

Are most search warrants for electronically stored information unconstitutional general warrants?

Association of American Law Schools 2024 Meeting

Criminal Procedure Section

Friday, January 5, 2024

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Leonard Bailey, U.S. Department of Justice

Laura Donohue, Georgetown Law

Orin Kerr, Berkeley Law

Tracey Maclin, Levin College of Law, University of Florida

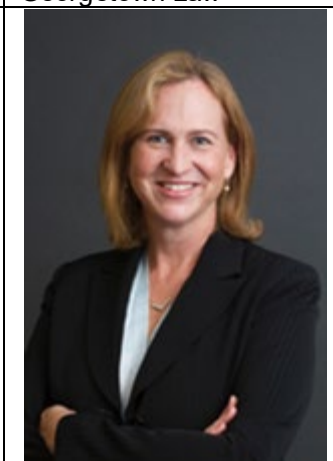
Paul Ohm, Georgetown Law

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U.S. Department of Justice



Format of today's session

- General warrants: overview
- Roundtable discussion among panelists
 - Can post questions or comments to moderator from your phone
- Open Q&A

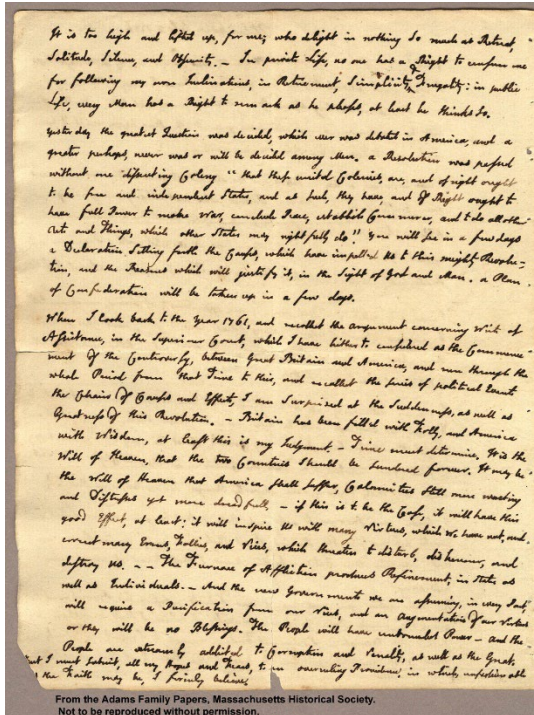
Orin Kerr

- DOJ Computer Crime and Intellectual Property Section 1998-2001
- One of the authors of SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS (DOJ 2002)
- “Current law allows computer searches for any evidence to look disturbingly like searches for all evidence. Everything can be seized. Everything can be searched. Nearly everything can come into plain view and be subject to use in unrelated cases. The result seems perilously like the regime of general warrants that the Fourth Amendment was enacted to stop.”
 - *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 TEX. TECH L. REV. 1, 11 (2015)

Paul Ohm

- DOJ Computer Crime and Intellectual Property Section
- “[There is a] manifest lack of probable cause and particularity in almost every computer case. ... Computer search warrants are the closest things to general warrants we have confronted in the history of the Republic.”
 - *Massive Hard Drives, General Warrants, and the Power of Magistrate Judges*, 97 VA. L. REV. IN BRIEF 1, 4, 11 (2011)

John Adams to Abigail Adams: July 3, 1776



- Yesterday the greatest Question was decided, which ever was debated in America, and a greater perhaps, never was or will be decided among Men
- A Resolution that these united Colonies, are, and of right ought to be free and independent States
- You will see in a few days a Declaration setting forth the Causes, which have impell'd Us to this mighty Revolution

July 3, 1776

It is too high and lifted up, for men who delight in nothing so much as Liberty, Liberty, Liberty, and Liberty. — In private Life, no one has a Right to complain me for following my own Inclination, in Retirement; Simplicity, Frugality: in public Life, every Man has a Right to run as he pleases, at least he thinks so.

