WHAT IS THE POINT OF THE SEC ECPA-REFORM POWER GRAB?

Last week, the Senate Judiciary Committee had a hearing on Electronic Communication Privacy Act reform, the main goal of which is to provide protection for content served on a third party's server. Because reform is looking more inevitable in Congress (the House version of the bill has more sponsors than any other), government agencies used the hearing as an opportunity to present their wish list for the bill. That includes asking for an expansion of the status quo for civil agencies, with witnesses from SEC, DOJ, and FTC testifying (DOJ also made some other requests that I hope to return to).

Effectively, the civil agencies want to create some kind of court order that will provide them access to stored content. A number of the agencies' witnesses — especially SEC's Andrew Ceresney — claimed that a warrant is the same as an order, which culminated in Sheldon Whitehouse arguing (after 45:30) that an order requiring court review is actually less intrusive than a warrant because the latter is conducted *ex parte*.

It took until CDT policy counsel (and former ACLU lawyer) Chris Calabrese to explain why that's not true (after 2:08):

> We have conflated two really different and very different things in this committee today. One is a court, some kind of court based on a subpoena and one is a probable cause warrant. These are not the same thing. A subpoena gives you access to all information that is relevant. As pursuant, relevant to a civil investigation, a civil infraction. So if you make a mistake on your taxes, that's a potential civil

> infraction. Nothing that has been put forward by the SEC would do anything but be a dramatic expansion of their authority to get at ordinary people's in-boxes. Not just the subjects of investigation, but ordinary folks who may be witnesses. Those people would have the—everything in their in-boxes that was relevant to an investigation, so a dramatic amount of information, as opposed to probable cause of evidence of a crime. That's a really troubling privacy invasion.

I'm utterly sympathetic with Calabrese's (and the EFF's) argument that the bid for some kind of civil investigative order is a power grab designed to bypass probable cause.

But I wonder whether there isn't another kind of power grab going on as well — a bid to force banks to be investigated in a certain kind of fashion.

It was really hard, to begin with, to have former and (presumably) future Debevoise & Plimpton white collar defense attorney Andrew Ceresney to talk about how seriously SEC takes it job of "the swift and vigorous pursuit of those who have broken the securities laws through the use of all lawful tools available to us," as he said in his testimony and during the hearing. There's just been no evidence of it.

Moreover, as Ceresney admitted, SEC hasn't tried to obtain email records via an order since the US v. Warshak decision required a warrant in the 6th Circuit, even though SEC believes its approach — getting an order but also providing notice to the target — isn't governed by Warshak. As SEC Chair Mary Jo White (another revolving door Debevoise & Plimpton white collar defense attorney) said earlier this year,

> "We've not, to date, to my knowledge, proceeded to subpoena the ISPs," White said. "But that is something that we

> think is a critical authority to be able to maintain, done in the right way and with sufficient solicitousness."

For five years, the SEC hasn't even tried to use this authority, all while insisting they needed it — even while promising they would remain "solicitous," if there were any worries about that.

Claims that the SEC needed such authority might be more convincing if SEC was actually pursuing crooks, but there's little evidence of that.

Which is why I'm interested in this passage, from a letter White sent to Pat Leahy in April 2013 and appended to Ceresney's testimony, explaining why SEC can't have DOJ obtain orders for this material.

> DOJ only has authority to seek search warrants to advance its own investigations, not SEC investigations. Thus, the Commission cannot request that the DOJ apply for a search warrant on the SEC's behalf. Second, many SEC investigations of potential civil securities law violations do not involve a parallel criminal investigation, and thus there is no practical potential avenue for obtaining a search warrant in those cases. The large category of cases handled by the SEC without criminal involvement, however, have real investor impact, and are vital to our ability to protect- and, where feasible, make whole — harmed investors.

The only times when SEC would need their fancy new order is if the subject of an investigation refuses to turn information voluntarily, and the threat that they could obtain an order anyway is, according to Ceresney, they key reason SEC wants to maintain this authority (though he didn't argue the apparent absence of authority has been responsible for SEC's indolence over

the last 5 years). But that act, refusing to cooperate, would get companies more closely into criminal action and — especially under DOJ's purportedly new policy of demanding that companies offer up their criminal employees — into real risk of forgoing any leniency for cooperation. But White is saying (or was, in 2013, when it was clear Eric Holder's DOJ wasn't going to prosecute) that SEC can't ask DOJ to subpoena something because that would entail a potentially criminal investigation.

Well yeah, that's the point.

Then add in the presumption here. One problem with prosecuting corporations is they hide their crimes behind attorney-client and trade secret privileges. I presume that's partly what Sally Yates meant in her new "policy" memo, noting that investigations require a "painstaking review of corporate documents … which may be difficult to collect because of legal restrictions." SEC's policy would be designed for maximal privilege claims, because it would involve the subject in the process.

> If the legislation were so structured, an individual would have the ability to raise with a court any privilege, relevancy, or other concerns before the communications are provided by an ISP, while civil law enforcement would still maintain a limited avenue to access existing electronic communications in appropriate circumstances from ISPs.

Other criminals don't get this treatment. Perhaps the problems posed by financial crime — as well as the necessity for broader relevancy based evidence requests — are unique, though I'm not sure I buy that.

But that does seem to be a presumption behind this SEC power grab: retention of the special

treatment financial criminals get that has thus far resulted in their impunity.