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FEBRUARY 24 – 28 | MOSCONE CENTER | SAN FRANCISCO

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Capitalizing on
Collective Intelligence

Updating the Law on Government Access to Your Online Data

SESSION ID: PNG-T09

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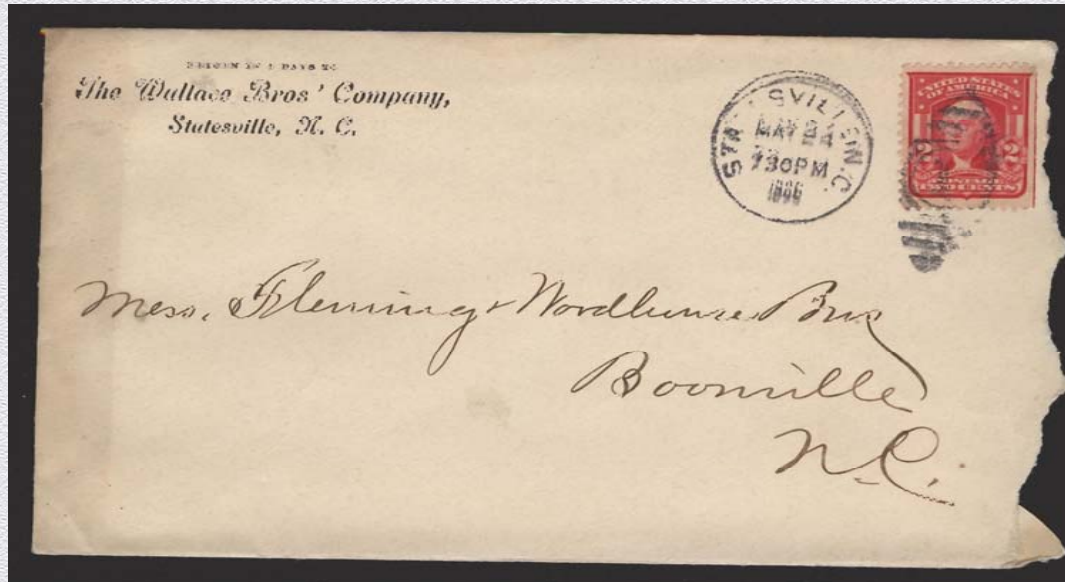


When does the Constitution protect our privacy?

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

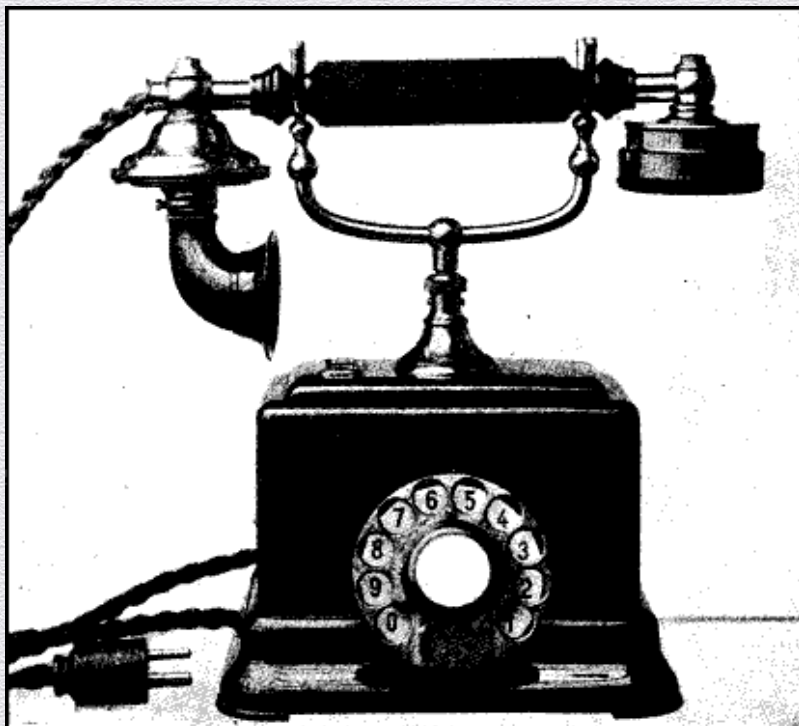
- Fourth Amendment (1791)

What happens when data leaves your possession?



Ex parte Jackson (1877) – the Constitution protects letters in transit, requiring the government to get a warrant from a judge to open a letter in transit through the postal system.

