Written by **C. Mitchell Shaw** on September 20, 2015

SEC, Other Agencies Trying to Block Bipartisan Bills to Protect E-mail

Most Americans assume that their e-mails have always been protected by the Fourth Amendment and that law enforcement agencies would need a warrant to gain access to them. That has been both true and not true *at the same time* for almost 30 years. For as long as e-mail has been a regular form of communication, Congress has allowed the Fourth Amendment to protect some e-mail, but has also allowed any messages stored on a mail server for 180 days or longer to be seized without a warrant. Now, finally, there is a real chance that could change. And federal bureaucracy is doing all it can to keep that from happening.

When the Electronic Communications Privacy Act (ECPA) was written in 1986, e-mail providers rarely kept e-mails on their servers for more than 60 days. In most cases, they were deleted after 30 days. In many cases they were deleted from the servers immediately after a user downloaded the e-mails to his computer. In the days before multi-gigabyte online storage, most people used e-mail programs, such as Outlook, to retrieve and store e-mail on their computers. While any e-mail stored on a user's computer was considered private information in his possession — and therefore protected by the Fourth Amendment — e-mail stored on a server was considered to be in the hands of a third party and not protected. ECPA allowed police agencies to obtain any e-mails more than 180 days old without a warrant. All that was needed was a subpoena — which does not require probable cause.

The "reasoning" was that any e-mail left on the server that long was considered abandoned. Never-mind that it was never deleted by the user or that some people used their e-mail provider's server as an archive for important e-mail they may want to access in the future. Any e-mail on the server for six months or longer was fair game without any probable cause.

Even if such a policy made sense then (and this writer asserts that it did not), it certainly doesn't make sense now. With nearly everyone using online e-mail services, such as Gmail, most e-mail is never "downloaded" to a computer. Even if it is, e-mail providers do not delete old emails by default anymore. With online storage being both plenteous and free, many e-mail users keep e-mails for much longer than the arbitrary 180 days' "statute of limitations" ECPA places on the Fourth Amendment's protection of them. How many e-mails do any of us have that are months — even years — old? Hundreds? Thousands? ECPA allows law enforcement agencies and others to gain access to them without any judicial oversight whatsoever.

There have been attempts to reform and amend ECPA before now. All have failed. Now, there are

bipartisan bills in both the House and the Senate that have the support of the White House, the tech industry, and privacy advocates. The bills are not perfect, but they are a huge step in the right direction. The bills would amend ECPA to require a warrant for law enforcement agencies to access all e-mails, regardless of their age, and require the agency which accessed the e-mails to inform the owner of the account that it had done so within 10 days in most cases.

H.R. 699, the