

U.S. Supreme Court Proposes Change to Rules Applicable to Searches of Electronic Data

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The United States Supreme Court — which establishes rules of civil and criminal procedure, subject to the objection of Congress — has proposed a significant amendment to the rules applicable to searches of electronic data by law enforcement. As currently written, Federal Rule of Criminal Procedure 41 generally allows Federal magistrate judges to issue search warrants only for computers or servers physically located in that judge's district. A judge's authority to permit the search and seizure of property has historically been limited to property located in that judge's district, and the existing rule treats electronic information the same as any item of tangible property. This means that law enforcement must first determine the location where relevant electronic information is physically stored and then obtain search warrants in those jurisdictions. If the physical location of the information is unknown, then a search warrant may be difficult or impossible to obtain.

The Supreme Court's proposed revision to Federal Rule of Criminal Procedure 41 would authorize magistrate judges to issue search warrants that allow law enforcement to access any computer or server anywhere in the world if the location cannot be determined or is being concealed by technological means. The proposed rule is intended to allow easier and faster access by law enforcement to information that cannot be physically located because of the growing use of proxy servers and other location-blocking technology.

For individuals and companies that store electronic data for themselves or others, the proposed amendment will likely provide increased access to that information by law enforcement if there is evidence that the data is relevant to a crime.

Dozens of privacy advocates and technology companies, including The American Civil Liberties Union and Google, have expressed concerns about the amendment. Critics of the change argue that it may be unconstitutional, is open to abuse and will allow overly broad access to private data by law enforcement.

Unless Congress objects to the proposed amendment, the change will take effect on December 1, 2016. Congress rarely interferes with rule amendments proposed by the Supreme Court, but Senator Ron Wyden has indicated that he will seek to block the proposal.

The full text of the proposed amendment can be found at <http://www.supremecourt.gov>

For additional information contact Ryan Siney