Yesterday the great Question was decided, which was most desired in America, and a greater perhaps never was or will be decided among Men, a Resolution was passed without one dissenting Colony "That these united Colonies are, and of right ought to be free and independent States, and as such, they have, and of Right ought to have full Power to make War, conclude Peace, establish Commerce, and to do all other Acts and Things, which other States may rightfully do." You will see in a few days a Declaration setting forth the Grievances which have injured us to their right, Liberties, and the Remedies which will justify us, in the Sight of God and Man. a Plan of Government will be taken up in a few days.

When I look back to the Year 1761, and recollect the Argument concerning Writ of Assistance, in the Superior Court, which I have hitherto considered as the Commencement of the Controversy, between Great Britain and America, and run through the whole Period from that Time to this, and recollect the pains of political Liberty, the Chains of Bonds and Slavery, I am surpris'd at the Suddeness, as well as Greatness of this Revolution. — Britain has been fill'd with Liberty, and America with Slavery, at least this is my Judgment — Time must determine, and the Will of Heaven, that the two Countries should be bound together, it may be the Will of Heaven that America shall suffer, Colonies this still more wounding and Soften'd yet more harden'd — if this is to be the Case, it will have this good Effect, at least; it will inspire us with many Virtues, which we have not, and correct many Vices, Follies, and Sins, which threaten to destroy us, and leaving us. — The Tyranny of Oppression produces Repinement, in those as well as Indian Slaves. — And the new Governement we are offering, in very short will require a Purification from our Sins, and our Degenerations. You shall see they will be no Blessings. The People will have unbounded Power — and the People are otherwise oblig'd to Corruption and Revolt, as well as the Grievances, and I must submit, all my Thoughts and Prayers to our governing Providence; in which, I firmly believe the Truth may be, I firmly believe.

From the Adams Family Papers, Massachusetts Historical Society.
Not to be reproduced without permission.

- When I look back to the Year 1761
- and recollect the Argument concerning Writs of Assistance, in the Superiour Court
- which I have hitherto considered as the Commencement of the Controversy between Great Britain and America
- I am surpris'd at the Suddenness as well as Greatness of this Revolution.

Writ of Assistance



- *Province of Massachusetts Bay*
- *George the third by the Grace of God of Great Britain King*
- *To all Our Officers and Subjects*
- *We strictly Injoin and Command you that you permit*
- *Charles Paxton, Surveyor and Searcher*
- *To enter into all places*
- *Where goods, for which customs have not been paid,*
- *Are suspected to be concealed*
- *And to add, assist and help in the execution of [the search]*

Feb 24, 1761



James Otis



- The writ of assistance is
- “the worst instrument of arbitrary power
- the most destructive of English liberty”

Otis

- “special warrants only are legal”
- “upon oath by the person who asks that he suspects such goods to be concealed in THOSE VERY PLACES HE DESIRES TO SEARCH.”

Fourth Amendment

- “no Warrants shall issue
- but upon probable cause supported by Oath or affirmation, and
- particularly describing the place to be searched and
- the persons or things to be seized.”

John Adams

“Otis was a flame of Fire!”



- “Every man of an immense crowded Audience appeared to me to go away, as I did, ready to take up Arms against Writts of Assistants [sic].
- Then and there was the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain.”

Fourth Amendment


- “The right of the people to be secure in their ... *papers* ...
- against unreasonable searches and seizures
- shall not be violated”

England

April 23, 1763

THE NORTH BRITON
NUMBER XVII.

WILLIAM HOGARTH,
ESQUIRE,



Cut in WOOD, from the
LIFE.

*Its proper power to hurt each creature feels,
Bulls aim their horns, and asses lift their beels.*
POPE.

SATURDAY, MAY the 21st, 1763.

THE humorous Mr. Hogarth, the supposed author of the *Analysis of beauty*, has at last entered the list of politicians, and has given us a print of *The Times*. *Words are man's province*, Pope says; but they are not Mr. Hogarth's province. He somewhere mentions his being indebted to a friend for a third part of the *wording*: that is his phrase. We all titter the

N^o 45. THE NORTH BRITON. 227

N^o XLV.* Saturday, APRIL 23, 1763.

