

Warshak Analysis

On December 14, 2010, the Sixth Circuit decided US v. Warshak, 2010 WL 5071766 (6th Cir.) This decision has major implications for how DoD IG issues subpoenas.

- The Sixth Circuit held that the use of a 2703(d) order or subpoena (under the Electronic Communications Privacy Act) to compel disclosure of email content from a commercial Internet Service Provider (ISP) violated the Fourth Amendment.
 - Basically, the court found that people have a privacy right in the content of their email, just like they do in their phone conversations or mailed letters.

What this means:

- In the past, field agents could obtain basic subscriber information which included:
 - (a) all names associated with the account;
 - (b) all addresses associated with the account, to include street/PO Box, City, State and Zip Code;
 - (c) local and long distance telephone connection records, or records of session times and durations;
 - (d) length of service, including start date and types of services utilized;
 - (e) telephone or instrument number(s) or other subscriber number(s) or identities, including any temporarily assigned network address; and,
 - (f) means and source of payment for such service, including any credit card or bank account number(s).

In addition, with customer notice, field agents could also obtain the contents of any wire or electronic communications held by a provider of remote computer services or that had been held in storage for more than 180 days.

- What this now means is that, at least on a temporary basis, DoDIG will not be issuing any more subpoenas for email content from public Internet Service Providers (ISPs) or wireless cellular phone providers.
 - We will, however, continue to issue subpoenas for basic subscriber information.
- If you need email content for your investigation, you should seek a search warrant.

Going forward:

- The Subpoena Program Office, in conjunction with the Office of General Counsel, will continue to follow this issue closely and will keep you informed of any developments that may arise.