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Sean Michael Larson

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WARRANTING LEGISLATIVE ACTION: THE SEARCH FOR WYOMING COURT AUTHORITY TO ISSUE EXTRATERRITORIAL SEARCH WARRANTS FOR ELECTRONICALLY STORED INFORMATION

*Sean Michael Larson**

Hypothetical¹

Pam saw her daughter Jill for the last time an hour after she gave Jill her smartphone. Jill asked to use Pam's smartphone to chat with her friends on Facebook. Pam realized her daughter was no longer at home when she called for Jill and there was no reply. Because Jill never left home without telling her mom, Pam became worried. Within the next hour, Pam called the local sheriff's deputy in Laramie County, Wyoming. At that time, law enforcement had no substantial leads as to where Jill had gone. The facts known were limited: Jill was missing and she was last seen at home using Facebook.

As the investigation progressed, the deputy decided to call a local Wyoming district judge for a search warrant to serve on Facebook, Inc. ("Facebook") in California. The deputy specified the California location because he had reason to believe electronic records of Jill's Facebook conversations were located on a server in California. Facebook's records might be the only way to locate Jill. The judge was initially uneasy about signing the warrant because no legal precedent existed

* Law Clerk to the Honorable Alan B. Johnson, Judge for the United States District Court of Wyoming. Former Law Clerk to the Honorable Steven K. Sharpe, Judge for the First Judicial District Court of Wyoming. J.D., University of Wyoming College of Law, 2013. Thanks to Judge Sharpe and Judge Thomas Campbell for their inspiration by assignment. Thanks to Jim Anderson for his encouragement and Thomas Szott for his editorial eye. Thanks to the members of the *Wyoming Law Review* editorial board for their diligent edits and patience. Thanks to my family and friends, especially my wife, Shaina Case.

¹ All facts and names contained in this Hypothetical are fictitious.

in Wyoming, and the judge was uncertain her court had jurisdiction. However, after receiving an affidavit and conducting hours of legal research, the judge decided to sign the search warrant.

Because of the delay—from when the deputy initially spoke with the judge to when the judge signed the warrant—if Jill was abducted, the probability law enforcement would find her decreased, and the chance Jill would be killed increased by 30%.² In this scenario, time was of the essence. The delay occurred because Wyoming law contains no clear statement of authority on whether a district court judge can use long-arm jurisdiction to issue a search warrant for electronically stored information located in a different state.

I. INTRODUCTION

Since the inception of our nation, questions of federal and state authority have consumed the courts. According to Chief Justice Marshall: “The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission”³ Although this statement was made in a different context, it applies very readily to state court authority today. Courts continually search for the appropriate scope of authority, long for plain language in statutes, and determine jurisdictional issues. For example, in divorce proceedings with children, a court must decide if it has initial or continuing jurisdiction over the divorce, the division of marital assets, and the custody of the children.⁴ In personal injury cases, courts must untangle whether the plaintiff served the defendant properly and whether the plaintiff alleged enough injury in the complaint to reach the courts’ jurisdictional limits.⁵ Finally, in criminal investigations, judges may be asked to issue search warrants for homes, cars, or a suspect’s blood.⁶ In

² See *Amber Alert Best Practices*, UNITED STATES DEPARTMENT OF JUSTICE 9 (2012), <http://www.ojjdp.gov/pubs/232271.pdf>. Specifically, one study found that, of cases where an abducted child was killed, 44% were killed in the first hour following abduction and 74% were killed within the first three hours. *Id.*

³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819).

⁴ See *cf.* *Weiss v. Weiss*, 2009 WY 124, ¶ 13, 217 P.3d 408, 411–12 (Wyo. 2009) (deciding jurisdiction for custody modification); *Marquiss v. Marquiss*, 837 P.2d 25, 34–39 (Wyo. 1992) (deciding jurisdiction for visitation); *Urbach v. Urbach*, 73 P.2d 953, 956 (Wyo. 1937).

⁵ See *cf.* *Dirks v. Jimenez*, 2015 WY 36, ¶¶ 7–20, 344 P.3d 262, 264–67, (Wyo. 2015) (discussing service of process); *Buttrey Food Stores Div. v. Coulson*, 620 P.2d 549, 554 (Wyo. 1980) (discussing the requirement to specifically allege damages); *Olmstead v. American Granby Co.*, 565 P.2d 108, 111–16 (Wyo. 1977) (discussing personal jurisdiction over corporate defendants).

⁶ *Contra Rideout v. State*, 2005 WY 141, ¶¶ 16–31, 122 P.3d 201, 203–11 (Wyo. 2005) (discussing a warrantless search of a home); *Vassar v. State*, 2004 WY 125, ¶¶ 13–29, 99 P.3d 987, 992–99 (Wyo. 2004) (discussing a warrantless search of an automobile); *Brown v. State*, 738 P.2d 1092, 1094–97 (Wyo. 1987) (discussing a warrantless search incident to an arrest).

issuing warrants, courts must decide if probable cause exists and if the affidavit is particularized, specific, and limited in scope.⁷

In all of the examples listed above, courts must decide—implicitly or explicitly—if they possess the power to hear the issues, decide factual and legal matters, and render decisions based on the parties’ requests.⁸ Because jurisdiction is a crucial issue in every case, courts need sufficiently clear language to evidence the authority they wield.⁹ If the language is unclear, judges will need to interpret the language to resolve any ambiguities.¹⁰

Referring back to the Hypothetical at the beginning of this article, it is unclear whether Wyoming courts can issue search warrants for electronically stored information located in other states.¹¹ In Wyoming, law enforcement officers who ask judges to issue search warrants concerning electronically stored information located in servers outside the state may receive varying responses.¹² Judges interpret ambiguities by: reading the applicable legal authority to permit anything not explicitly foreclosed or reading the applicable legal authority to foreclose anything not expressly permitted.¹³ Thus, it comes down to how each judge construes the language of the statute.¹⁴ However, if the Wyoming Legislature or the Criminal Division of the Wyoming Permanent Rules Advisory Committee (the “Rules Committee”) produced language expressly permitting or expressly denying jurisdiction over such matters, inconsistencies of interpretation would be reduced. Therefore, this article argues that the Wyoming Legislature and the Rules Committee need to provide a clear resolution.

⁷ See *Abeyta v. State*, 2007 WY 142, ¶¶ 8–29, 167 P.3d 1, 6–10 (Wyo. 2007); *Page v. State*, 2003 WY 23, ¶ 9, 63 P.3d 904, 909 (Wyo. 2003); *Hixon v. State*, 2001 WY 99, ¶ 5, 33 P.3d 154, 156 (Wyo. 2001).

⁸ See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (“Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court’s decision will bind them.”).

⁹ See *Best v. Best*, 2015 WY 133, ¶ 10, 357 P.3d 1149, 1152 (Wyo. 2015).

¹⁰ See *Montana Food, L.L.C. v. Todosijejevic*, 2015 WY 26, ¶ 13, 344 P.3d 751, 755 (Wyo. 2015).

¹¹ See generally WYO. R. CRIM. P. 41(a); WYO. STAT. ANN. §§ 7-7-101 to -105 (2015).

