Does Access Mean Consent?
Fourth Amendment Rights in Private Sector Email after
Warshak v. United States

Susan Freiwald
Professor of Law,
University of San Francisco School of Law

Many law review articles address private sector employees’ limited ability to assert electronic communications privacy rights vis-à-vis their employers. In the absence of a worker’s privacy statute, employee privacy claims pale in comparison to employers’ property claims, particularly when employers announce their intent to electronically monitor their employees’ email and internet use. Less clear, however, is how employers’ rights to access their employees’ electronic communications impacts government access to that information. The government would argue that, when it seeks information for law enforcement purposes, it does not need a warrant to compel employers to disclose those employee communications to which they have access. That argument has weakened in the wake of United States v. Warshak, 631 F.3d 266, 283-88 (6th Cir. 2010), which recognizes a reasonable expectation in emails stored with a third party Internet Service Provider (“ISP”), notwithstanding the ISP’s technical ability to access those emails. In this article, I discuss how the Warshak reasoning might apply in the private sector workplace to provide employees with the protection of a warrant requirement when law enforcement agents demand that their employers disclose their electronic communications.