BARNES & THORNBURG LLP

Magistrates' Revolt: Unexpected Resistance To Federal Government Efforts To Get "General Warrants" For Electronic Information

May 15, 2014 | | Privacy,The GEE Blog

Any White Collar practitioner, and anyone interested in current and future efforts by the Federal Government to access electronic communications in its investigations, should take note of a recent mini-trend amongst a number of United States Federal Magistrates around the country. That trend, recently noted by the *Washington Post*, involves United States Magistrates - the "work horses" of the Federal courts who handle much of the day-to-day work carried out in the Federal court system. In a number of rulings issued without generating much publicity, a series of Federal Magistrates around the country have been denying Government requests for search warrants for broad, and sometimes all encompassing, swaths of electronic communications of suspects. These requests typically come before the Magistrates in the form of search warrants addressed to telecommunications companies to provide either large amounts of citizens' emails or even, on a number of occasions, access to detailed location information contained in citizens' cell phones. The number and volume of these opinions percolating up from the Magistrate level is beginning to be noticed. Whether it will have any direct effect on how District Courts and Appellate Courts come to view such Government requests for very large amounts of electronic data remains to be seen. Leading this apparently spontaneous and somewhat unorganized revolt is Magistrate Judge John M. Facciola, who sits in Washington, D.C. For instance, in a Memorandum Opinion and Order issued on March 7, 2014, entitled "In the Matter of the Search of Information Associated with [redacted] … that is stored at premises controlled by Apple, Inc.," Judge Facciola ruled on a search warrant request made by the Government, which was conducting an investigation into a possible kickback scheme involving Federal contractors. The Government apparently wanted to search all emails belonging to the targeted citizen, not just email that had something conceivably to do with the alleged kickback payments. Further, the search warrant would have allowed the Federal Government to keep the email, presumably forever. In his opinion, which Judge Facciola pointedly informed the Government that he would make public, albeit with appropriate redactions to shield the identities of all concerned, Judge Facciola was very clear about the concern he had with the pattern of Federal Government search warrant requests for electronic data. "This Court is increasingly concerned about the Government applications for search warrants for electronic data. In essence, its application asks for the entire universe of information tied to a particular account, even if it has established probable cause only for certain information. … This Court is concerned that the Government will see no obstacle to simply keeping all of the data that it collects, regardless of its relevance to the specific investigation for which it is sought … Despite the Court raising its concerns and urging the Government to adopt a different approach, the Government continues to ask for all electronically stored information in e-mail accounts, irrespective of the relevance to the investigation." As this extended quote makes clear, Judge Facciola is concerned that the Federal Government is, in its zeal to uncover wrongdoing,

RELATED PRACTICE AREAS

Financial and Regulatory Litigation
Government Litigation
Securities and Capital Markets
White Collar and Investigations

RELATED TOPICS

Electronic Information
Search warrants

seeking and getting from many other Magistrates, search warrants so broad as to be reminiscent of the type of “general warrants” so notorious at the time of the American Revolution and one of the prime motivators for the enactment of the Fourth Amendment to the U.S. Constitution. Indeed, at another point in his Memorandum, Judge Facciola makes specific reference to the historical basis for his concerns. “As the Supreme Court has said, those searches deemed necessary should be as limited as possible. Here, the specific evil is the ‘general warrant’ abhorred by the colonist, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person’s belongings. (citation omitted) To follow the dictates of the Fourth Amendment and to avoid issuing a general warrant, a Court must be careful to ensure that probable cause exists to seize each item specified in the warrant application…” Judge Facciola also notes that by his own account he has modified “approximately 20 search and seizure warrants for electronic information during September and December 2013.” Finally, in what has to be seen as a declaration of, if not war then certainly a spirited defiance, Judge Facciola states: “[this Court] will no longer do so. Instead, any warrants that do not comport with the requirement of the Fourth Amendment will – like the present Application – be denied with an explanation of why they have been denied so that the Government may have an opportunity to correct its defects. To be clear: the Government must stop blindly relying on the language provided by the Department of Justice’s Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations Manual. By doing so, it is only submitting unconstitutional warrant applications.” Wherever you are from, and as they used to say in westerns, “Them’s fightin’ words.” Other Magistrates around the country are also now regularly pushing back on Government search warrant applications for personal electronic communications and information. Magistrates in the Houston Federal court, the Eastern and Southern Districts of New York and Kansas City have also recently denied Government requests for warrants seeking the entire contents of e-mail accounts or Facebook pages, which, in the Magistrates’ opinions lack sufficient efforts on the part of the Government Application to differentiate between electronic documents which have relevance and for which there is probable cause and other electronic data. The value of these Magistrate opinions lies not in their precedential value, because they have none. And anecdotal evidence suggests that most of these rebellious Magistrate opinions pushing back against the Federal Governments have been overruled by the District Courts who have authority over the same cases. However, the opinions provide to practitioners arguments and lines of reasoning which can, and should, be developed by practitioners seeking, at later stages of litigation, to challenge Government search warrants for this kind of material. Additionally, the mere fact of so many Magistrates reacting against current Federal Government practice in this regard may have a modifying effect upon the Government itself and cause them to tailor their requests. Finally, District Courts will not, I suspect, be oblivious to the arguments being made by the Magistrates and cannot but help, at some level, to be influenced by the Magistrates’ concerns. Therefore, while the Magistrates’ Revolt itself may not directly result in any significant change in Federal criminal practice when it comes to the Government’s accessing large amounts of personal e-data, over time, the Magistrates very well may have lit a spark from which an important fire may start. After all, isn’t that what revolutionaries do?