¹² See WYO. STAT. ANN. § 7-7-101 (indicating that issuing a search warrant is in the judge’s discretion by using the word “may”). Moreover, from August 2013 until August 2015, I served as a judicial law clerk in the First Judicial District Court for the State of Wyoming. During that time, I learned that some judges will sign these types of warrants, while other judges will not. The Wyoming Supreme Court has not considered this issue.

¹³ See Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 954 (2003).

¹⁴ See *id.*

Part II of this article explains the legal analysis of extraterritorial search warrant jurisdiction.¹⁵ Part II also describes Wyoming circuit court and district court jurisdiction over search warrants for electronically stored information.¹⁶ Finally, Parts III and IV urge the Wyoming Legislature and the Rules Committee to work together to clarify whether Wyoming judges can legally sign extraterritorial search warrants for electronically stored information.¹⁷

II. A TWO-STEP ANALYSIS: STORAGE JURISDICTION AND FORUM JURISDICTION

Two issues must be addressed in order to determine if a court has the authority to issue an extraterritorial search warrant. First, does the state or federal law of the extraterritorial jurisdiction—where the judge is not located, but in which the electronically stored information sits—allow for long-arm jurisdiction? Second, if so, does the law of the forum jurisdiction where the judge is located grant authority to issue search warrants in the extraterritorial jurisdiction?¹⁸ This two-step process is more complex than it first appears because the law of each jurisdiction includes four levels of legal authority: (1) constitutional; (2) statutory; (3) rule-based; and (4) common law.¹⁹ If the four levels of authority work together in each jurisdiction, extraterritorial jurisdiction over electronically stored information is relatively simple and courts have limited leeway to interpret the law differently. But if the four levels of authority are vague, ambiguous, or contradictory, courts can, in good faith, justify either position by reading and interpreting the statute and policy considerations.²⁰

A. Storage Jurisdiction

Step one of the extraterritorial search warrant analysis is to determine whether a foreign jurisdiction allows another jurisdiction to reach into its territory.²¹ The next two subsections show that the federal government and some states allow reach into their territory. Federal and state laws are each addressed in turn.

¹⁵ See *infra* notes 18–59 and accompanying text.

¹⁶ See *infra* notes 60–85 and accompanying text.

¹⁷ See *infra* notes 86–141 and accompanying text.

¹⁸ See *State v. Rose*, 330 P.3d 680, 683–84 (Or. Ct. App. 2014) (analyzing extraterritorial search warrant jurisdiction in two steps: first, focusing on the law where the electronic information is stored—federal jurisdiction under the Stored Communications Act; and second, deciphering Oregon’s law allowing long-arm jurisdiction over such information—state authority to reach outside of Oregon).

¹⁹ See WILLIAM H. PUTMAN, *LEGAL RESEARCH, ANALYSIS AND WRITING* 3–22 (2d ed. 2009) (discussing the hierarchy of legal authority).

²⁰ See, e.g., *State v. Esarey*, 67 A.3d 1001, 1008 n.17 (Conn. 2013) (interpreting Connecticut’s then-ambiguous statute to allow extraterritorial search authority).

²¹ See *Rose*, 330 P.3d at 683.

1. Federal Law—*The Stored Communications Act*

Congress enacted the Stored Communications Act (“SCA”) in 1987 after increased privacy concerns about new technologies, and in recognition of the need to balance law enforcement interests with citizens’ rights to privacy.²² Specifically,

[i]n the 1980s, the development and growth of new communication technologies created uncertainty regarding the extent to which the Fourth Amendment applied to new technologies like electronic mail. During this time, the government demanded that communications companies disclose email messages, without first seeking a warrant. Recognizing the need to clarify existing privacy protections, as applied to newer technologies, Congress commissioned the Office of Technology Assessment (OTA) to conduct a report on federal government IT and civil liberties.²³

The changing face of technology required a new legal framework to balance the interests of civil liberties and law enforcement practices.²⁴ Through legislation, Congress attempted to protect individual rights to privacy, while allowing law enforcement agencies some flexibility.²⁵

When no previous legal framework existed, the SCA clarified both substantive and procedural law concerning the demand for electronically stored information.²⁶ The SCA is an important tool for prosecutors and law enforcement agencies, both state and federal. The SCA separates electronic services that hold electronic information into two categories.²⁷ Those categories are the electronic communication services (“ECS”) and the remote computing services (“RCS”).²⁸ ECS “means any service which provides to users thereof the ability to send or receive wire or electronic communications.”²⁹ Thus, an ECS is an email service

²² See generally 18 U.S.C. §§ 2701–2712 (2015). The Stored Communications Act was enacted as part of the Electronic Privacy Act of 1986 and codified in 18 U.S.C. §§ 2701–2712.

²³ Ilana R. Kattan, Note, *Cloudy Privacy Protections: Why the Stored Communications Act Fails to Protect the Privacy of Communications Stored in the Cloud*, 13 VAND. J. ENT. & TECH. L. 617, 627 (2011) (citations omitted).

²⁴ See *id.*

²⁵ *Id.*

²⁶ See generally 18 U.S.C. § 2703; see also Kattan, *supra* note 23, at 627.

²⁷ See generally 18 U.S.C. § 2703.

²⁸ *Id.*

²⁹ 18 U.S.C. § 2510(15) (2015).

similar to Google's Gmail. In contrast, RCS "means the provision to the public of computer storage or processing services by means of an electronic communications system."³⁰ An RCS is a cloud storage service similar to Google Drive.

The SCA applies differently depending on the type of service provider. For example, if an ECS possessed the relevant electronic information, the government³¹ may require disclosure of any electronic information stored for 180 days or less.³² The government may also compel disclosure of information stored beyond 180 days by following the portion of the SCA applicable to RCS.³³ The government can only require disclosure "pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction."³⁴ The various courts of competent jurisdiction include:

- (A) any district court of the United States (including a magistrate judge of such a court) or any United States court of appeals that—
 - (i) has jurisdiction over the offense being investigated;
 - (ii) is in or for a district in which the provider of a wire or electronic communication service is located or in which the wire or electronic communications, records, or other information are stored; or
 - (iii) is acting on a request for foreign assistance pursuant to section 3512 of this title; or
- (B) a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants . . .³⁵

If the electronic information is stored by an RCS, then the government may require the disclosure of any wire or electronic communication on behalf of, and received by, electronic means from a subscriber or customer without notice to the subscriber or customer in certain situations.³⁶ However, notice to the subscriber

³⁰ 18 U.S.C. § 2711(2) (2015).

³¹ A governmental entity is "a department or agency of the United States or any State or political subdivision thereof." 18 U.S.C. § 2711(4).

³² *See* 18 U.S.C. § 2703(a).

³³ *See* 18 U.S.C. § 2703(b).

³⁴ 18 U.S.C. § 2703(a).

³⁵ 18 U.S.C. § 2711(3).