How does the law respond to disruptive technology?



Olmstead v. United States (1928) – the Constitution does not protect the privacy of phone calls in transit through the telephone network.

Courts and Congress catch up.

- 1967: Supreme Court reverses Olmstead: voice in transit is protected by the Constitution.
- 1968: Congress adopts the federal Wiretap Act - detailed procedures for issuing judicial warrants for interception of “wire or oral” communications in transit.
- 1978: Congress adopts a parallel universe of rules for national security - FISA



Disruptive technology – a second wave

1969 – CompuServe founded – Internet introduces non-voice comms and stored comms

1977 – Commercial cell phone service introduced

Problem: Wiretap Act only covered “wire” or “oral” comms and only in transit.



Congress responds again - Electronic Communications Privacy Act 1986

- ◆ Required a warrant for all **real-time** access to content
 - ◆ Cell phone conversations
 - ◆ Email and other electronic communications
- ◆ However, allowed access without a warrant to some **stored** communications and other stored data

Two new waves of disruptive technology

“The Cloud”

- ◆ Under ECPA, many communications, documents and other items stored with a service provider are available to the government with a mere subpoena – no court order required, no probable cause of criminal conduct.

Location

- ◆ ECPA allows access to “records pertaining to a subscriber” without a judicial warrant and without a finding of probable cause

Warrant vs. subpoena – what's the diff?

UNITED STATES DISTRICT COURT
CENTRAL DIVISION District of Utah

SEALED

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)

David Lacy
[REDACTED]

APPLICATION AND AFFIDAVIT
FOR SEARCH WARRANT

Case Number: 2:09-MJ-212-A

I, PATRICK G. BROSNAN, being duly sworn depose and say:
I am a Special Agent and have reason to believe that [] on the person of or [X] on the premises known as (name, description and/or location)
SEE ATTACHMENT A, attached to this application and incorporated herein by reference
in the District of Utah there is now concealed a certain person or property, namely, (describe the person or property)
SEE ATTACHMENT B, attached to this application and incorporated herein by reference

which is (give alleged grounds for search and seizure under Rule 41(b) of the Federal Rules of Criminal Procedure)
Believed to be property that constitutes evidence of the commission of a criminal offense and contraband, the fruits of crime or things otherwise criminally possessed.

This application also seeks authorization for executing officers or agents to be accompanied by an archeologist or cultural artifacts expert, for the sole purpose of assisting agents in identifying and authenticating items to be seized, as contemplated in Attachment B of the Application and Warrant, incorporated by reference herein.

Continued on the attached sheet and made a part hereof. xx Yes No
in violation of Title(s) 18 United States Code, Section(s) 16 U.S.C. § 470 ee, 18 U.S.C. § 641, 1163. The facts to support the issuance of a Search Warrant are as follows:
See attached Affidavit incorporated by reference herein.

Sworn to before me, and subscribed in my presence
6/08/09
Date

Special Agent, FBI
SALT LAKE CITY, UTAH
City and State

SAMUEL ALBA, UNITED STATES MAGISTRATE JUDGE
Name and Title of Judicial Officer

Signature of Judicial Officer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Search of

Residence at [REDACTED]
Frederick, Maryland,
owned by Bruce Edwards Ivins,
DOB [REDACTED], SSN [REDACTED]

SEARCH WARRANT

CASE NUMBER: 07-524M-CI

TO: Postal Inspector Thomas F. Dellafera, and any Authorized Officer of the United States

Affidavit(s) having been made before me by Postal Inspector Thomas F. Dellafera, who has reason to believe that [] on the person or [X] on the premises known as (name, description and/or location)

Single Family Residence at [REDACTED] Frederick, Maryland, and large white shed on rear of property, owned by Bruce Edwards Ivins, DOB [REDACTED], SSN [REDACTED]

in the District of Maryland there is now concealed a certain person or property, namely (describe the person or property)
trace quantities of Bacillus anthracis or simulants thereof, hairs, textile fibers, lab equipment or materials used in preparation of select agents, papers, tape, pens, notes, books, manuals, receipts, financial records of any type, correspondence, address books, maps, handwriting samples, photocopy samples, photographs, computer files, cellular phones, phone bills, electronic pager devices, other digital devices, or other documentary evidence.

