

**UNITED STATES V. COUNCILMAN**

*373 F.3d 197, reh'g en banc granted and  
opinion withdrawn by 385 F.3d 793 (1st. Cir. Oct. 5, 2004)*

The First Circuit held that an Internet service provider's real-time surveillance of its customers' e-mail during the course of transmission did not violate the Wiretap Act because the communication was obtained from temporary storage rather than a non-storage component of the Internet's infrastructure.

Defendant Councilman was Vice President of Interloc, Inc. ("Interloc") and Alibris, the company that acquired Interloc in 1998. Interloc was an online literary clearinghouse that paired its customers, rare and used book dealers, with book buyers. As part of its service, Interloc provided its customers with e-mail service. According to the indictment, Councilman directed Interloc employees to write computer code to intercept and copy all incoming communications to Interloc's customers from Amazon.com. The e-mail messages were copied in real time as they entered the Interloc mail server, before being made available to subscribers. Councilman and other Interloc employees routinely read these e-mails.

The government charged Councilman with conspiring to engage in conduct prohibited by Title I of the Electronic Communications Privacy Act (ECPA), the Wiretap Act, 18 U.S.C. §§ 2510-2522. However, the First Circuit found that the plain language of ECPA showed that Congress did not intend that the Wiretap Act apply to electronic communications if they were in "electronic storage." The court focused on the fact that Interloc obtained the customer e-mail messages while they were in "temporary storage" in a computer system. According to the court's analysis, Title II of ECPA, the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2711, includes the phrase "temporary storage," while the Wiretap Act's definition of "electronic communications" does not. Consequently, the court believed that Congress did not intend that the interception provisions of the Wiretap Act apply to electronic communications in storage, whether temporary or not. The court noted that the stipulation signed by the parties stated that the e-mails were not affected while they were transmitted through wires or cables between computer systems. In light of these findings, the court determined that the e-mails were not "in transit" and subject to the Wiretap Act protections against "interception," but were instead stored communications.

In a dissenting opinion, Judge Lipez reasoned that the Wiretap Act and not the SCA should control. Citing legislative history and judicial precedent, he explained that the term "temporary storage" in the SCA referred to a message that sits in an e-mail user's mailbox after transmission is completed and prior to the user retrieving the message from the mail server. Judge Lipez concluded that the Wiretap Act, not the SCA, covered messages still in transmission, regardless of where they resided on the Internet's physical infrastructure.

The First Circuit reheard this case en banc on December 8, 2004, and at the time of this publication, it had not yet issued an opinion.