³⁶ *See* 18 U.S.C. § 2703(b).

or customer is not required when the government obtains a warrant from a “court of competent jurisdiction.”³⁷

Additionally, the government may request records from the service provider concerning the subscriber or customer accounts without notice to the customer.³⁸ The government may request such records through five means: (1) by obtaining a warrant under the proper federal or state procedures from a court of competent jurisdiction; (2) by obtaining a court order based on specific articulable facts showing reasonable grounds to believe the contents are relevant and material to an ongoing criminal investigation; (3) by obtaining consent from the subscriber or customer for such disclosure; (4) by making a formal written request concerning telemarketing fraud; or (5) if the government uses proper subpoena processes, by seeking the name and address of the subscriber or customer, the local and long distance telephone records or session times and durations, the length of service, the type of service, the telephone or instrument number, subscriber number, network address, and the source of payment for the service.³⁹ Finally, the SCA addresses immunity of ECS and RCS from suits, creates a requirement that ECS and RCS preserve evidence, and allows warrants to be served without an officer present.⁴⁰

The SCA's Grant of Long-Arm Jurisdiction

The SCA expressly allows state judges to utilize their authority to issue search warrants across state lines for electronically stored information.⁴¹ Throughout section 2703 of the SCA, state procedures are mentioned five times, indicating the legislature's intent to allow states to use the SCA provisions.⁴² In addition, state courts are expressly considered courts of competent jurisdiction under the SCA.⁴³ Thus, the plain language of the SCA illustrates the legislative intent to allow all states the ability to utilize the SCA.⁴⁴

It is unclear if states must authorize long-arm jurisdiction before judges are able to use the reach of the SCA. On the one hand, Congress appears to suggest that use of long-arm jurisdiction is the default.⁴⁵ For example, the SCA provides:

³⁷ See 18 U.S.C. § 2703(b)(A).

³⁸ See 18 U.S.C. § 2703(c)(3).

³⁹ 18 U.S.C. § 2703(c).

⁴⁰ See 18 U.S.C. § 2703(e)–(g).

⁴¹ See 18 U.S.C. § 2703(a).

⁴² See 18 U.S.C. § 2703(a), (b)(1)(A)–(B), (c)(1)(A), (d).

⁴³ See 18 U.S.C. § 2711(3)(B) (2015).

⁴⁴ See generally 18 U.S.C. § 2711.

⁴⁵ See 18 U.S.C. § 2703(d).

“In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State.”⁴⁶ This language suggests that the federal government authorizes state judges to use the SCA unless the state’s legislature prohibits it. On the other hand, the federal government cannot grant additional power to state judges except through preemption.⁴⁷ Federal law preempts state law when the federal government expressly preempts state law, when the federal government exclusively governs the area of law, or when state law is in conflict with federal law.⁴⁸ Since the SCA does not preempt state law, it does not authorize state judges to use extraterritorial jurisdiction until the state legislature allows for such use.⁴⁹ Moreover, Congress has not expressly preempted each state’s authority to define its judiciary’s authority when issuing search warrants, nor has Congress exclusively governed search warrant authority for state judges. Therefore, to provide clarity, this article focuses on whether state law is in conflict with the SCA.

Conflict preemption is not created by ordinary conflicts. A state law is invalid only where compliance with federal and state law is a “physical impossibility” and the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁵⁰ Additionally, “[i]n preemption analysis, courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the *clear and manifest purpose* of Congress.’”⁵¹ The SCA’s only indication of intent to preempt state law is in section 2703(d), which states, “a court order shall not issue if prohibited by the law of such State.”⁵² This phrase alone does not rise to the level of a “clear and manifest purpose.”⁵³ Therefore, the SCA does not supersede the police power of each state to govern the reach of its judges. Because of the weak language in the SCA, individual states must authorize extraterritorial jurisdiction before judges can take advantage of the SCA provisions.

2. State Law—California and Alabama

At least two states—California and Alabama—have enacted laws similar to the SCA.⁵⁴ Both California and Alabama allow other states to exercise long-arm

⁴⁶ 18 U.S.C. § 2703(d)

⁴⁷ See U.S. CONST. art. VI, cl. 2; cf. *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012).

⁴⁸ See *Arizona*, 132 S. Ct. at 2500–01.

⁴⁹ See 18 U.S.C. § 2703(d); see also U.S. CONST. art. VI, cl. 2; *Arizona*, 132 S. Ct. at 2500–01.

⁵⁰ *Arizona*, 132 S. Ct. at 2501 (citations omitted).

⁵¹ *Id.* (emphasis added).

⁵² 18 U.S.C. § 2703(d).

⁵³ *Arizona*, 132 S. Ct. at 2501.

⁵⁴ See, e.g., CAL. PENAL CODE § 1524.2(c) (2015); ALA. CODE § 13A-8-115(c) (2015).

jurisdiction to access electronically stored information.⁵⁵ For example, California law dictates:

A California corporation that provides electronic communication services or remote computing services to the general public, when served with a warrant issued by another state to produce records that would reveal the identity of the customers using those services, data stored by, or on behalf of, the customer, the customer's usage of those services, the recipient or destination of communications sent to or from those customers, or the content of those communications, shall produce those records as if that warrant had been issued by a California court.⁵⁶

Although Wyoming courts theoretically could use the SCA to reach into California without adopting the statute, its language reinforces the notion that out-of-state courts are courts of "competent jurisdiction" as required by the SCA.⁵⁷

If Wyoming wanted to allow other states to exercise out-of-state-jurisdiction within its borders, Wyoming could adopt Alabama's statute which bolsters the SCA out-of-state authority in a similar way.⁵⁸ Alabama provides:

Warrants or appropriate orders for production of stored wire or electronic communications and transactional records pertaining thereto shall have statewide application or application as provided by the laws of the United States when issued by a judge with jurisdiction over the criminal offense under investigation or to which such records relate.⁵⁹

As seen in California and Alabama, where states explicitly recognize the SCA and demand companies that store electronic information to comply with orders pursuant thereto, forum courts are afforded additional legal authority to reach into the storage jurisdiction, unless the forum state does not grant such jurisdiction.

B. Forum Jurisdiction

Step two of the extraterritorial search warrant analysis is to determine whether the forum jurisdiction allows its judges to reach into the storage jurisdiction.⁶⁰ In

⁵⁵ See, e.g., CAL. PENAL CODE § 1524.2(c); ALA. CODE § 13A-8-115(c).

⁵⁶ CAL. PENAL CODE § 1524.2(c).

⁵⁷ See 18 U.S.C. § 2703.

⁵⁸ Compare CAL. PENAL CODE § 1524.2(c) and ALA. CODE § 13A-8-115(c) with 18 U.S.C. § 2703.

⁵⁹ ALA. CODE § 13A-8-115(c).

⁶⁰ See *State v. Rose*, 330 P.3d 680, 683 (Or. Ct. App. 2014).

Wyoming, the two commonly used state forums for issuing search warrants are circuit courts and district courts. Circuit courts are courts of specific jurisdiction, while district courts are courts of general jurisdiction.⁶¹ Both court systems possess common jurisdiction over search warrants, but district courts have a more extensive reach under the Wyoming Rules of Criminal Procedure.⁶²

1. *Wyoming Circuit Court Authority*

The majority of criminal proceedings in circuit courts are governed by the Wyoming Rules of Criminal Procedure.⁶³ Specifically, Rule 41(a) applies to circuit courts and reads as follows:

Upon the request of the attorney for the state or a federal, state, or local peace officer, a search warrant authorized by this rule may be issued by a judicial officer. *If issued by a judicial officer other than a district judge it shall be by a judicial officer for the jurisdiction wherein the property sought is located.*⁶⁴

Courts must apply the rules of statutory construction when interpreting rules of procedure.⁶⁵ Meaning, if the rule is not ambiguous, then the court must apply its plain language.⁶⁶ Because Rule 41(a) is not ambiguous, the court must apply its plain language.

