MAGISTRATE JUDGE TARGETS DOJ'S SEARCH ≠ SEIZURE THEORY

The second-and-third-to-last line of Magistrate Judge John Facciola's opinion responding to a warrant application for information from Apple reads,

> 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. [link added, h/t Mike Scarcella]

Over the course of the opinion — which denies a warrant for three entire months of emails, plus account information and correspondence with Apple for a criminal investigation into Defense Contractor kickbacks — Facciola lays out what, over the last 6 months he has found to be a problem with DOJ's search and seizure guidelines.

- In the Matter of the Search of Information Associated with [redacted] Stored at Premises Controlled by Yahoo! (13-MJ-728; September 25, 2013) in which Facciola ordered the government to return data not within the scope of the request to Yahoo
- In the Matter of an Order Authorizing Disclosure of Historical Cell Cite

Location (13-MC-199, 13-MC-1005, and 13-MC-1006; October 31, 2013) in which Facciola warned the government he would reject future warrant applications because of "generic and inaccurate boilerplate language"

- In the Matter of the Search of Information Associated with the Facebook Account Identified by the Username Aaron Alexis (13-MJ-742; November 26, 2013) in which Facciola objected to government's two-step procedure to search the Navy Yard shooter's to get all of Alexis' email
- In [redacted}@Mac.com (14-MC-228; this case) in which the government listed a bunch of email data to be "disclosed by Apple" but then laid out the authority to "seize" (implicitly all) the underlying emails

Here's how Facciola describes what is common to all these warrant applications.

> In essence, the applications ask for the entire universe of information tied to a particular account, even if it has established probable cause only for certain information.

He goes on to describe that the government uses

essentially the same argument it uses in its NSA dragnets to claim that seizing all the phone records from a company don't count as seizing them.

> Any search of an electronic source has the potential to unearth tens or hundreds of thousands of individual documents, pictures, movies, or other constitutionally protected content. It is thus imperative that the government "describe the items to be seized with as much specificity as the government's knowledge and circumstances allow." United States v. Leary, 846 F.2d 592, 600 (10th Cir. 1988).
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> Here, the government has adequately described the "items to be seized"—but it has done so in the wrong part of the warrant and in a manner that will cause an unconstitutional seizure. **By abusing the two-step procedure under Rule 41, the government is asking Apple to disclose the entirety of three months' worth of e-mails and other e-mail account information. See Application at 14-15. Yet, on the very next page, it explains that it will only "seize" specific items related to its criminal investigation**; it goes so far as to name specific individuals and companies that, if mentioned in an e-mail, would make that e-mail eligible to be seized. Id. at 15. Thus, the government has shown that it can "describe the items to be seized with [] much specificity"; it has simply chosen not to by pretending that it is not actually "seizing" the information when Apple discloses it. See Facebook Opinion [#5] at 9-10 ("By distinguishing between the two categories, the government is admitting that it does not have probable cause for all of the data that Facebook would disclose; otherwise, it would be able to 'seize' everything that is given to

> it.").
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> As this Court has previously noted, **any material that is turned over to the government is unquestionably "seized" within the meaning of the Fourth Amendment**. See Brower v. Cnty. of Inyo, 489 U.S. 593, 596 (1989) (noting that a "seizure" occurs when an object is intentionally detained or taken). The two-step procedure of Rule 41 cannot be used in situations like the current matter to bypass this constitutional reality because the data is seized by the government as soon as it is turned over by Apple.
>
> [snip]
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> **What the government proposes is that this Court issue a general warrant that would allow a "general, exploratory rummaging in a person's belongings"—in this case an individual's e-mail account**. Coolidge, 403 U.S. at 467. This Court declines to do so.

This opinion will likely result only in DOJ submitting a new application. It'll clean up its ways or submit applications in other districts to avoid Facciola. This opinion, by a Magistrate, certainly won't establish the principle that as soon as DOJ obtains data, it has seized it under the Fourth Amendment.

Still, given how centrally this claim that seizures don't equal seizures, perhaps the obvious logic of Facciola's stance will encourage other judges to stop twisting the normal meaning of seize to be solicitous to government demands.