

YOU DON'T HAVE TO GIVE THE GOVERNMENT THE FINGER: JUDGE DENIES WARRANT APPLICATION REQUIRING SUSPECT TO UNLOCK CELL PHONE

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A decision handed down last week by a federal judge in Oakland, California, could – if adopted by other judges – narrow the ability of law enforcement officers to access information contained in persons' cellphones or other mobile devices. The ruling came in a case entitled [*In the Matter of the Search of a Residence in Oakland, California*](#), Case Number 4-19-70053 in the United States District Court for the Northern District of California.

What the Government Wanted

The case arose in the context of a government investigation of two individuals whom the government believed were using Facebook Messenger to extort a third person (the "Victim"). The suspects appeared to be sending, via Messenger, communications to the Victim in which they threatened to release an embarrassing video unless the Victim paid them money. The government agents applied to [Magistrate Judge Kandis A. Westmore](#) for a search warrant.

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Here's what the agents wanted Judge Westmore to authorize them to do:

1. Search a specified residence in Oakland.
2. Seize any mobile phones or similar devices found at the residence during the search.
3. Compel any person present to press a finger or thumb, or to utilize any other "biometric" feature (such as facial or iris recognition), to unlock the device so the government could access and search its contents.

The Fourth Amendment Limits the Government

Judge Westmore found, from an affidavit presented to her by the government agents, that probable cause existed to search the residence. But she further found overbroad (*and, therefore, in violation of the Fourth Amendment to the United States Constitution*) the agents' request to seize and search devices found on anyone besides the identified suspects.

She invited the agents to reapply for a warrant

"limited to those devices reasonably believed by law enforcement to be owned or controlled by the two suspects identified in the affidavit."

The Fifth Amendment Imposes Further Limitations

Judge Westmore went further. She determined that forcing the suspects to supply a finger, thumb or other biometric feature to unlock a device would violate the Fifth Amendment, which forbids the government from requiring any person to incriminate himself or herself. The judge noted that courts have previously ruled that individuals cannot be forced to reveal a numeric or alpha-numeric passcode to unlock a phone, "because the act of communicating the passcode is testimonial."

She reasoned that use of a finger, thumb, or other biometric feature to unlock a device would similarly be "testimonial," because such an "act concedes that the phone was in the possession and control of the suspect, and authenticates ownership or access to the phone and all its digital contents." She distinguished the request to compel a biometric feature from situations in which courts routinely find other physical acts – such as "furnishing a blood sample, submitting to fingerprinting, providing a handwriting or voice exemplar, or standing in a lineup" – to be non-testimonial and not protected by the Fifth Amendment.

Non-Biometric Alternatives

As an alternative to compelling the suspects to use biometric features to unlock the devices, the Court noted that the government could likely obtain the same information through legal process served upon Facebook.

"While it may be more expedient to circumvent Facebook, and attempt to gain access by

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infringing on the Fifth Amendment's privilege against self-incrimination, it is an abuse of power and is unconstitutional," the judge wrote.

The judge made a few other observations worth noting.

"technology," she wrote, "is outpacing the law." Nevertheless, she proclaimed, "Courts have an obligation to safeguard constitutional rights and cannot permit those rights to be diminished merely due to the advancement of technology."

On the heels of the 2018 decision by the Supreme Court of the United States in [Carpenter v. United States](#), which placed limits on the government's ability to obtain from cell phone companies cell site location information, Judge Westmore's ruling stands as a further reminder that new technologies impose challenges upon law enforcement officers, lawyers and the courts.

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