The second sentence of Rule 41(a) restricts the authority to issue search warrants to judicial officers who are not district court judges.⁶⁷ Thus, circuit court judges do not have rule-based authority to issue search warrants outside of their district.⁶⁸ If and when a circuit court judge is asked to issue an extraterritorial search warrant, two reasons to reject the search warrant exist: (1) rule-based lack of jurisdiction and (2) discretion to deny search warrants granted by Wyoming

⁶¹ See *State Farm Mut. Auto. Ins. Co. v. Kunz*, 2008 WY 71, ¶ 6, 186 P.3d 378, 380 (Wyo. 2008) (quoting WYO. CONST. art. V, § 10); see generally WYO. STAT. ANN. §§ 5-9-101 to -107, -127 to -131 (2015).

⁶² See generally WYO. STAT. ANN. §§ 7-7-101 to -105 (2015); see also WYO. R. CRIM. P. 41(b).

⁶³ WYO. R. CRIM. P. 54(a) (stating: "Except as noted in subdivision (b), these rules shall apply to all criminal actions in all courts.").

⁶⁴ WYO. R. CRIM. P. 41(a) (emphasis added). Judicial officers are defined as "justices of the supreme court, district judges, circuit judges, magistrates, municipal judges and district court commissioners." WYO. R. CRIM. P. 1(b)(2).

⁶⁵ See *Busch v. Horton Automatics, Inc.*, 2008 WY 140, ¶ 13, 196 P.3d 787, 790 (Wyo. 2008).

⁶⁶ See *id.*

⁶⁷ See WYO. R. CRIM. P. 41(a).

⁶⁸ See generally *id.*

Statute section 5-9-133.⁶⁹ Additionally, circuit courts could theoretically exercise jurisdiction outside their district, but such exercise must include a direct relation to the county.⁷⁰ Unless the Rules Committee amends Rule 41 to allow circuit court judges to exercise jurisdiction outside their districts, circuit courts cannot benefit from the grant of long-arm jurisdiction by the SCA or other comparable state statutes.⁷¹

2. Wyoming District Court Authority

When examining the district court's extraterritorial authority, the language of Rule 41(a) is much more perplexing: "If issued by a judicial officer *other than a district judge* it shall be by a judicial officer for the jurisdiction wherein the

⁶⁹ The Wyoming legislature granted circuit court judges the discretion to issue search warrants. See WYO. STAT. ANN. § 5-9-133(a)(vi) (2015). "A circuit court *may* . . . (iv) Issue warrants, including search warrants, summonses, subpoenas or other process in civil and criminal cases" *Id.* § 5-9-133(a)(iv) (emphasis added). Therefore, even if a circuit court judge believed he or she had authority to issue an extraterritorial search warrant, he or she would have discretion in deciding whether or not to actually issue the search warrant. This discretion allows a more careful circuit court judge to avoid creating reversible error through extraterritorial search warrant abstinence.

⁷⁰ Wyoming statutes do not directly allow circuit court judges to use extraterritorial jurisdiction. See WYO. STAT. ANN. §§ 7-7-101 to -105 (2015). Some statutes require specific procedures to govern search warrants rather than the general rules. *Id.* § 7-7-105. For example, section 9-1-640 allows quasi-extraterritorial search warrants. See WYO. STAT. ANN. § 9-1-640 (2015). Section 9-1-640 provides:

- (c) The provider of electronic communication service or remote computing service shall not disclose the following except pursuant to a warrant:
 - (i) In-transit electronic communications;
 - (ii) Account memberships related to Internet groups, newsgroups, mailing lists or specific areas of interest;
 - (iii) Account passwords;
 - (iv) Account content to include:
 - (A) Electronic mail in any form;
 - (B) Address books or contact/"buddy" lists;
 - (C) Financial records;
 - (D) Internet proxy content or "Web surfing" history;
 - (E) Files or other digital documents stored within the account or pursuant to use of the account.

Id. § 9-1-640(c). In Wyoming, the attorney general or the local district attorney can apply for a search warrant for information held by ECS or RCS. See WYO. STAT. ANN. §§ 7-7-101 to -105. Theoretically, a circuit court judge in Wyoming could issue a search warrant for Facebook messages, emails, and related electronic items pertaining to a child exploitation investigation when the local provider of ECS or RCS is in possession of the property. Therefore, under section 9-1-640(c), a Wyoming circuit court judge could issue a search warrant for out-of-state electronic property as long as the property was possessed by an in-county ECS or RCS. See WYO. STAT. ANN. § 9-1-640(c).

⁷¹ See generally 18 U.S.C. § 2703 (2015); CAL. PENAL CODE § 1524.2(c) (2015); ALA. CODE § 13A-8-115(c) (2015).

property sought is located.”⁷² The district court must apply the same rules of construction as are set out in the section above.⁷³

Although Rule 41(a) is clear when applied to circuit courts, it is ambiguous when applied to district courts. Using the doctrine of *expressio unius est exclusio alterius*,⁷⁴ the court must construe a rule by listing the subjects on which it operates and excluding from its effect all those not expressly mentioned.⁷⁵ By excluding district court judges in Rule 41(a), the plain language indicates that district court judges are not limited to the jurisdiction where the “property sought is located.”⁷⁶ Specifically, Wyoming district court judges can issue search warrants to be executed on property outside their district, and no language in Rule 41(a) indicates that this authority is limited.⁷⁷ On the other hand, no language in Rule 41(a) expressly permits out-of-state reach.⁷⁸

Because Rule 41(a) is ambiguous when applied to district courts, as opposed to circuit courts, the next step is to look at the state constitution and state statutes for clarification. In Wyoming, the constitution does not clarify the ambiguity because it does not appear to limit the district court’s search warrant jurisdiction or grant out-of-state jurisdiction.⁷⁹ The Wyoming Constitution grants its citizens security against search and seizure, but says nothing about the exercise of jurisdiction outside state lines.⁸⁰ Wyoming’s constitution provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.⁸¹

⁷² WYO. R. CRIM. P. 41(a) (emphasis added).

⁷³ See *Busch v. Horton Automatics, Inc.*, 2008 WY 140, ¶ 13, 196 P.3d 787, 790 (Wyo. 2008); see also *supra* text accompanying notes 65–66.

⁷⁴ *Expressio unius est exclusio alterius* is a “cannon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.” *Expressio unius est exclusio*, BLACK’S LAW DICTIONARY (4th ed. 2011).

⁷⁵ See *Walters v. State ex rel. Wyoming Dep’t. of Transp.*, 2013 WY 59, ¶ 18, 300 P.3d 879, 884 (Wyo. 2013).

