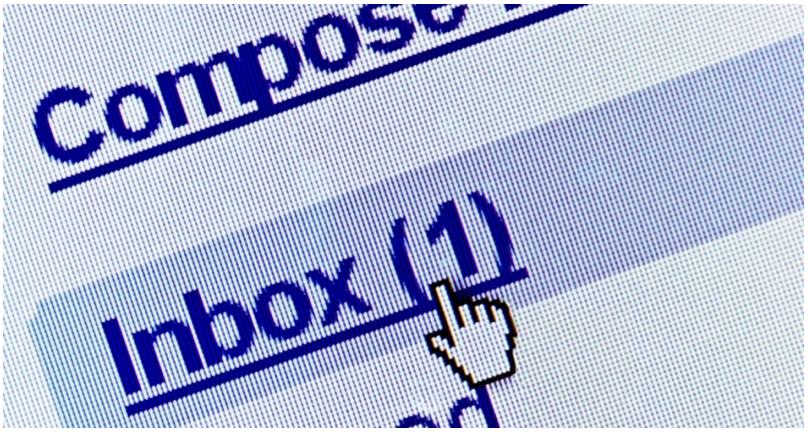
Written by **Joe Wolverton, II, J.D.** on April 12, 2013

IRS: No Search Warrant Needed to Read Taxpayers' E-mail



The federal government's surveillance bandwagon is getting crowded. The Internal Revenue Service (IRS) is the latest to jump on, claiming that its agents do not need a warrant to read "taxpayers'" e-mails.

According to documents obtained from the IRS as a result of a lawsuit filed by the American Civil Liberties Union (ACLU), the tax-collecting behemoth believes that Americans have "generally no privacy" when it comes to the information included in any electronic communication from e-mail to Facebook chats and direct messages exchanged on Twitter.

These forms of communication are not protected by that expectation of privacy granted to other aspects of their personal lives; thus IRS agents need not petition a judge for the right to snoop into the content of these communications.

This unbelievable, though not now unique, interpretation of the right of Americans "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" as guaranteed by the Fourth Amendment to the Constitution, was set out in an IRS Search Warrant Handbook now in the possession of the ACLU.

Specifically, the guidelines provided to agents in the handbook state that "emails and other transmissions generally lose their reasonable expectation of privacy and thus their Fourth Amendment protection once they have been sent from an individual's computer."

Surrendered as a result of an ACLU Freedom of Information Act request, the IRS handbook was drafted by the office of chief counsel for the Criminal Tax Division.

In a statement posted on an ACLU blog, attorney Nathan Wessler refuted the IRS' opinion of the Fourth Amendment's protections:

> Let's hope you never end up on the wrong end of an IRS criminal tax investigation. But if you do, you should be able to trust that the IRS will obey the Fourth Amendment when it seeks the contents of your private emails. Until now, that hasn't been the case. The IRS should let the American public know whether it obtains warrants across the board when accessing people's email. And even more important, the IRS should formally amend its policies to require its agents to obtain warrants when seeking the contents of emails, without regard to their age.

Perhaps the most damning revelation contained in the documents is that regarding the recalcitrant attitude maintained by the IRS with regard to unwarranted taxpayer surveillance after a 2010 federal court held that electronic communication — specifically e-mail — was protected by a reasonable expectation of privacy.

In its ruling in the case of *U.S. v Warshak*, the Sixth Circuit Court of Appeals held, "Given the fundamental similarities between email and traditional forms of communication, it would defy common

sense to afford emails lesser Fourth Amendment protection." Adding 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 been recognized to serve."

The IRS is now in good company in its haughty disregard for any obstacle — legal or ethical — standing in its way of eviscerating the Constitution, depriving Americans of liberty, and placing all so-called "taxpayers" within the walls of a constantly monitored prison with federal agents as wardens.

What of the pre-*Warshak* rules? Perhaps the IRS is heeding an earlier iteration of the Fourth Amendment guidelines. Here's the story from CNET:

> Before the *Warshak* decision, the general rule since 1986 had been that police could obtain Americans' e-mail messages that were more than 180 days old with an administrative subpoena or what's known as a 2703(d) order, both of which lack a warrant's probable cause requirement.
>
> The rule was adopted in the era of telephone modems, BBSs, and UUCP links, long before gigabytes of e-mail stored in the cloud was ever envisioned. Since then, the 6th Circuit Court of Appeals ruled in *Warshak*, technology had changed dramatically: "Since the advent of e-mail, the telephone call and the letter have waned in importance, and an explosion of Internet-based communication has taken place. People are now able to send sensitive and intimate information, instantaneously, to friends, family, and colleagues half a world away…. By obtaining access to someone's e-mail, government agents gain the ability to peer deeply into his activities."

No matter. Within months after the *Warshak* rules governing the relationship of the Fourth Amendment to e-mail was handed down by a federal appeals court, the IRS upped the ante, promulgating an updated edition of its Search Warrant Handbook that defiantly ordered agents to continue on as they were informing them that they can "obtain everything in an account except for unopened e-mail or voice mail stored with a provider for 180 days or less" without a warrant.

This position was supported by a memo sent out in October 2011 by IRS senior counsel William Spatz. In this document, Spatz argued that the IRS should adhere to rules from the Ninth Circuit Court and that "The Ninth Circuit and other courts have recognized that a warrant is not required by the Constitution for a government entity to require an electronic communications provider to produce a customer's non-content information regarding an electronic communication."

In truth, however, Americans are not "taxpayers" and they need not look to the courts for protection of their right to be free from government monitoring and meddling in their personal correspondence, whether it be electronic or more traditional in form. Besides, in October of last year, the Supreme Court gave a green light to the National Security Agency to continue its practice of listening in on private phone conversations without a warrant and without probable cause. When it comes to the right to be free from government intrusion, the federal judiciary seems to believe that the federal government giveth and the federal government taketh away.

There is much to be feared from relying on the courts to serve as sentinels on the walls set around federal authority. As Thomas Jefferson warned in a letter written in October 1823:

> At the establishment of our Constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions

> nevertheless become law by precedent, sapping by little and little the foundations of the Constitution and working its change by construction before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance.

The only lasting hope for freedom from government consolidation of all power is the refusal by states to enforce or participate in any federal program not specifically authorized by the contract that created that power in the first place — the Constitution. Americans will know the fullest expression of liberty only in a nation where God is recognized as the true source of all rights and where government is regarded as a clear and present danger to the continuing enjoyment of them.

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