

The authoritative news source for communications regulation

A service of **WARREN COMMUNICATIONS NEWS**

TODAY'S NEWS: Friday, June 10, 2016
(9 of 37)

PREVIOUS

NEXT

Vol. 36 No. 112
10 Jun 2016

Amendment 'Poison Pill'

Impasse Over NSL Amendment Forces Withdrawal of ECPA Update, Possibly Killing It

TOP NEWS | 10 Jun 2016 | Ref: 1606090007

Print

Share

Legislation updating the 30-year-old Electronic Communications Privacy Act may be dead this session after sponsors of the bill withdrew it from Senate Judiciary Committee consideration over a controversial amendment that would widen FBI access to Americans' sensitive data online (see [1606070035](#)). Sens. Mike Lee, R-Utah, and Pat Leahy, D-Vt., the main sponsors of S-356, which seeks to strengthen Fourth Amendment protections for Americans' stored electronic content, said they couldn't "in good conscience" include Texas Republican Sen. John Cornyn's amendment. They called it a "poison pill."

A spokesman for Lee said in an interview that unless Cornyn changes his mind and withdraws the amendment, the updated ECPA bill wouldn't pass this session. The spokesman said there was little give and take in negotiations between Senate offices in the two weeks since Cornyn, a co-sponsor of S-356, offered the amendment. The spokesman said it appears Cornyn wanted the bill "dead."

Several observers said they're not hopeful about chances an updated ECPA would pass this year -- a turnaround from late April, when the House passed its version (HR-699) 419-0. "A clean bill should be passed immediately and hope springs eternal, but this looks dead, dead, dead," emailed Tim Sparapani, a privacy consultant to several technology companies. Bijan Madhani, Computer and Communications Industry Association's public policy and regulatory counsel, emailed that a coalition of privacy groups and tech associations and companies supporting the ECPA update bill is "still open to conversations over amendments and a path forward." But he said, "At this point I'm not optimistic. There doesn't seem to be enough time left on the calendar, or a willingness among staff to look for compromise where it might be possible."

Cornyn's amendment would expand FBI use of national security letters (NSLs) -- which are essentially administrative subpoenas that allow the bureau to self-certify it met statutory requirements -- to gain access to certain types of people's data, such as account number, login history and IP address. During the meeting, Cornyn said the amendment expanding the use of NSLs wouldn't apply to the content of individuals' electronic communications but their metadata for counterterrorism investigations. He previously characterized it as a "scrivener's error" or fixing a "typo." Privacy experts said the FBI has been pushing for this authority for a few years to get more access to data (see [1605260016](#)).

During the meeting, Lee said Cornyn's amendment is a "controversial expansion" of the FBI's use of NSLs: "Such an expansion, I am convinced, would swallow up the protections that this bill offers to the American people and that the American people justifiably deserve and have reason to expect." With such metadata, "the government can look into exactly what website someone is

Top News

- > Divisive House FCC Funding Bill ...
- > AT&T, Comcast, Cablevision Viola...
- > Net Neutrality Ruling Could Stir...
- > Satellite Operators Lining Up in...
- > Set-Top NPRM Defenders Rally on ...
- > TAC Working Groups Update Effort...
- > FCC Denies BDS Comment Extension...
- > NTIA Clears ICANN's IANA Transit...
- > Impasse Over NSL Amendment Force...
- > EAS Participants Don't Want Addi...
- > ISOC Urges Multistakeholder Appr...

Comm Daily® Notebook

- > Telecom Groups Urge FCC To Heed ...
- > UMFU Emissions Need Restrictions...
- > FCC Taking Nominations for WRC A...
- > DC Circuit Sets Sept. 13 Argumen...

Capitol Hill

- > Keep Consumer Protection Robocal...
- > Senate Commerce To Mark Up 2 Tel...
- > Senate Subcommittee Confirms Jun...
- > APTS CEO Lauds Senate Appropriat...
- > CBO Scores Pallone's Sandy Act

Wireline

- > RUS Tweaks to Rural Broadband Lo...

Wireless

- > FCC Rejects U.S. Cellular Appeal...
- > Lenovo Unveils Second-Gen Phones...

Internet

- > Internet Ad Revenue Hit \$15.9 Bi...
- > Major Ad Agencies, Google, Other...
- > Symantec Introduces IoT Cybersec...
- > Technology To Play Key Role in B...
- > Facebook, Twitter Join CTA

State Telecom

- > Proposed NY Low-Income Condition...

Telecom Notes

- > PwC To Hold LNPA Webinar; Offici...
- > Current 'Prolonged Slump' in...

Intellectual Property

- > DOJ Urges Supreme Court Remand S...

visiting [and] they can tell a whole lot about that person," he said. In "good conscience," Lee said, he can't have the amendment attached to the bill and asked it be withdrawn. "We want to make sure that when we get this passed, it enhances rather than diminishes our interest protected by the Fourth Amendment," he added.

Cornyn said it's "odd" that the amendment would be described as a poison pill and said the bill's sponsors should call for a vote. "But they know it won't lose," he said. "They know it's likely to pass. And I believe with the president's support for this legislation that it's likely pass the Senate and I believe the House of Representatives would likely -- whether they like it or not -- they would accept that as part of the deal to get the warrant-for content provision in the underlying bill." Lee's spokesman told us later there was a chance it could pass, calling support for it on the committee an "educated speculation. The problem is his amendment would pass the committee, in which case it would then become a poison pill amendment to ECPA."

When we asked if his bill was dead this session, Leahy didn't directly answer. "We could pass the bill we spent a couple of years negotiating between Republicans and Democrats and that everybody has signed onto," he told reporters. "We could pass that easily. These last-minute things are poison pills. If you want to take it up as separate legislation, do so."

While S-356 has 30 co-sponsors, Lee wanted the Senate to pass the House version, called the Email Privacy Act. The legislation would require law enforcement agencies to obtain a probable-cause warrant for electronic communications regardless of how long it has been stored by third-party providers. The bill would close a loophole that allows law enforcement to get a subpoena only for content older than 180 days. Sen. Orrin Hatch, R-Utah, and Senate Judiciary Chairman Chuck Grassley, R-Iowa, who said early in the meeting he would hold the bill over to continue negotiations, said they supported the ECPA update legislation.

But Sen. Dianne Feinstein, D-Calif., said she would vote against the bill because it doesn't resolve a problem the SEC had (see [1605130021](#)). In a May 11 letter to Grassley, SEC Chairwoman Mary Jo White and two commissioners (there are two vacancies on the five-seat SEC) wrote that the agency wouldn't be able to get criminal warrants as required by the legislation, hindering their investigations. They instead suggested they be required to get a court order or another judicial standard on par with a criminal warrant. Feinstein said she "became very concerned" after reading the letter, and her staff is trying to work out some solution. SEC and other civil agencies such as the FTC expressed such concerns last year at House and Senate hearings (see [1511300009](#), [1509160055](#) and [1509170035](#)).

written by Dibya Sarkar

Broadcast

> PTC Pushing TV Parental Guidelin...

Cable

> Centralite Starts Direct-to-Cons...

> Charter, Former Customer Both Ci...



Media Notes

> If 'Time Comes' for Mainstre...

Communications Personals

> Untitled Article

Communications Daily

Home | About | Advertise | Contact | Privacy Policy | User Agreement   

Copyright© 2016 by Warren Communications News, Inc. Reproduction or retransmission in any form, without written permission, is a violation of Federal Statute (17 USC101 et seq.).