⁷⁶ See WYO. R. CRIM. P. 41(a).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See generally WYO. CONST. (containing no language allowing or prohibiting extraterritorial jurisdiction for search warrants).

⁸⁰ See generally WYO. CONST. art. I, § 4.

⁸¹ WYO. CONST. art. I, § 4.

Similarly, Wyoming statutes do not resolve the ambiguity either. Section 7-7-101 grants district court judges the authority to issue search warrants.⁸² Sections 7-7-101 through 7-7-105 describe the law concerning search warrant issuance, execution, and procedure.⁸³ As previously discussed, multiple statutes control search warrant procedures in specific contexts.⁸⁴ These statutes do not appear to authorize nor prohibit out-of-state jurisdiction by district court judges.⁸⁵ Thus, the language of Rule 41(a) allows a district court judge to conclude, in good faith, that he or she does or does not have extraterritorial search warrant authority.

III. TO SIGN OR NOT TO SIGN?

A judge's conception of his or her role is a complex, multifaceted thought process. As expressed by Judge Richard A. Posner:

A court has, roughly speaking, a choice between two conceptions of its role. One is narrow, formalistic; the model is that of deducing legal outcomes from a major premise consisting of a rule of law laid down by a legislature and a minor premise consisting of the facts of the particular case. The other conception is broader, free-wheeling, pragmatic; judicial discretion is acknowledged and an outcome that is reasonable in light of its consequences sought. A court that takes the first route will be inclined to narrow, "literal," "strict," "originalist," or "textualist" interpretation of statutes and constitutional provisions, interpretation that sticks closely to the surface meaning of the text as its authors would have understood that meaning, as that is the kind of interpretation that minimizes (or at least pretends to minimize) judicial discretion. A court that takes the second route will be inclined to loose construction, recognizing and trying to *adjust for the limitations of foresight of legislators* and the framers of constitutional provisions, limitations that can make literal interpretation a trap; trying in short to reach reasonable results consistent with the broad purposes of the provision in question. The choice between these styles of adjudication and hence interpretation is relative to circumstances, and the circumstances are strongly influenced by institutional considerations. *These include the structure and personnel of the judiciary and of the legal profession more broadly; the structure, personnel, and operating*

⁸² WYO. STAT. ANN. § 7-7-101 (2015).

⁸³ WYO. STAT. §§ 7-7-101 to -105 (2015).

⁸⁴ See generally *id.*; WYO. STAT. ANN. § 9-1-640 (2015); see also *supra* note 70 and accompanying text.

⁸⁵ See generally WYO. STAT. ANN. §§ 7-7-101 to -105; WYO. STAT. ANN. § 9-1-640.

*methods of the legislature; the relative competence of the different branches of government with respect to specific classes of issue; the power relations among the branches; and the political, economic, and social institutions of the society.*⁸⁶

Judge Posner addressed the distinction between strict and loose construction in a very intricate manner.⁸⁷ He explained that a judge views an issue through either a broad or narrow lens and uses multiple factors to evaluate the issue, including the “structure, personnel, and operating methods of the legislature; the relative competence of the different branches of government with respect to specific classes of issue; the power relations among the branches; and the political, economic, and social institutions of the society.”⁸⁸ Here lies the issue at hand—judicial discretion.

In Wyoming, the legislative branch has not defined judicial authority over particular matters, including extraterritorial search warrants. As a result, courts are left with open-ended language to interpret.⁸⁹ In turn, Wyoming judges can “adjust for the limitations of foresight of legislators,”⁹⁰ meaning judges can use policy considerations to decide whether they have authority to issue search warrants for out-of-state electronically stored information. If the legislature squarely addressed the issue, judges would have a difficult time justifying a different result based on their own conceptions of policy. While the legislature cannot be expected to address every conceivable issue, it should address inconsistent practices that decrease judicial economy and drain state resources.

A. Differing Decisions Based on Policy Considerations

1. District Court Judges Possess In-State, Out-of-District Jurisdiction

A judge who takes the position that he or she possesses only in-state jurisdiction believes that the Wyoming Rules of Criminal Procedure (the “Rules”)—recommended by the Rules Committee and adopted by the Wyoming Supreme Court—control only search warrant authority within Wyoming’s borders.⁹¹ Language exists within the Rules to support such a reading.⁹² First, the language does not explicitly discuss out-of-state jurisdiction.⁹³ This is problematic

⁸⁶ Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 954 (2003) (citations omitted) (emphasis added).

⁸⁷ *See id.*

⁸⁸ Posner, *supra* note 86, at 954.

⁸⁹ *See supra* notes 80–84 and accompanying text.

⁹⁰ Posner, *supra* note 86, at 954.

⁹¹ *See generally* WYO. R. CRIM. P. 41 (2015).

⁹² *Id.*

⁹³ *See* WYO. R. CRIM. P. 41.

because logic suggests that the Rules Committee would discuss such an extension of authority with full transparency if such an extension were intended. Second, the Rules have been amended multiple times since the enactment of the SCA in 1987, yet Rule 41 has never been amended to mention long-arm statutes in other jurisdictions.⁹⁴ Third, the current Rules contain a sample form for search warrants, indicating that property is only to be searched and seized “in the State of Wyoming.”⁹⁵ Fourth, and perhaps most importantly, the Wyoming Legislature has yet to address the issue. While state courts are allowed to create rules to govern themselves, a rule concerning jurisdiction should be addressed by the legislative body, not through the judiciary.

The Wyoming Supreme Court addressed this issue indirectly in *Smith v. State*.⁹⁶ In *Smith*, the court analyzed whether remotely communicated search warrant affidavits provided the same protections as written affidavits through the lens of the Wyoming Constitution.⁹⁷ The court listed several important concerns regarding unreasonable searches and seizures under the constitution.⁹⁸ The court explained:

It would be unrealistic to find that all states view the issue of remotely communicated search warrants—telephone warrants—from the same perspective. [*State v. Valencia*], is illustrative of that observation “A primary objective of our rules governing search warrants *is to enhance the soundness and integrity of the judicial decisional process entailed in their issuance.*”

. . . .

In [*White v. State*], the Supreme Court of Mississippi took a position quite similar to that taken by the New Jersey Supreme Court in *Valencia*:

“While not statutorily provided for in Mississippi, telephonic search warrants could possibly act as a buffer against warrantless searches which often undermine Fourth Amendment protections. In the trial court’s ruling as to the reasonableness of the search, the judge stated his belief that this Court would prefer ‘a finding of probable cause by a neutral and detached

⁹⁴ See generally *id.*; see also 18 U.S.C. §§ 2701–2712 (2015).

⁹⁵ See WYO. R. CRIM. P. Form 10 app. (2015).

⁹⁶ See generally *Smith v. State*, 2013 WY 122, 311 P.3d 132 (Wyo. 2013).

⁹⁷ See *Smith*, ¶ 2, 311 P.3d at 134–35.

⁹⁸ *Id.*

magistrate telephonically' in a situation where the only other alternative would be a warrantless search. While this may be true, there are other problems with this procedure which warrant[] a detailed examination and discussion by this Court. If exigent circumstances existed so as to preclude obtaining a proper search warrant, as long as the officers were in good faith in their request and followed other procedural safeguards, evidence found as a result of the issuance of a 'telephonic search warrant' would be admissible at trial. *However, nothing under current Mississippi law provides for this type of search warrant.*"

....

