UPDATE: YOU MIGHT HAVE TO GIVE THE GOVERNMENT THE FINGER AFTER ALL

Posted on February 13, 2019 by Sanford J. Boxerman

Tag: Sandy Boxerman

Recently I wrote about a decision of United States Magistrate Judge Kandis A. Westmore denying the Government's application for a search warrant. Specifically, Judge Westmore would not allow the Government to force a suspect to supply a finger, thumb, or other biometric feature (such as facial or iris recognition) to unlock any cellphone or another device that might be found on the premises during the execution of the warrant.

Many commentators proclaimed that the decision means that the Government can't require its citizens to provide biometric features when the Government needs to access electronic devices which might contain evidence of a crime. I confess that I might have conveyed a similar message. The opinion, read in isolation, suggests such a result.

Further investigation, however, reveals that the situation is not nearly so clear-cut.

It turns out that at least three other federal judges have confronted this precise issue, and two of these judges reached the opposite conclusion from that of Judge Westmore. And even in the case decided by Judge Westmore, her opinion will not be the last word on the subject.

The First Finger: Chicago Case

In 2017, federal prosecutors in Chicago applied for a search warrant very similar to the one the Government sought in the Oakland case. The magistrate judge to whom the Chicago application was initially submitted came to the same conclusion that Judge Westmore would later reach; the Chicago magistrate denied the Government's application insofar as it would have authorized the Government to require the residents of the searched home to press their fingers and thumbs upon the fingerprint sensor of devices found in the home during the search.

The Government asked a district court judge to review the magistrate's denial. (Stated differently, the Government appealed the magistrate's decision to the district judge.) The district judge disagreed with the magistrate and gave the Government such permission. In so ruling, the district judge emphasized that the government agents, and not the residents of the home, would choose which fingers to apply to the sensors, so the residents would not themselves be telling law enforcement agents how to unlock the devices.

The Second Finger: The D.C. Case

In addition to that Chicago case, this past summer a federal magistrate judge in the District of Columbia also approved a search warrant application which included the compelled use of individuals' physical characteristics to unlock cell phones and computers.

So, if you're keeping score, we have **two judges** *granting* such permission (the district judge in Chicago and the magistrate in the District of Columbia) and **two judges** *refusing* to grant such permission (the magistrate in Chicago and now Judge Westmore).

Why Didn't the California Decision Mention These Other Cases?

I found it surprising that Judge Westmore, in her written opinion, did not mention that this question had been considered and decided by these other federal judges. Upon reflection, I think I know how that might have happened.

As far as I can tell, after the Government submitted the search warrant application to Judge Westmore she looked at it, probably had her clerks do some legal research, and then wrote her decision denying the application. I am speculating that whoever conducted the legal research simply missed these other cases. From an examination of the case file, it does not appear that the Government had an opportunity to brief the matter. Had the Government had that chance; it is almost certain that the Government would have found, and brought to the Court's attention, the contrary rulings from the district judge in Illinois and the magistrate in the District of Columbia.

Indeed, on January 23, 2019, the Government filed a 17-page document asking a district court judge to review (and reverse) Judge Westmore's decision. In its filing, the Government pointed out the Chicago and D.C. cases. A hearing on the Government's motion has been set for this coming March 13.

In the Illinois and District of Columbia proceedings, in contrast, the judges issued rulings only after extensive briefing and argument. A search warrant application is usually an *ex parte* proceeding (meaning that the judge hears only from one side, the Government). In these cases, however, both judges recognized that the matter required a more comprehensive analysis. Those judges, therefore, appointed lawyers from the federal public defender offices to research and present whatever legal and factual arguments they felt the judges should consider when ruling on the applications.

The approach of these judges was in keeping with our judiciary's belief in the adversary system. Under this approach, courts do not independently gather facts, research the law and then render opinions. Rather, the courts generally leave it to the parties to a suit (the adversaries) to present the relevant facts and legal authorities which each party believes should cause the court to rule in that party's favor. Certainly, courts can and often do supplement the parties' legal arguments with research of their own, often to confirm that the parties are accurately describing the law. But, for the most part, our system assumes that the best result will be obtained when both sides put their best feet forward and then the court, after sorting through the various contentions as to the facts and the law, makes a decision.

I intend no criticism at all of Judge Westmore or her decision when I suggest that the decision's failure to mention either of the earlier cases confronting the very same issue she faced probably resulted from a procedural deviation from the adversary system.

So the law is...uncertain

In any event, as to whether the Government can compel the use of biometric features to unlock a cell phone, the answer, for now, seems to be, a definite "maybe".