



Petraeus Scandal Raises Concerns About Email Privacy

By: CARRIE JOHNSON - November 13, 2012

The FBI review of sensitive email messages between former CIA Director David Petraeus and his biographer-mistress Paula Broadwell has been raising big questions about Big Brother.

One of them: When can federal law enforcement review a person's private communications?

To Julian Sanchez, a research fellow at the Cato Institute, the real scandal over the Petraeus affair is not the extramarital sex, but the invasion of privacy.

"Law enforcement and certainly intelligence agencies have an incredible amount of ability to gather huge volumes of detailed information about people's most intimate online communications, a lot of it without requiring a full-blown warrant, a lot of it without requiring even any kind of judicial approval," Sanchez said.

The Electronic Communications Privacy Act gives the FBI a lot of authority. The 1986 law says emails in transit to the recipient, or unopened messages, are highly protected. But in many places around the country, law enforcement can get opened messages and emails older than six months with a subpoena or an order that requires only that they be relevant to an ongoing criminal investigation.

"Given the weakness of the initial case here, given the fact that it now seems the initial impetus for this investigation was not actually a crime, you have to wonder, were they able to get access to some of these older emails in part because they didn't have to show probable cause that a crime had been committed?" Sanchez asked.

The FBI and the Justice Department have been reluctant to detail their investigative methods in a case that remains open. But former computer crimes prosecutor Orin Kerr said he believes investigators in the Petraeus case must have gotten court permission to review the Gmail messages between the CIA director, his mistress and other people caught up in the case.

"In terms of email privacy, the basic idea is the government can get the contents of email accounts much like they can get search warrants to search homes. The big difference is when the government searches your home, you probably know about it," said Kerr, now a law professor at George Washington University.

If senior members of Congress get their way, that could change. A bill under consideration by the Senate Judiciary Committee would amend the 1986 law to require the FBI to obtain a search warrant, showing probable cause to a judge, before agents get email contents from an Internet service provider. The legislation sponsored by Sen. Patrick Leahy, D-Vt., would also force the FBI to provide more detailed notice to the person whose email account is being reviewed.

The bill is scheduled to be marked up by the Judiciary Committee over the next few weeks, said Leahy's spokeswoman, Jessica Brady.

One take away from the Petraeus scandal may be just because you do it on the Internet doesn't mean it's a secret, Kerr said.