



TELECOMMUNICATIONS

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By: Jessica Davison

Federal Court Rules Fourth Amendment Protects Email

Last week, the Sixth Circuit Court of Appeals ruled that police must get a search warrant before searching Internet users' email records. The decision struck down part of The Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701 et seq., which has been held to permit a governmental entity to compel a service provider ("ISP") to disclose the contents of electronic communications in certain circumstances without a warrant.

The Court's analysis was based on the long history of cases interpreting the scope of the protection provided by the Fourth Amendment against "unreasonable searches and seizures." As the Court explained, it is well-established that, "[N]ot all government actions are invasive enough to implicate the Fourth Amendment. The Fourth Amendment's protections hinge on the occurrence of a "search", which occurs when the government infringes upon an expectation of privacy that society is prepared to consider reasonable. The question of whether there is a reasonable expectation of privacy breaks down into two discrete inquiries: (i) has the target of the investigation manifested a subjective expectation of privacy in the object of the challenged search; and (ii) is society willing to recognize that expectation as reasonable?

With respect to defendant's subjective expectation, the Court concluded that, given the "sensitive and sometimes damning substance of his emails," the defendant clearly had an expectation that his emails would be private. With respect to whether his expectation was reasonable, the Court first noted that, "[T]his question is one of grave import and

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enduring consequence, given the prominent role that email has assumed in modern communication.” With this in mind, the Court went on to conclude that defendant’s expectation of privacy was reasonable. In reaching this conclusion, the Court gave substantial weight to the following matters: (i) the ubiquitous nature and use of email in all aspects of modern communication and life means that by obtaining access to someone’s email, government agents gain the ability to peer deeply into his activities; (ii) the fact that information is being passed through a communications network; and (iii) the Fourth Amendment, which has historically focused on searches of physical property and telephonic communications, “must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish.”

“Given the fundamental similarities between email and traditional forms of communication,” the Court concluded that “it would defy common sense to afford emails lesser Fourth Amendment protection.” The Court went on to say, “It follows that email 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 ... serve[d]... [T]he police may not storm the post office and intercept a letter, and ... are likewise forbidden from using the phone system to make a clandestine recording of a telephone call--unless they get a warrant...”

The Court’s decision rendered the evidence against Defendant, Stephen Warshak, invalid. This ruling was far from a victory for the Defendant. The Court affirmed the conviction Warshak for defrauding customers with his product, “natural male enhancement” pills. However, the Court remanded Warshak’s case to a lower court for reconsideration of his sentence. Warshak also remains liable for a \$44 million money laundering judgment.

A complete copy of the Sixth Circuit Opinion is available [here](#).

What do you think? Do you agree with the Sixth Circuit’s decision? Should users have a reasonable expectation of the privacy of their emails? Should it matter if they originate from a personal or third party employer’s email service? We welcome your thoughts! Please feel free to comment at our interactive blog at blog.tlgdc.com.

If you have questions about this issue, or if we may be of assistance to you, please feel free to contact us.

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