*The following advertisement appeared in all the papers
on the 13th of April.*

THE NORTH BRITON makes his appeal to the good sense, and to the candour of the ENGLISH nation. In the present unsettled and fluctuating state of the *administration*, he is really fearful of falling into involuntary errors, and he does not wish to mislead. All his reasonings have been built on the strong foundation

Lord Halifax, Secretary of State: Warrant



- make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper
- entitled the North Briton, Number 45

Lord Halifax Warrant



- and any of them having found
- apprehend and seize
- together with their papers

John Wilkes

Testimony at trial



- “Whether a table with a locked drawer should be removed entire or be opened”
- “Mr. Mann was sent to Lord Halifax for directions, and brought word that the drawers must be opened.”

John Wilkes

Testimony at trial



- “Blackmore fetched a smith to open the table.”
- “They took all the papers in those drawers and pocket book of Mr. Wilkes’s
- And put them all in a sack together”

Wilkes' Attorney

- This case extended far beyond Mr. Wilkes personally
- It touched the liberty of every subject of this country
- Of all offences that of a seizure of papers was the least capable of reparation

Wilkes' Attorney

- And for the promulgation of our most private concerns, affairs of the most secret personal nature, no reparation could be made
- The law never admits of a general search warrant
- Even in the Inquisition itself, they never delegate an infinite power to search

Chief Justice Pratt (later Lord Camden)



- was a point of the greatest consequence I have ever met with in my whole practice
- “such a power
- is totally subversive of liberty”

Paul Revere



Liberty Bowl (1768)





Magna
Charta

Bill of
Rights

No. 45.

Wilkes & Liberty

General
Warrants

For more on this history:

- Clark D. Cunningham, *Apple and the American Revolution: Remembering Why We Have the Fourth Amendment*, 126 Yale Law Journal Forum 218 (2016)
- www.yalelawjournal.org/forum/apple-and-the-american-revolution-remembering-why-we-have-the-fourth-amendment-1
- Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181-1328 (2016)
- Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925 (1997)
- Tracey Maclin, *James Otis (1725-1783)*, Yale Biographical Dictionary Of American Law (Roger K. Newman ed. 2009)
- And see other references in bibliography at end of this ppt²⁵

General Warrant?

- As written?
- As executed?

As Written

Microsoft v US Dept of Justice (S.D.N.Y)

<http://www.clarkcunningham.org/Apple/Cases/Microsoft2dCir.html>



UNITED STATES DISTRICT COURT

for the
Southern District of New York

13 MAG 2814

In the Matter of the Search of)
(Briefly describe the property to be searched)
or identify the person by name and address))

Case No.

The PREMISES known and described as the email account)
[REDACTED]@MSN.COM, which is controlled by Microsoft Corporation)
)

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the WESTERN District of WASHINGTON
(Identify the person or describe the property to be searched and give its location):

The PREMISES known and described as the email account [REDACTED]@MSN.COM, which is controlled by Microsoft Corporation (see attachments).

The person or property to be searched, described above, is believed to conceal (identify the person or describe the property to be seized):
See attachments.

To the extent that the information described in Attachment A for MSN, [REDACTED], is within the possession, custody, or control of MSN [REDACTED], then MSN [REDACTED] is required to disclose the following information to the Government for each account or identifier listed in Attachment A [REDACTED] (the "TARGET ACCOUNT") for the period of inception of the account to the present:

- a. The contents of all e-mails stored in the account, including copies of e-mails sent from the account;

A variety of techniques may be employed to search the seized e-mails for evidence of the specified crimes, including but not limited to keyword searches for various names and terms including the TARGET SUBJECTS, and other search names and terms; and email-by-email review.

As executed
U.S v. Ravelo (D. N.J.)