There are too many cases to cite for the accepted proposition that the constitutional affidavit requirement provides two protections for a defendant. First, it guarantees that an impartial judicial officer *will determine whether probable cause exists* based upon a review of specific sworn testimony. Second, it ensures that such sworn testimony *will be preserved for potential later review by an appellate court.*⁹⁹

This excerpt illustrates four of the important concerns under Article I, Section 4 of the Wyoming Constitution: (1) the soundness and integrity of the judicial decision-making process; (2) the authority for issuing certain types of search warrants; (3) the existence of probable cause; and (4) the preservation for appeal.¹⁰⁰ These concerns exist when Wyoming district court judges issue search warrants to be executed on property outside the state. Because of these issues, and without a statute granting extraterritorial jurisdiction, a Wyoming district court judge might not recognize the policy interests of signing a search warrant for out-of-state electronically stored information.

2. District Court Judges Possess Boundless Jurisdiction

A judge who takes the position that he or she possesses out-of-state jurisdiction believes the open-ended language of Rule 41 evidences the intent of the Rules Committee and the Wyoming Supreme Court to take advantage of long-arm jurisdiction.¹⁰¹ In 1969, Rule 41(a) was known as Rule 40(a) and stated: "A search

⁹⁹ *Smith*, ¶¶ 18–19, 24, 311 P.3d at 137–38, 140 (third alteration in original) (citations omitted) (emphasis added).

¹⁰⁰ *See id.*; *see generally* WYO. CONST. art. I, § 4.

¹⁰¹ *See generally* WYO. R. CRIM. P. 41 (2015).

warrant authorized by this rule may be issued by a district judge or commissioner for the jurisdiction wherein the property sought is located.”¹⁰² In 1992, the rule was amended to state: “A search warrant authorized by this rule may be issued by a judicial officer. If issued by a judicial officer other than a district judge it shall be by a judicial officer for the jurisdiction wherein the property sought is located.”¹⁰³ After Rule 41 was amended, the language appears to evidence the intent to allow district court judges extraterritorial jurisdiction without state boundary limitations.¹⁰⁴ In addition, the amendment seems to evidence the intent that the Rules should govern search warrants for crimes committed in Wyoming, even though the electronic information—from the locally committed crime—was stored in another state. This interpretation provides state prosecutors and law enforcement officers with a convenient local forum from which they can gather evidence for a prosecution. Judges in favor of extraterritorial jurisdiction use policy to support such a reading.

Although *Smith* demonstrated the concerns some judges have regarding unreasonable searches and seizures, those concerns are negated here by the fact that the criminal activity occurred in a state where internet companies conduct business.¹⁰⁵ Internet material viewed and used in Wyoming, but stored elsewhere should not require local prosecutors and law enforcement officers to apply for search warrants in other state courts.¹⁰⁶ Wyoming district court judges who believe that they have out-of-state jurisdiction may look to other state courts to support this interpretation.

For example, the Supreme Court of Connecticut found that “the increasing significance of electronically stored communications” was so persuasive that it explained, in dicta, that Connecticut courts did have extraterritorial power.¹⁰⁷ Additionally, in *State v. Rose*, the Oregon Court of Appeals described the reasons the Oregon Legislature allowed extraterritorial jurisdiction over electronically stored information as follows:

In written testimony in support of the bill, Representative Andy Olson explained that HB 2502 amended the process for obtaining records from businesses, allowing “a prosecutor or

¹⁰² WYO. R. CRIM. P. 40(a) (1969) (current version at WYO. R. CRIM. P. 41(a) (2015)), http://www.courts.state.wy.us/Documents/CourtRules/Orders/crimpro/crimpro_1968112101.pdf.

¹⁰³ WYO. R. CRIM. P. 41(a) (1992) (current version at WYO. R. CRIM. P. 41(a) (2015)), http://www.courts.state.wy.us/Documents/CourtRules/Orders/crimpro/crimpro_1991122300.pdf.

¹⁰⁴ See *id.*

¹⁰⁵ See generally *Smith*, ¶ 2, 311 P.3d at 134–35; see *supra* text accompanying note 97.

¹⁰⁶ See generally *Smith*, ¶ 2, 311 P.3d at 134–35; see *supra* text accompanying note 97.

¹⁰⁷ See *State v. Esarey*, 67 A.3d 1001, 1008 n.17 (Conn. 2013). The Connecticut Legislature later enacted a statute to eliminate any confusion, see CONN. GEN. STAT. § 54-33a(e) (2015).

a defense attorney to obtain business records from a business doing business in Oregon, even if the records or the business is located outside of the state.” Olson noted that

“[b]usiness records are often vital evidence in criminal cases. For the criminal justice system to work properly, prosecutors and defense attorneys must have access to business records and be able to use them in court. For example, business records are essential in identity theft cases as well as cases involving crimes committed via the Internet.”

...

Olson clarified, however, that the procedure created by HB 2502 for obtaining such records affects only businesses “that have subjected themselves to Oregon’s jurisdiction by doing business in Oregon.” Therefore, contrary to defendant’s argument, subsection (1)(b) requires that the court issuing the warrant have personal jurisdiction over the recipient business and does not require that the issuance of the warrant itself be predicated on its execution within Oregon.¹⁰⁸

Although the *Rose* court had a statute to rely on, the court still gave strong policy considerations to support the use of extraterritorial jurisdiction.¹⁰⁹ Wyoming courts could use these same policy considerations to justify decisions to sign extraterritorial jurisdiction search warrants when the court rules are ambiguous.

B. Clarifying the Law to Produce Consistent Practice

Currently, some Wyoming judges sign search warrants for electronically stored information outside the state while others do not.¹¹⁰ This inconsistent practice could confuse practitioners, judges, and law enforcement. For example, in districts where there are multiple judges, law enforcement officers and prosecuting attorneys could theoretically request a search warrant from a second judge if the first judge denied the request. Both judges and staff spend significantly more time and resources to evaluate if a judge can sign extraterritorial search warrants because the law is unclear; this is due to changing technologies and the evolution of law in other jurisdictions. If the law remains unclear, the Wyoming Supreme

¹⁰⁸ *State v. Rose*, 330 P.3d 680, 686 (Or. Ct. App. 2014).

¹⁰⁹ *See id.*

¹¹⁰ *See supra* note 12 and accompanying text.

