

Growing Consensus On Warrants for Email

by [Greg Nojeim](#) [1]

March 21, 2013

A [hearing](#) [2] earlier this week at the House Judiciary Subcommittee on Crime and Homeland Security reflected a growing consensus on the need for government officials to obtain a warrant before accessing private email.

The [Electronic Communications Privacy Act \(ECPA\)](#) [3], which has not had an update since it passed in 1986, specifies that government officials do not need a warrant to access stored email that is over 180 days old.¹ The Department of Justice has also historically argued ECPA grants law enforcement the authority to access *opened* email without a warrant.

However, in its [testimony](#) [4] this week, the Department of Justice did not attempt to mount a defense of the archaic and nonsensical 180-day rule, nor did it defend its interpretation that opened email can be accessed without a warrant.

This fundamental shift by DOJ reflects a growing consensus that the government should obtain a warrant before accessing the content of communications.

At the hearing, Subcommittee Chairman James Sensenbrenner (R-WI) stated he believes the Constitution's Fourth Amendment requires a warrant for the content of communications. Judiciary Committee Chairman Bob Goodlatte's (R-VA) line of questioning suggested he too favors a warrant for content. On the Democratic side, Subcommittee Ranking Member Bobby Scott (VA) pointed to the need to update ECPA. Committee Ranking Member John Conyers (MI) has previously cosponsored a [bill](#) [5] that would require a warrant for content.

Despite the growing consensus among Republicans, Democrats and DOJ, there were problematic provisions floated by law enforcement at the hearing.

DOJ proposed doing away with the warrant requirement for civil investigations conducted by federal agencies. Last fall, when the Senate Judiciary Committee was considering its own ECPA reform bill, which ultimately [passed](#) [6] out of Committee with bipartisan support, a [media report](#) [7] about a similar proposal created major public outcry. On the heels of the outcry, the Committee opted not to consider the proposal.

At the hearing this week, DOJ also requested that Congress eliminate the warrant requirement to access logs of the senders and recipients of emails. From a civil liberties perspective, this request is a nonstarter that runs counter to public demands and Congressional efforts to strengthen privacy laws.

Finally, at the hearing an official with the Tennessee Bureau of Investigation requested that Congress enact a data retention mandate. Time and again, Congress has rejected similar mandates, which would unfairly harm the privacy of all Internet users and likely be [ineffective](#) [8] in aiding law enforcement. Just last year, Congress [stripped a data retention mandate](#) [9] from a bill after public outcry around the provision.

As the consensus continues to build around requiring warrants for the content of communications, Congress should reject proposals that saddle that simple but powerful concept with amendments that would diminish civil liberties.

1. ¹ When ECPA was passed in 1986, email storage was much more expensive than it is today. The few people who actually used email would download important messages to their hard drives. Emails that were stored online for more than 180 days were considered abandoned,

and therefore did not receive warrant protection. In 2013, users have access to free, nearly unlimited online email storage, rendering the 180-day provision woefully unsuited to the times.

Copyright © 2013 by Center for Democracy & Technology. CDT can be freely copied and used as long as you make no substantive changes and clearly give us credit. [Details](#).

Source URL: <https://cdt.org/blogs/2103growing-consensus-warrants-email>

Links:

- [1] <https://cdt.org/personnel/greg-nojeim>
- [2] http://judiciary.house.gov/hearings/113th/hear_03192013_2.html
- [3] <https://www.cdt.org/issue/wiretap-ecpa>
- [4] http://judiciary.house.gov/hearings/113th/03192013_2/Tyrangiel%2003192013.pdf
- [5] <http://www.govtrack.us/congress/bills/112/hr6339/text>
- [6] <https://www.cdt.org/blogs/greg-nojeim/2911ecpa-reform-legislation-advances>
- [7] http://news.cnet.com/8301-13578_3-57552225-38/senate-bill-rewrite-lets-feds-read-your-e-mail-without-warrants/
- [8] https://www.cdt.org/files/pdfs/CDT_Letter_HR1981.pdf
- [9] <https://www.cdt.org/blogs/mark-stanley/0607victory-internet-freedom-data-retention-mandate-absent-bill>