Written by **Jack Kenny** on November 29, 2012

Senate Committee Weighs Amendment to Electronic Privacy Act

The Senate Judiciary Committee has before it a bill that proponents hope will not only increase protection of personal privacy, but will also bring some order and consistency to a conflicting patchwork of laws and judicial decisions about the government's reach into personal data stored in electronic records.

The bill, sponsored by Sen. Patrick Leahy (D-Vt.) would amend the 1986 Electronic Communications Privacy Act to require a search warrant, rather than a subpoena, to search data stored in what is commonly called a "cloud" of electronic records, including e-mails, text messages, and documents stored on Internet sites like Google. The proposed amendment to the 26-year-old law would require police to obtain a warrant for all e-mail searches, the *New York Times* reported, changing a provision of the law that allows warrantless searches of e-mails more than 180 days old.

The amendment would be the first major change to the statute after more than a quarter century in which both the means of electronic communications and the capacity for storage of them has increased dramatically. An update and a tightening of the requirements for a search are long overdue, Greg Nojeim, senior counsel and director of the Center for Democracy & Technology's Project on Freedom, Security & Technology, told *NBC News.*

"Requiring a warrant for email and other information stored in the cloud would provide privacy to consumers, certainty to law enforcement, and clarity to the companies that receive law enforcement demands," Nojeim said. The American Civil Liberties Union is also supporting the amendment.

"We believe the statute is very out of date," said Christopher Calabrese, ACLU legislative counsel. "All email and all private communications should be covered by a warrant" and not just a subpoena, he said.

But the bill has drawn opposition from law enforcement organizations whose representatives argue that the existing law is already too restrictive of police efforts to track criminal activity through a daunting web of mobile communications that makes it harder to pursue and apprehend lawbreakers.

"The crime scene of the 21st century is filled with electronic records and other digital evidence," said a letter from representatives of various investigative, legal, and police agencies, sent to the Judiciary Committee by the National Sheriffs' Association. The "laws, policies, protocols, and practices related to the process of law enforcement evidence retrieval from communications service providers are out-of-

date and increasingly insufficient moving forward," the letter said.

The conflicting views are reflected throughout the country, as different jurisdictions have come up with a variety of laws governing the search of electronic data and judges have applied different standards in interpreting the federal Constitution's Fourth Amendment ban on "unreasonable searches and seizures" and in determining the boundaries of a reasonable expectation of privacy. Those issues were at the heart of a ruling in September by a Rhode Island judge who threw out evidence against a man charged with the murder of his girlfriend's child, the *New York Times* reported. The 2009 case involved a police officer who accompanied an ambulance to an apartment where a woman had called for help after finding her six-year-old son unconscious. The officer found a cellphone belonging to the boyfriend, who was also in the apartment at the time. A text-message found on the phone pointed to the boyfriend as the likely source of injury to the boy, who died that evening of a "blunt force trauma to the abdomen which perforated his small intestine," according to court records.

Police took the suspect in for questioning, and in the investigation that followed they obtained more than a dozen search warrants to examine the cellphones of the boy's mother, the boyfriend, and their relatives. When the case came to trial nearly three years later, Rhode Island Superior Court Justice Judith C. Savage ruled all the evidence inadmissible since the investigation followed from a warrantless seizure and search of the defendant's cellphone and communications contained therein. That search, she ruled, did not fit the "plain view" exception to the exclusionary rule, which bars the introduction of evidence obtained from warrantless searches.

"Given the amount of private information that can be readily gleaned from the contents of a person's cell phone and text messages — and the heightened concerns for privacy as a result — this court will not expand the warrantless search exceptions to include the search of a cell phone and the viewing of text messages," Judge Savage wrote in a 190-page ruling now under appeal to the state's Supreme Court. Text messages, she wrote are "raw, unvarnished and immediate, revealing the most intimate of thoughts and emotions" and are thus covered by a reasonable expectation of privacy.

Other courts have held to different standards concerning that expectation of privacy. A court in Washington, the *Times* reported, ruled that text communications are like telephone voice mail messages that can be overheard by anyone in a room and are not protected by state privacy laws. A federal appeals court in Louisiana is considering whether location records stored in smart phones are covered by a personal right to privacy or are "business records" belonging to the phone companies.

"The courts are all over the place," Hanni Fakhoury, a lawyer with the San Francisco-based civil liberties group, Electronic Frontier Foundation, told the *Times.* "They can't even agree if there's a reasonable expectation of privacy in text messages that would trigger Fourth Amendment protection."

While revising the law is a legislative function, judges have often weighed in where legislatures have been either unwilling or unable to act. In the latter case, the Rhode Island legislature, months before Judge Savage's ruling, passed a law requiring a warrant for the search of a cellphone, even when taken during the course of an arrest. Governor Lincoln Chafee, a former Republican U.S. senator who ran for governor as an independent, vetoed the bill, preferring to leave the matter to the judges.

"The courts, and not the legislature, are better suited to resolve these complex and case-specific issues," the governor said.