<http://clarkcunningham.org/Apple/Cases/USvRavelo.html>



- Paul Barrett, [Inside a \\$5.7 Billion Antitrust Trainwreck](#), Bloomberg Businessweek, Nov. 11, 2015
 - “story has a can’t-make-this-stuff-up quality”
- Keilo Ravelo: Grew up in Dominican Republic
- Columbia Law ‘91
- Sidley Austin – then Partner, Roger & Wells
- Then Hunton & Williams, then Wilkie Farr & Gallagher
- Negotiated \$5.7B antitrust settlement for Master Card

United States District Court
District of New Jersey

In the Matter of the Search of

THE CELLULAR TELEPHONE
MORE PARTICULARLY
DESCRIBED IN ATTACHMENT A

SEARCH WARRANT

Mag. No. 14-7269 (CLW)

To: Criminal Investigator Jason Annuziato and any Authorized Officer of the United States

Affidavit having been made before me by Criminal Investigator Jason Annuziato who has reason to believe that on the premises known as

SEE ATTACHMENT A

in the District of New Jersey there is now concealed a certain property, namely

SEE ATTACHMENT B

I am satisfied that the affidavit and any recorded testimony establish probable cause to believe that the property so described is now concealed on the premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to execute this warrant on or before January 6, 2015, 2014
Date (not to exceed 14 days)

on the place named above for the property specified, serving this warrant and executing the warrant at any time in the day or night as I find reasonable cause has been established, and if the property be found there to seize same, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to the Honorable Cathy L. Waldor, U.S. Magistrate Judge as required by law.

December 24, 2014 at
Date and Time Issued

1:45
PM

at

Newark, New Jersey
City and State

ATTACHMENT A

The Subject Phone is a cellular telephone, that is an iPhone with the Model No. A1533 and the IMEI No. 013850001358913, which cellular telephone is black in color on the front and silver in color on the back. The Subject Phone is presently located at the Drug Enforcement Administration's office in Newark, New Jersey.

ATTACHMENT B

Evidence, fruits, and instrumentalities of violations of Title 18, United States Code, Sections 1341 (mail fraud), 1343 (wire fraud), 1349 (conspiracy to commit wire and mail fraud), including

1. communications, including e-mails and text messages, with co-conspirators of and witnesses to the criminal violations listed above that concern the commission of the offenses listed above;
2. contact information for co-conspirators of and witnesses to the criminal violations listed above;
3. documents or information concerning ALD, ALITS, Alternative Litigation Solutions, Alternative Lit Solutions, LLC, ELIT Solutions LLC, ELIT Litigation Solutions, LCC, E-LIT, and Elitlitigation Solutions LLC;
4. documents concerning the submission of invoices to or payments of invoices to vendors by Law Firm 1 and Law Firm 2 (as described in the affidavit).

From: Steve Sadow <stevesadow@gmail.com>

Date: December 22, 2014 at 9:13:23 PM EST

To: "Kogan, Andrew (USANJ)" <Andrew.Kogan@usdoj.gov>

Cc: "Wilson, Ronnell (USANJ)" <Ronnell.Wilson@usdoj.gov>, Aidan O'Connor
<aconnor@pashmanstein.com>

Subject: Re: U.S. v. Ravelo

Just to be as clear as possible, it will be the defense's position that the cellphones were not seized incident to arrest or with consent, and therefore have been seized unlawfully. Additionally, please be advised that you do not have the defense's consent to search or otherwise obtain the contents of the cellphones.

Accordingly, by this email, the defense hereby requests the immediate return of the cellphones seized from Ms. Ravelo's residence today.

May 23, 2016 Dear Judge McNulty,

- “The Government is in the process of determining whether it intends to introduce any of the contents of the Phone in its case-in-chief at trial.
- Once it is determined what, if any, evidence on the Phone is privileged, the trial team will receive the contents of the Phone minus the privileged items.
- The trial team will then conduct its review and determine if it intends to use any of the contents of the Phone in its case-in-chief at trial.”

