ruling, it is time for ISPs to resolutely refuse to provide customer e-mails to law enforcement unless a warrant has been obtained.

Crime in the Suites is authored by the [Ifrah Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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