

Clark D. Cunningham
W. Lee Burge Chair in Law & Ethics
P.O. Box 4037
Atlanta, GA 30302-4037
Phone: 404/413-9168
Fax: 404/413-9225
Email: cdcunningham@gsu.edu
Home page: www.ClarkCunningham.org



September 8, 2016

Dear President Obama,

The week of September 19 in two cases on opposite sides of the country the Department of Justice (DOJ) is expected to continue its efforts to prevent federal courts from being able to decide critical questions involving one of the most important legal issues of our era: what protections are provided by the Constitution for private information stored in cell phones and in the cloud? I write, not to ask you to weigh in on the substantive issues in these cases, but simply to consider in consultation with your Attorney General whether to exercise the executive discretion and judgment to allow the courts to reach the merits in these cases.

In Seattle Microsoft is asking the court to impose limits on the government's ability to use search warrants to read our email without our knowledge when we use Outlook and other cloud-based email systems. An example of such a search warrant is attached. DOJ moved to dismiss the lawsuit at the very outset, saying that Microsoft should not be allowed to raise the constitutional rights of its customers. DOJ also takes the position in the case that customers cannot sue unless they can prove their own email accounts are being seized, but the point of the lawsuit is that DOJ routinely gets orders preventing Americans from ever knowing the government has read their email. The inescapable logic of DOJ's position is that NO American can bring a lawsuit challenging secret warrants to search cloud-based email. The importance of having a decision on the merits is demonstrated by the many friend of the court briefs filed in support of Microsoft from such varied parties as the ACLU, the US Chamber of Commerce and Fox News. Remarkably three former U.S. Attorneys, who collectively served the Western District of Washington for every year from 1989 – 2009, and the retired Special Agent in Charge of the FBI's Seattle office have together filed an amicus brief in support of Microsoft's position. I respectfully suggest you give consideration to whether the administration should drop its opposition to allowing the court to consider Microsoft's request for a declaratory judgment on the merits. September 23 is the deadline for DOJ to file its reply brief.

In *United States v. Ravelo*, pending in Newark, DOJ has used a search warrant to download the entire contents of a lawyer's personal cell phone, over 90,000 items, and has taken the position it is entitled to look at everything (except for privileged lawyer-client communications) BEFORE the court decides whether the search complied with the Constitution. DOJ has further said there is no point to the court making a decision on the constitutional issues now, declaring even if the court decides that the search violated the Constitution it still has the power to keep and use all the downloaded data. I attach the two letters to the court from U.S. Attorney Fishman so stating. These positions seem

inconsistent with the values of your Administration and indeed of our constitutional form of government. The hearing on the constitutionality of the cell phone search is set for September 19. Once again, I do not ask you to consider the merits of whether the search was constitutional – only the opportunity for Ms. Ravelo, and other Americans subjected to a cell phone search warrant, to be heard by a court before all her private information is reviewed by the government.

I also attach a brief essay with further details about both cases scheduled to be published by the Yale Law Journal Forum next month. I have no relationship with any of the parties in either case.

Respectfully yours,

Clark D. Cunningham
W. Lee Burge Chair in Law & Ethics

cc:

Loretta E. Lynch, Attorney General
Counsel of record in Microsoft v Department of Justice, United States v. Ravelo (by email)