May 23, 2016 Dear Judge McNulty,

- If the trial team determines that it will indeed use any of the contents of the Phone in its case-in-chief at trial,
- it will provide the [Search Warrant] Affidavit to defense counsel
- and will address any motion to suppress at that time.
- Respectfully submitted,
- Paul J. Fishman, United States Attorney
 - By: Andrew Kogan, Assistant U.S. Attorney

May 23, 2016 Dear Judge McNulty,

- If the trial team determines that it will indeed use any of the contents of the Phone in its case-in-chief at trial,
- it will provide the [Search Warrant] Affidavit to defense counsel
- and will address any motion to suppress at that time.
- Respectfully submitted,
- Paul J. Fishman, United States Attorney
 - By: Andrew Kogan, Assistant U.S. Attorney

Back to the Future

Ravelo case (2016)

- [T]he Government is in the process of determining whether it intends to introduce any of the contents of the Phone in its case-in-chief at trial. . . .
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- The trial team will then conduct its review and determine if it intends to use any of the contents of the Phone in its case-in-chief at trial.
- If the trial team determines that it will indeed use any of the contents of the Phone in its case-in-chief at trial, it will provide the [Search Warrant] Affidavit to defense counsel and will address any motion to suppress at that time.
 - Paul J. Fishman, United States Attorney

Wilkes case (1763)

- May 7, 1763 Mr. Wilkes
- In answer to your letter of yesterday, we acquaint you, that your papers were seized in consequence of the heavy charge brought against you, for being the author of an infamous and seditious libel,
- for which his Majesty has ordered you to be prosecuted
- Such of your papers as do not lead to a proof of your guilt, shall be restored to you.
- Such as are necessary for that purpose, it was our duty to turn over to those, whose office it is to collect the evidence, and manage the prosecution against you.
 - Dunk Halifax [Secretary of State]

July 12, 2016 Dear Judge McNulty,

- “Assuming arguendo that the Court granted Keila Ravelo’s motion to suppress the contents of her cellular telephone (“the Phone”) and a motion to return the Phone, the government would still be able to retain a copy of the Phone to be used lawfully, among other reasons, for impeachment purposes, at a sentencing hearing, filing an appeal, and/or in opposition to any habeas petition.
- if the court were to grant Ms. Ravelo’s motion to suppress evidence obtained from the Phone, Ms. Ravelo would likely file a subsequent motion under Fed. R. Crim. P. 41(g) for the return of the Phone.
- Were the Court to grant the defendant’s Rule 41 motion, the government would likely retain copies of the contents of the Phone.”
- Paul J. Fishman, United States Attorney
 - By: Andrew Kogan, Assistant U.S. Attorney

Are most search warrants for electronically stored information unconstitutional general warrants?

Orin Kerr

- DOJ Computer Crime and Intellectual Property Section 1998-2001
- One of the authors of SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS (DOJ 2002)
- “Current law allows computer searches for any evidence to look disturbingly like searches for all evidence. Everything can be seized. Everything can be searched. Nearly everything can come into plain view and be subject to use in unrelated cases. The result seems perilously like the regime of general warrants that the Fourth Amendment was enacted to stop.”
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Paul Ohm

- DOJ Computer Crime and Intellectual Property Section 2001-2005
- “[There is a] manifest lack of probable cause and particularity in almost every computer case. ... Computer search warrants are the closest things to general warrants we have confronted in the history of the Republic.”
 - *Massive Hard Drives, General Warrants, and the Power of Magistrate Judges*, 97 VA. L. REV. IN BRIEF 1, 4, 11 (2011)

Some sample warrants

www.clarkcunningham.org/Apple-web/AALS-2024-Resources/Warrants.html

- 2009-FEDERAL
Searching and seizing computers and obtaining electronic evidence in criminal investigations 241-250 (3RD ed. DOJ), Appendix F
[Sample Premises Computer Search Warrant Affidavit](#)
- 2010 – Vermont
In re Appeal of Application for Search Warrant, 2012 Vt. 102, 71 A.3d 1158 (2012)
[Search warrant for computer with conditions](#)
- 2013-FEDERAL
Microsoft Corporation v United States, Joint Appendix (2nd Cir.)
[Search warrant to Microsoft for msn.com email accounts](#)