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

YOU ARE HEREBY COMMANDED to search on or before November 9, 2007
(date)
(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search [] (in the daytime - 6:00 A.M. to 10:00 P.M.) [X] (at any time in the day or night as I find reasonable cause has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to the undersigned U.S. Judge/U.S. Magistrate Judge, as required by law.

OCT 31 2007 5:05 PM
Date and Time Issued in Washington, DC pursuant to the domestic terrorism search warrant provisions of Rule 41(b)(3)

DEBORAH A. ROBINSON
U.S. MAGISTRATE JUDGE

United States District Court
For the District of Columbia
A TRUE COPY
NANCY MAVER WHITTINGTON, Clerk

DEBORAH A. ROBINSON
U.S. MAGISTRATE JUDGE

Subpoena involves no prior judicial approval.

United States District Court SOUTHERN DISTRICT OF INDIANA	
TO: Kristina Clair 4701 Pine St., Box 96 Philadelphia, PA 19143	SUBPOENA TO TESTIFY BEFORE GRAND JURY
SUBPOENA FOR: <input type="checkbox"/> PERSON <input checked="" type="checkbox"/> DOCUMENTS OR OBJECT(S)	
YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.	
PLACE U.S. Courthouse 46 East Ohio Street, 4th Floor Indianapolis, IN 46204	ROOM 464 DATE AND TIME February 24, 2009 9:30 a.m.
YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):	
SEE SUBPOENA ATTACHMENT	
In lieu of actual appearance before the Grand Jury, you may voluntarily waive your right to personally present the records and request a Special Agent to take custody of the documents to present to the Grand Jury. If you elect to do so, please complete the enclosed Waiver and Certification and forward it and your response before the date of compliance to the attention of: Task Force Officer Joel A. Arthur Federal Bureau of Investigation 575 N. Pennsylvania Street, Room 679 Indianapolis, IN 46204 Telephone: 317-639-3301	
You are not to disclose the existence of this request unless authorized by the Assistant U.S. Attorney. Any such disclosure would impede the investigation being conducted and thereby interfere with the enforcement of the law.	
This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.	
CLERK LAURA A. BRIGGS, CLERK (BY) DEPUTY CLERK <i>[Signature]</i>	DATE January 23, 2009 Arthur/kjb
This subpoena is issued upon application of the United States of America TIMOTHY M. MORRISON United States Attorney 09-01-DLP-15-10	NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY Doris L. Pryor Assistant United States Attorney 10 West Market Street, Suite 2100 Indianapolis, Indiana 46204-3648 (317) 226-6333
*If not applicable, enter "none."	

The parallel universe – foreign intelligence collection

Foreign Intelligence Surveillance Act

- ◆ Warrants for surveillance inside the US, targeting persons inside the US
- ◆ National Security Letters for stored metadata
- ◆ Pen/trap provision for real-time collection of metadata
- ◆ Warrants for physical searches
- ◆ Section 215: Business records
- ◆ Section 702 (aka “PRISM”): Programmatic surveillance targeting persons reasonably believed to be outside the US

The courts begin to respond

- ◆ One federal appeals court requires warrant for all stored email (Warshak – 2010)
- ◆ Supreme Court requires warrant for prolonged GPS tracking – does not rule on cell tower data (Jones – 2012)
- ◆ Supreme Court declines to rule on NSA surveillance (Clapper – 2013, pre-Snowden)
- ◆ District courts rule on Section 215 program (2013, post-Snowden)

Time for Congress to respond again

Updating ECPA – a convergence of interests:

- ◆ Service providers
- ◆ Users
- ◆ Government



Digital Due Process



<http://www.digitaldueprocess.org>

ECPA Reform

- ◆ Judge's warrant for all content
 - ◆ Leahy-Lee – S. 607
 - ◆ Yoder-Polis – H.R. 1852
 - ◆ <http://www.vanishingrights.com/>
- ◆ Judge's warrant for location tracking
 - ◆ GPS Act – H.R. 2168, S. 1212

Global Government Surveillance Reform

The undersigned companies believe that it is time for the world's governments to address the practices and laws regulating government surveillance of individuals and access to their information.

While the undersigned companies understand that governments need to take action to protect their citizens' safety and security, we strongly believe that current laws and practices need to be reformed.

Consistent with established global norms of free expression and privacy and with the goals of ensuring that government law enforcement and intelligence efforts are rule-bound, narrowly tailored, transparent, and subject to oversight, we hereby call on governments to endorse the following principles and enact reforms that would put these principles into action.

