# Justice: Email snooping law no longer makes sense (Update)

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The Justice Department on Tuesday dropped its support for a controversial provision in a federal law that allows police to review some private emails without a warrant, but it asked Congress to expand its surveillance powers in other ways.

The testimony by a top Obama administration lawyer before a House subcommittee was met with cautious optimism by privacy advocates and civil liberties groups who have worked for years to overturn parts of the 1986 Electronic Communications Privacy Act. They said it provides a starting point for a compromise in a debate that has endured for more than a decade.

"What's very positive to me is the amount of common ground that's suddenly arisen," said Chris Calabrese, legislative counsel with the American Civil Liberties Union, one of several organizations looking to change the law. "If we have an agreement on this (provision), we should move forward."

The 1986 law was written before the Internet was popularized and before many Americans used Yahoo or Google servers to store their emails indefinitely. The law allows federal authorities to obtain a subpoena approved by a federal prosecutor—not a judge—to access electronic messages older than 180 days. Privacy groups have sought since 2000 to amend the law but failed after the Sept. 11, 2001, terror attacks shifted the debate over the government's ability to intercept communications.

With Americans increasingly relying on email—and the proliferation of "cloud computing" to store messages on servers outside a person's home—the debate has shifted back toward privacy protections. Meanwhile, technology companies including Google, Twitter and Dropbox have said they are overwhelmed with requests by law enforcement for email records. Google says government demands for emails and other information held on its servers increased 136 percent since 2009.

On Tuesday, the acting assistant attorney general in the Office of Legal Policy, Elana Tyrangiel, told a House Judiciary subcommittee that there is no principled basis to treat email less than 180 days old differently than email more than 180 days old. She also said emails deserve the same legal protections whether they have been opened or not.

Her comments were in contrast to previous testimony by Justice Department officials, asking Congress not to do anything that would disrupt law enforcement's ability to investigate violent crimes and child pornography.

Tyrangiel said, however, that Congress should carve out an exemption for civil investigators, such as federal regulators looking into alleged antitrust or environmental violations. Those investigators should only require a subpoena to review emails, she said, because their work doesn't involve criminal charges.

Tyrangiel also said that Congress should consider making it easier for law enforcement to see who is emailing or otherwise sending online messages to whom. She said existing law requires law enforcement to obtain a warrant or court order to access that information for emails, whereas only a subpoena is needed to obtain telephone records.

"While law enforcement can obtain records of calls made to and from a

particular phone using a subpoena, the same officer can only obtain 'to' and 'from' addressing information associated with email using a court order or a warrant, both of which are only available in criminal investigations," she said.

The law has been invaluable for investigators in child pornography cases and to develop probable cause to obtain warrants against suspected criminals, said Richard Littlehale, head of a high-tech investigative unit with the Tennessee Bureau of Investigation. He said the privacy problem has been overstated and that the law should be changed to compel service providers to retain every text message and email in case law enforcement needs access to it later.

"The truth is that no one has put forward any evidence of pervasive law enforcement abuse of ECPA provisions," Littlehale told the House panel.

Greg Nojeim, senior counsel at the Center for Democracy and Technology, said these proposals "run in the opposite direction" of where Congress is headed and are unlikely to gain traction. Allowing warrantless review of email logs in particular, he said, "removes a judicial check on a very intrusive surveillance power. Records about who you communicate with can almost be more revealing than the content of your communications."

Hanni Fakhoury, a staff attorney with the Electronic Frontier Foundation, agreed and said he thinks the Justice Department changed its position on warrantless email snooping because it had little choice.

"I feel like they were the last people in the world to come to the conclusion," he said. "DOJ has very little to lose coming around to saying, 'OK, we're going to require a search warrant.'"

The Justice Department declined to comment.