Some sample warrants

www.clarkcunningham.org/Apple-web/AALS-2024-Resources/Warrants.html

- 2014-FEDERAL (D.N.J.)
[Ravelo search warrant for iPhone](#)
- 2016-FEDERAL (D.Mass.)
Crawford search warrant for iPhone with order requiring Apple to bypass lock screen
- [Warrant application](#)
- [Warrant application excerpts](#)
- [Warrant](#)
- 2018-GEORGIA
Nelson v. State, 863 S.E.2d 61 (Ga, 2021)
[Nelson search warrant for iPhone](#)

Some selected cases

- *United States v. Comprehensive Drug Testing Inc.*, 621 F.3d 1162, 1180 (9th Cir. 2010) (en banc) (Kozinski, C.J., concurring).
-
- [*In re Appeal of Application for Search Warrant*, 2012 Vt. 102, 71 A.3d 1158 \(2012\)](#), cert. denied, 130 S.Ct. 2391 (2013) (conditions added to search warrant for personal computer requiring that search be performed by third parties or trained computer personnel separate from the investigators and operating behind a firewall protected a legitimate privacy interest and were not an abuse of discretion)
-
- [*In the Matter of the Search of premises known as: Three Hotmail Email accounts*](#), 2016 WL 1239916 (D. Kansas 2016) (David J. Waxse, U.S. Magistrate Judge) (Memorandum and Order Denying Application for Search Warrant) (thorough review of both caselaw and scholarship in this area, urges use of court-appointed special masters, potentially assisted by independent vendors, to review aggregate data and then turn over only responsive items to the government pursuant to a warrant that meets constitutional standards for particularity, citing approval of such an approach for searching computer data by the Vermont Supreme Court, 71 A3d 1158 (2012).)
- [*In the Matter of the Search of Information Associated with \[redacted\]@mac.com That is Stored at Premises Controlled by Apple, Inc.*](#), **13 F.Supp.3d 145** (D.D.C., April 7, 2014) (John M. Facciola, U.S. Magistrate Judge), *vacated sub nom*, **13 F.Supp.3d 157** (D.D.C., August 8, 2014)
- More cases at www.clarkcunningham.org/Apple/Index.html

Short bibliography

- William Clark, *Note*, [Protecting the Privacies of Digital Life: Riley v California, the Fourth Amendment's Particularity Requirement and Search Protocols for Cell Phone Search Warrants](#), 56 BOSTON COLLEGE L. REV. 1981, 1997-2007 (2015).
- Patrick J. Cotter, [Magistrates' Revolt: Unexpected Resistance to Federal Government Efforts to Get "General Warrants" for Electronic Information](#), The National Law Review, May 15, 2014
- Clark D. Cunningham, *Apple and the American Revolution: Remembering Why We Have the Fourth Amendment*, 126 YALE L.J. F. 216 (2016), available at
 - www.yalelawjournal.org/forum/apple-and-the-american-revolution-remembering-why-we-have-the-fourth-amendment-1
- Reid Day, *Comment*, *Let the Magistrates Revolt: A Review of Search Warrant Applications for Electronic Information Possessed by Online Services*, 64 U. KAN. L. REV. 491 (2015)
- Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. ANN. SURV. AM. L. 533-685 (2017) <https://scholarship.law.georgetown.edu/facpub/1791>
- Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181-1328 (2016)
- Adam M. Gershowitz, [The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches](#), 69 Vanderbilt L.Rev. 585, 617-21 (2016)

Short bibliography

- Orin S. Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 TEXAS TECH LAW REVIEW 1 (2015).
- Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 Yale L.J. 700 (2010).
- Orin S. Kerr, *Ex Ante Regulation of Computer Search and Seizure*, 96 Va. L. Rev 1241 (2010)
- Tracey Maclin, *James Otis, (1725-1783)* in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW (Roger K. Newman ed. 2009)
- Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925 (1997).
- Tracey Maclin, *When the Cure For The Fourth Amendment is Worse Than the Disease*, 68 SOUTHERN CALIFORNIA LAW REVIEW 1 (1994).
- Ann E. Marimow & Craig Timberg, [Low-level federal judges balking at law enforcement requests for electronic evidence](#), Washington Post, Apr. 24, 2014

Short bibliography

- Paul Ohm, *Massive Hard Drives, General Warrants, and the Power of Magistrate Judges*, 97 Virginia Law Review Online 1 (2011).
- Paul Ohm, *The Life of Riley (v. California)*, 48 Tex. Tech L. Rev. 133 (2015).
- Stephen Wm. Smith, *Gagged, Sealed & Delivered: Reforming ECPA's Secret Docket*, 6 Harv. L. & Pol'y Rev. 313, 313 (2012)
- More resources listed at www.clarkcunningham.org/Apple/Index.html

Possible remedies/reforms?

