

CLOUD STORAGE AND DUE PROCESS

A DEFENSE ATTORNEY'S PERSPECTIVE

David Aylor, Esq.
Charleston, SC, USA

MICROSOFT: OUTDATED LAW, UNDUE TENSION

Stored Communications Act (SCA)

2013 case, 1986 law

Microsoft: Court can't grant search warrant
for my server located in Ireland!

Court: You own it and you are in the U.S., so
you need to bring it into U.S. and give it to
FBI. Stored data warrant more like subpoena
than warrant.



MICROSOFT, cont'd

- ISP's location matters, not data's location (per PATRIOT Act amendment to SCA)
- Subpoena law (custody & control) analogous to stored data warrant. Police aren't going to Dublin to search servers. Micro. will get data and surrender it.
- Microsoft's argument: would it cause improper frustration of law enforcement? What about MLAT?

Different LEA Search Standards

- Warrant or no warrant?
- Probable cause required? or...
- Special, articulable facts that data is relevant to ongoing investigation? or...
- Gov't's mere promise of data's relevance?
- Is data historical, or is it real-time?
- If constitution violated, is gov't excused under a recognized exception?

Background case: U.S. v. JONES (S. Ct. Jan 23, 2012)

- 2 bases for unreasonable search under 4th Amend., property and privacy theories
- 28 day transmission of Jones's car's GPS data violated both theories
- Privacy theory: aggregate vs. single data, public vs. private data
- Private data protected by 4th Am., as in...

U.S. v. DAVIS (CA 6, June 11, 2014)

- LEA got court order for historical cell-tower location data, without warrant, by “special facts” showing. Guided by *Jones*:
- Unconstitutional because this std is below prob. cause std req'd by 4th Amend.
- Conviction upheld, though, because good faith exception applied.

U.S. v. ESPUDO (S.D. Cal., July 19, 2013)

- LEA got court order for real-time cell-tower location data without warrant, under “special facts” showing.
- Real-time data prohibited by Pen/Trap and CALEA statutes, not SCA.
- Invalid because such data requires prob. cause per federal criminal procedure.

GOOD FAITH EXCEPTION IN *DAVIS* AND *ESPUDO*

- Evidence will not be barred from trial if LEA objectively reasonably relied on the warrant or order from the court.
- The appellate court must ask whether a reasonably well-trained officer would have known the warrant/order was invalid under the law in existence at the time.

CURRENT U.S. (blurry) PICTURE

- Difference between data created after LEA is permitted access (real-time data) and before (historical data)?
- Constitutional to get historical data with mere showing of special articulable facts instead of probable cause?
- May gov't sidestep CALEA bar on cell-site data via Pen/Trap Title by arguing it does not bar such data via SCA?
- All of these are disputed in lower courts. Supreme Court has yet to rule on SCA's validity for these issues of access.

GOV'T v. CITIZEN—The Tools

Mutual Legal Assistance Treaty?

Or statute (like SCA)?

Custody and control (ex., Microsoft)?

Private contract with foreign 3rd party (to evade local gov't)?

Popularity of cloud: better for defendants?

NON-COUNCIL NATIONS' LAWS

China, India: little similarity to Council—
allowing little co-operation?

IT laws are more modern than U.S. law, but
do they suffer from less protective process?

CHINA, INDIA

- [China] Regs on Consumer Protection and Telecoms, but no unified data protection agency (different economic sectors have different standards)
- [India] Executive's Pwr: seemingly unlimited over the private citizen/corporation (absolute confiscation power)
- How to begin dialogue and protect own nation with such differences, despite these countries' modern IT laws?

SUMMARY

- U.S. courts requiring probable cause for data to compensate for old law.
- But they preserve LEA's power to get data where situation resembles the usual subpoena process.
- Should a new law alter, for cloud data, the balance between high std for LEA access and citizens' property rights?

QUESTIONS?