Court may have to address the issue in the near future; much like the Supreme Court of Connecticut did in *State v. Esarey* in 2013.¹¹¹

In *Esarey*, the court indirectly addressed the issue of extraterritorial search warrant authority and explained in a footnote that the court would have upheld the validity of the extraterritorial search warrant.¹¹² The court said:

We stay our hand with respect to determining whether a judge of the Superior Court has the authority to issue a search warrant for electronic information that is stored on an out-of-state server when the underlying investigation relates to crimes committed in this state. *We note, however, that our prior jurisprudence does not suggest a rigid approach to our state courts' jurisdiction under § 51-1a (b), allowing us to act extraterritorially when a crime at issue has an "overwhelming factual nexus" to Connecticut and its "public welfare." Indeed, there is nothing in . . . our search warrant statute, that expressly restricts a trial judge's authority to order searches to Connecticut's borders.*¹¹³

The court then discussed the reasons it would have approved an out-of-state electronic search warrant—had the parties presented that question—by stating:

[C]onsistent with the Stored Communications Act, 18 U.S.C. § 2703(b), it would appear to us that, under our existing statutes, a Connecticut trial judge may, in connection with the investigation of a crime committed here, order a search of electronically stored communications contained on a remote computing service's server located in another state—*particularly when that state has a statute requiring such service providers to honor warrants issued by the courts of other states.*¹¹⁴

The court further explained the policy behind its decision was to

urge our legislature to undertake a review of Connecticut's relevant statutory scheme to ensure its consistency with federal and sister state provisions authorizing service providers to

¹¹¹ See *Esarey*, 67 A.3d at 1008 n.17.

¹¹² See *id.* The court cited to a Connecticut statute that did not expressly limit the trial court's authority of the state's boundaries when issuing search warrants. See *id.* at 1006–07 n.15 (citing CONN. GEN. STAT. § 54-33a(c) (2015)).

¹¹³ *Esarey*, 67 A.3d at 1008 n.17 (citations omitted) (emphasis added).

¹¹⁴ *Id.* (citations omitted) (emphasis added).

honor, and facilitate the service of, warrants issued by out-of-state judges, such as 18 U.S.C. § 2703(b), § 1524.2(c) of the California Penal Code.¹¹⁵

In sum, the Supreme Court of Connecticut believed the trial courts had authority to issue out-of-state search warrants for five reasons: (1) Connecticut statutes and case law allowed for wide jurisdiction in prosecuting crimes with a sufficient nexus to the state, and search warrants should be afforded the same jurisdictional latitude; (2) Connecticut law does not prohibit out-of-state search warrants; (3) the federal courts and statutes allow for this type of search warrant; (4) other states possess statutes that allow another state to exercise extraterritorial jurisdiction; and (5) the law needs to adapt to the times because we live in an electronic age.¹¹⁶

There are two flaws in the court's reasoning. First, if the court believed the trial court had authority, it could have addressed extraterritorial search warrant authority in the body of its opinion. Second, the court used footnote seventeen to lobby the Connecticut Legislature to "review the statutory scheme."¹¹⁷ Evidently, the court did not believe these issues to be particularly clear. Moreover, the five reasons expressed in *Esarey* have the following counter-arguments: (1) wide jurisdictional latitude may create a legal battle over which state's law controls; (2) such a loose construction of judicial branch authority could be problematic; (3) federal law is built for policing interstate action across the entire country which is schematically different than state law; (4) another state's allowance of long-arm jurisdiction does not mean your state automatically has authorization to issue warrants; and (5) people seeking a search warrant can use technology to apply for a search warrant in the appropriate jurisdiction where a judge can correctly assess the law of his or her own state.

In addition, the court in *Esarey* cited weak authority for its position.¹¹⁸ For example, *Hubbard v. MySpace, Inc.*, *Lozoya v. State*, and *In re Search of Yahoo*,

¹¹⁵ *Id.* (citations omitted).

¹¹⁶ See generally *Esarey*, 67 A.3d at 1008 n.17.

¹¹⁷ See *Esarey*, 67 A.3d at 1008 n.17.

¹¹⁸ Compare *Esarey*, 67 A.3d at 1008 n.17 with *Hubbard v. MySpace, Inc.*, 788 F. Supp. 2d 319 (S.D.N.Y. 2011) and *Lozoya v. State*, No. 07-12-00142, 2013 WL 708489 (Tex. Ct. App. Feb. 27, 2013) and *In re Search of Yahoo, Inc.*, No. 07-3194-MB, 2007 WL 1539971 (D. Ariz. May 21, 2007). In *Hubbard*, the United States District Court for the Southern District of New York dismissed the complaint against MySpace, in which account holders sued for disclosure in violation of the Stored Communications Act. See *Hubbard*, 788 F. Supp. 2d at 320–21. The court analyzed the validity of a search warrant issued by a Georgia state court, executed in Beverly Hills, California. *Id.* at 323–25. In *Lozoya*, a Texas Court of Appeals issued an unpublished memorandum opining that as long as a state search warrant complies with the SCA, Texas state judges have the authority to issue search warrants out-of-state. See *Lozoya*, 2013 WL 708489, at *2. In *In re Search of Yahoo*, the United States District Court for the District of Arizona explained its reasoning for issuing an out-of-district search warrant under the SCA. See *In re Search of Yahoo*, 2007 WL 1539971, at *1.

Inc. all analyzed search warrants that were issued by a federal magistrate.¹¹⁹ In each of these cases, the court used persuasive authority to support its position.¹²⁰ Further, *Esarey* acknowledged other jurisdictions that disagreed with its logic.¹²¹ Thus, the remaining leg of authority on which the *Esarey* opinion stood was a small portion of the SCA.¹²² Although the *Esarey* court thoughtfully addressed the issue of extraterritorial jurisdiction search warrants, it did so illogically.

Esarey serves as one reason why the Wyoming Legislature and the Rules Committee must address the issue of extraterritorial jurisdiction sooner rather than later. This issue causes conflict and confusion at the trial court level and should not reach the Wyoming Supreme Court. If it does, the parties will brief and argue the issue extensively—costing the Attorney General’s Office and potentially the State Public Defender’s Office large sums of money—and the Wyoming Supreme Court will likely spend substantial time, energy, and resources to address the issue in a written opinion. Finally, the Wyoming Supreme Court could issue an opinion in either direction or worse, side-step the issue as in *Esarey* and plead to the legislature for redress.

IV. POLICY WEIGHS IN FAVOR OF USING THE JURISDICTION GRANTED BY OTHER STATES

The bulk of this article advocates for the Wyoming Legislature and the Rules Committee to clearly and decisively determine the issue of extraterritorial jurisdiction search warrants by using plain language.¹²³ This article also advocates for the Wyoming Legislature to enact a statute similar to Oregon, and for the Rules Committee to amend the Rules to reflect the legislative changes and to incorporate the use of the SCA. One reason for doing so is illustrated in the Hypothetical stated at the outset of this article.¹²⁴ A clear decision on this issue is better than no decision. In addition, policy supports granting Wyoming district courts extraterritorial jurisdiction for electronically stored information for crimes that are committed in that district.

¹¹⁹ Compare *Esarey*, 67 A.3d at 1008 n.17 with *Hubbard*, 788 F. Supp. 2d at 323–25 and *Lozoya*, 2013 WL 708489, at *2 and *In re Search of Yahoo*, 2007 WL 1539971, at *1.

¹²⁰ See generally *Hubbard*, 788 F. Supp. 2d at 323–25; *Lozoya*, 2013 WL 708489, at *2; *In re Search of Yahoo*, 2007 WL 1539971, at *1.

¹²¹ See *Esarey*, 67 A.3d at 1008 n.17; see also *State v. Wilson*, 618 N.W.2d 513, 519–20 (S.D. 2000) (holding that if there was no constitutional or statutory authority permitting a state judge of general jurisdiction to sign a search warrant to be executed in another circuit within the state, then the search warrant was invalid).