In re Appeal of Application for Search Warrant, 2012 Vt. 102, 71 A.3d 1158 (2012)

The application to search the computer belonging to Eric Gulfield is *granted* subject to the conditions listed herein. In setting these conditions, the Court has been guided by *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 9th Cir. 2009).

1. As a condition for receiving a search warrant to search the subject computer, the State cannot rely upon the “plain view doctrine” to seize any electronic records other than those authorized by this warrant. That is, any digital evidence relating to criminal matters other than the identity theft offenses, may not be seized, copied, or used in any criminal investigation or prosecution of any person.
(1) NOT approved by Vermont Supreme Court

Vermont Warrant

2. Inspection and investigation of the subject computer must be done by either an independent third party or specially trained computer personnel who are not involved in the investigation while staying behind a firewall, that is, in the absence of other agents of the State, and subject to a ban on copying or communicating to any person or the State any information found on the subject computer other than digital evidence relating to identity theft offenses.
3. Any digital evidence relating to the ~~threats~~^{offenses} being investigated must be segregated and redacted before it is provided to the State, no matter how intermingled it is.

Vermont Warrant

4. If the segregation is performed by State computer personnel, it is a condition of this warrant that the computer personnel will not disclose to the State investigators or prosecutors any information other than that which is the target of the warrant, that is, digital evidence of the identity theft offenses.
5. The search protocol employed must be designed to uncover only the information for which the State has probable cause, that is the aforesaid alleged offenses, and only that digital evidence may be provided to the State. Techniques to focus the search should include but are not limited to, specific time periods relevant to the alleged criminal activity, key word searches, and limiting the search to specific file types.

Vermont Warrant

6. The government has at its disposal sophisticated hashing tools that allow identification of well-known illegal files (such as child pornography) that are not

at issue in this case. These and similar search tools may not be used without specific authorization by the court.

Vermont Warrant

7. Information relevant to the targeted alleged activities may be copied to other media to provide to State agents. No other digital evidence may be so copied.
8. The government must return non-responsive data, keeping the court informed about when it has done so and what it has kept.
9. Any remaining copies of the electronic data must be destroyed absent specific judicial authorization to do otherwise.

Vermont Warrant

10. Within the time specified in the warrant, the State must provide the issuing officer with a return disclosing precisely what data it has obtained as a consequence of the search, and what data it has returned to the party from whom it was seized. The return must include a sworn certificate that the government has destroyed or returned all copies of data that it is not entitled to keep.

Import from wiretap statute

Wiretap statute

- 18 USC § 2511(1), (4)
- 18 USC § 2516(1)(a)-(t)
- 18 USC § 2518(3)(c)
- 18 USC § 2516(1),(2)

Applied to ESI

- Felony to obtain, disclose, or use ESI except as authorized by this statute
- Limited to specified serious crimes
- Limited to circumstances where other investigatory procedures have already been tried or are unavailable
- Must be authorized by a DOJ official at least at the level of Deputy Assistant Attorney General or,
 - for state warrants, the Attorney General of the relevant jurisdiction,
 - or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to apply for an ESI warrant

Apple and the American Revolution, 126 Yale Law Journal Forum at 203

- If a warrant authorizes seizure of a device containing ESI or the copying of ESI from such a device or any other storage media (such as a remote server)
- the device or copied ESI shall be held under court supervision
- until the owner of the ESI has been provided notice and an opportunity for a hearing to contest the terms of the warrant and/or the procedures to be used to search the device or copied ESI for one or more items of information described with particularity in the warrant
- Exigent circumstances exception