



Since 2010, the SEC has abided by the Sixth Circuit's decision in [United States v. Warshak](#), and has not subpoenaed emails of an individual from third party service providers.

That changed, however, when the SEC decided to test the law by filing a recent action against Yahoo to force compliance with a subpoena for the emails of an individual. In *Warshak*, the court held that the use of something less than a warrant, such as a subpoena or court order under the Electronic Communications Privacy Act (ECPA), violates the Fourth Amendment. Not only had the SEC respected that decision but the DOJ had also changed its policies to comply with *Warshak*. While the SEC stayed out of court, it did [oppose](#) efforts in Congress to codify the *Warshak* holding via ECPA reform. However, when Yahoo refused to comply with an SEC subpoena based on *Warshak*, the SEC took Yahoo to court, leading to a hearing on the matter on June 30, 2017 in the federal court for the District of Maryland. *SEC v. Yahoo, Inc.*, Case No. 8:15cv1339 (D. Md) (GJH).

While the Judge did not make a decision at the hearing, he did express views on the facts and law that will influence his decision. **How did we get here?** – Before bringing its subpoena enforcement action against Yahoo the SEC attempted to obtain the emails directly from the individual. But the individual did not fully comply, and the Judge entered an order requiring him to show cause why he should not be held in contempt. That avenue has still not been exhausted, and if the contempt process played out and resulted in the production of the emails by the individual, there would be no need for the SEC to seek emails from Yahoo. Yet the court has not taken that approach, and in fact suggested to the SEC at a prior date that it issue a subpoena to Yahoo. During the hearing, the Judge expressed reservations about contempt procedures such as placing the individual in jail, suggesting this would be a last resort. **Is Fourth Circuit law on point?** – At the beginning of the hearing, the Judge said he was leaning in favor of the SEC's position, relying on the Fourth Circuit's decision in *United States v. Bailey*. That case held that a government's subpoena to a physician for his records did not violate the Fourth Amendment. In the view of the Fourth Circuit, because subpoenas are not warrants they are limited by a general reasonableness standard, not by the probable cause requirement. Yahoo attempted to distinguish *Bailey* as a case where the subpoena was served on a doctor for his own records, not a third party with access to another's privacy. Yahoo argued the more relevant case in the Fourth Circuit is *United States v. Graham*, addressing a government subpoena for historical cell site location data (non-content data) from a phone company. In *Graham*, the Fourth Circuit made clear that requests for content were different, and afforded Fourth Amendment protection.

Warshak – The Judge seemed receptive to the SEC's position that he was not bound by *Warshak* because it is a Sixth Circuit case. The Judge also stated that *Warshak* was distinguishable because the case involved a lack of notice, thus requiring a heightened standard of probable cause with judicial review. As Yahoo correctly pointed out, however, notice was not an issue in *Warshak* and had nothing to do with the court's decision. **"It doesn't feel right"** – The Judge recognized one of the problems with the SEC's position. He was troubled by the fact that in a situation where the DOJ is conducting a parallel criminal investigation, the DOJ could evade the

requirement for a warrant by having the SEC obtain the same records by a subpoena, then turn the records over to the DOJ. The Judge added that while it is true that there would be judicial review of the subpoena, the court would be deciding only relevance, a much lower standard than probable cause. The Judge stated, "part of me is very concerned about that, it doesn't feel right." In response, the SEC simply claimed that in this particular case it was not seeking to help DOJ evade the warrant requirement. **Notice resolves the Fourth Amendment issue?**

– The Judge noted that the SEC's subpoena allowed for notice and an opportunity to contest the subpoena, thus meeting the Fourth Amendment requirement of reasonableness. Yahoo asserted that the warrant requirement applies when invading a reasonable expectation of privacy, and the SEC's action was no different than seeking the contents of an individual's safety deposit box from a bank or an individual's private records in his apartment from the landlord, both of which require a warrant. As Yahoo noted, the SEC in effect was making Yahoo an agent of the government by asking it to invade its customer's privacy. This made the SEC's action a search, not a subpoena. Under these circumstances, Yahoo argued the Court should follow *Warshak*. **Raising the Third Party Doctrine** – The Judge also questioned whether the fact that the emails were held by a third party led to a lower expectation of privacy. Yahoo disagreed, stating that the government cannot ask a bank to open an individual's safety deposit box without a warrant. Yahoo also pointed out that the SEC did not dispute that the individual had a reasonable expectation of privacy in the emails held by third party service provider Yahoo.

Alternative means? – The Judge asked the SEC whether it would help to enter an order requiring the individual to turn his computer over to the SEC. The SEC said the emails were unlikely to be on the individual's hard drive. Yahoo offered to produce the headers of the emails so the SEC could determine whether the individual withheld any emails. Yahoo also pointed out the SEC could subpoena other individuals in the headers. The SEC did not express a willingness to accept either alternative, and the Judge did not express a view on those options. **"Not an easy case"** – The Judge noted the "ferocity" of Yahoo's positions at the hearing and said this is "not an easy case." The Judge said it would take the matter under advisement and make a ruling at a later date. However the court rules, there may be an appeal to the Fourth Circuit. A ruling by the Fourth Circuit at odds with the warrant requirement articulated in *Warshak* will create a circuit court split and the issue could ultimately end up in the Supreme Court. However, the issue will be moot if Congress passes an ECPA reform

bill codifying *Warshak*, as has been proposed. In the meantime, if the district court rules against Yahoo, third party service providers can expect the floodgates to open with respect to SEC subpoenas.

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