¹²² See generally *Esarey*, 67 A.3d at 1008 n.17.

¹²³ See *supra* notes 86–122 and accompanying text.

¹²⁴ See *supra* notes 1–2 and accompanying text.

In Wyoming, if a crime is committed locally and relevant electronically stored information is available in a different jurisdiction, the prosecuting attorney should be able to apply for a search warrant to serve on the company located outside the state. That company can then object in Wyoming if it so chooses. Following this proposition will allow Wyoming courts to be better prepared to deal with the issues of the case—such as relevance—because they have jurisdiction over the underlying criminal act. If the search warrant is sought in another state, then the judge will need to get up-to-speed on the case in order to address a potential motion to quash, only for the remaining issues in the case to occur elsewhere. In addition, Wyoming jurisdiction over an out-of-state company is justified because if a defendant uses the company's services while committing an allegedly criminal act in Wyoming, the company would have sufficient in-state presence. Fairness, efficiency, and justice all support the use of extraterritorial search warrants issued by Wyoming state district court judges to inspect electronically stored information; as long as the storage jurisdiction allows for such long-arm jurisdiction.

Oregon's Statute as a Model for Change

In 2013, Oregon amended its statute governing seizures in criminal cases.¹²⁵ The Oregon statute begins by laying out the basic jurisdictional rules.¹²⁶

- (1) [C]riminal process authorizing or commanding the seizure or production of papers, documents, records or other things may be issued to a recipient, regardless of whether the recipient or the papers, documents, records or things are located within this state, if:
 - (a) The criminal matter is triable in Oregon under ORS 131.205 to 131.235; and
 - (b) The exercise of jurisdiction over the recipient is not inconsistent with the Constitution of this state or the Constitution of the United States.¹²⁷

The statute then discusses the proper service of process for a search warrant.¹²⁸

- (2) Criminal process that authorizes or commands the seizure or production of papers, documents, records or other things from a recipient may be served by:

¹²⁵ See OR. REV. STAT. § 136.583 (2013) (current version at OR. REV. STAT. § 136.583 (2015)), https://www.oregonlegislature.gov/bills_laws/ors/ors136.html.

¹²⁶ See OR. REV. STAT. § 136.583(1) (2015).

¹²⁷ *Id.*

¹²⁸ See *id.* § 136.583(2).

- (a) Delivering a copy to the recipient personally; or
- (b) Sending a copy by:
 - (A) Certified or registered mail, return receipt requested;
 - (B) Express mail; or
 - (C) Facsimile or electronic transmission, if the copy is sent in a manner that provides proof of delivery.¹²⁹

Oregon requires the applicant of a search warrant to provide the recipient or the court with the materials requested in the warrant within twenty business days.¹³⁰ There are three exceptions to the twenty day delivery deadline.¹³¹ The statute also allows the recipient of the search warrant to object within the time required to provide a response.¹³² Additionally, Oregon requires search warrants to specify the important facts on its face,¹³³ makes the recipient verify the authenticity of the documents,¹³⁴ and requires anyone who intends to use the delivered material as evidence to file a written notice of intent.¹³⁵ Finally, recipients and respondents are immune from civil and criminal liability.¹³⁶

A *recipient* is “a business entity or nonprofit entity that has conducted business or engaged in transactions occurring at least in part in this state.”¹³⁷ Oregon defines an *applicant* as “(A) [a] police officer or district attorney who applies for a search warrant or other court order or seeks to issue a subpoena under this section; or (B) [a] defense attorney who applies for a court order or seeks to issue a subpoena under this section.”¹³⁸ A *defense attorney* is “an attorney of record for a person charged with a crime who is seeking the issuance of criminal process for the defense of a criminal case.”¹³⁹ Oregon refers to *criminal process* as “a subpoena, search warrant or other court order.”¹⁴⁰

¹²⁹ *Id.*

¹³⁰ *See id.* § 136.583(3).

¹³¹ *See id.* § 136.583(3)(a)–(c) (allowing a longer or shorter deadline by court order or stipulation).

¹³² *See id.* § 136.583(4).

¹³³ *See id.* § 136.583(5) (requiring the search warrant to name the statutory authority and time requirements for response and delivery).

¹³⁴ *See id.* § 136.583(6).

¹³⁵ *See id.* § 136.583(7). If a party does not timely object to the written notice of intent, the objection is waived. *See id.* § 136.583(8).

¹³⁶ *See id.* § 136.583(9).

¹³⁷ *Id.* § 136.583(11)(e).

¹³⁸ *Id.* § 136.583(11)(a).

¹³⁹ *Id.* § 136.583(11)(d).

¹⁴⁰ *Id.* § 136.583(11)(b).

Aside from providing clear definitions as to the terminology, the Oregon statute also addresses many of the major policy concerns against extra-territorial jurisdiction search warrants.¹⁴¹ For these reasons, the Wyoming Legislature should craft a statute reflecting Oregon's resolution to the issues of extraterritorial jurisdiction.

V. CONCLUSION

Wyoming jurisdiction over out-of-state electronically stored information related to criminal investigations depends on whether the State of Wyoming gives courts permission to use extended jurisdiction granted to them by the federal government or other states.¹⁴² The Wyoming Legislature and the Rules Committee have not clearly granted permission, so district court judges have read Rule 41 inconsistently, causing confusion and inefficiency.¹⁴³ Wyoming state trial courts suffer the consequences of ambiguous language each day. This problem, of ambiguity, can be fixed before it slows the trial court docket or reaches the Wyoming Supreme Court.¹⁴⁴

The Wyoming Legislature should grant Wyoming district court judges the authority to issue extraterritorial search warrants for electronically stored information by enacting a statute similar to Oregon.¹⁴⁵ After the Wyoming Legislature enacts the statute, the Rules Committee should then recommend an amendment to Rule 41 reflecting the statutory change. The Wyoming Supreme Court should thereafter adopt the recommended amendments, thus creating clarity between the statutes and the court rules.

Ambiguities will always be present in language, and state legislatures cannot foresee all circumstances that will eventually clutter the statutes. However, state legislatures can and do address issues that continue to cause inefficiency and debate among the judiciary. Given the current state of search warrant practices concerning electronically stored information in Wyoming, it is time for the legislature to provide clarity through cooperation with the Rules Committee and the Wyoming Supreme Court. The search for the meaning of Rule 41 is no longer warranted.

¹⁴¹ As stated when discussing the *Esarey* opinion, the concerns are (1) conflicting state law, (2) overly loose construction of authority, (3) conflicting federal law, and (4) overreaching federal authority. The Oregon statute specifies how its law applies, negating the conflict with other state and federal law. It protects against federal overreach and loose construction of judicial authority, because Oregon clarified how to deal with these warrants, instead of letting the SCA and wide judicial discretion govern.

¹⁴² See *supra* notes 18–85 and accompanying text.

¹⁴³ See *supra* notes 18–122 and accompanying text.

¹⁴⁴ See *supra* notes 86–122 and accompanying text.

¹⁴⁵ See *supra* notes 125–41 and accompanying text.