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GUEST COLUMN

Rule may expand hacking authority

By Alan Butler

What if I told you that the U.S. Supreme Court's most significant digital privacy ruling this year is not decision in a high profile Fourth Amendment or consumer privacy case, but a simple procedural order? What if I told you that the rule change included in this order, approving a proposal from an obscure committee, could fundamentally alter Fourth Amendment rights and the way that federal investigators conduct searches of remote computers? You might wonder how congressional leaders and experts were not involved in such a significant decision. You would not be alone.

The Supreme Court established Rule 41 of the Federal Rules of Criminal Procedure in December 1944 pursuant to the Sumners Courts Act. Rule 41 outlines the procedures for searches and seizures conducted by federal prosecutors and overseen by federal courts. These rules were meant to "codify existing law and practice," but Justices Felix Frankfurter and Hugo Black did not support their adoption.

In his opinion dissenting from the 1944 order, Frankfurter wrote that the Supreme Court was "not an appropriate agency for formulating the rules of criminal procedure

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Courtesy Brian Needelman

Brian Needelman of Johnson & Hutchinson LLP holds a copy of the Daily Journal at the top of Mount Kilimanjaro. He said the climb gave him confidence and determination for his first solo trial coming up Monday.

Attorney readies for trial by climbing Kilimanjaro

By Amanda Schallert
Daily Journal Staff Writer

Around hour five up a sheer escarpment near Mount Kilimanjaro's summit, Brian Needelman reached a crater and craved a few minutes rest in the thin air.

Halting at 5756 meters would only have made the rest of the trek harder for the Johnston & Hutchinson LLP associate. So in the pitch black, he counted steps and looked ahead at a guide's headlamp until they summited around daybreak.

The tricks he applied during that sleepless night in late March are the same ones he may use in court next week at his first solo trial, Needelman said.

"Don't wait 10 minutes, just keep going. Just count your steps," he said. "That night especially, summit night, made me think I could handle anything. If you can see your endpoint you can handle it until then."

Needelman had originally planned to climb Africa's highest mountain after his plaintiff personal injury case finished in March. He said the trial, which he expects to last about three days, involves an automobile accident and is an admitted liability case against Allstate Insurance.

After the case got pushed forward to May 16 because of witness scheduling problems, he got the blessing of Johnston & Hutchinson to go anyway, and took off to Tanzania. "I climbed it before my first trial instead of capping my first trial, but I think it might be better that way," he said. "It's good by itself, but it also lends itself to more accomplishment. You believe in yourself more. Going into this trial more centered and more confident will be good for me and good for my client."

Needelman started at the small firm in downtown Los Angeles in February 2013 after graduating from the UCLA School of Law, and has assisted in several trials.

Not every firm lets an associate tramp through four different climate zones while getting ready for court, but Thomas Johnston said the partners thought it would prepare Needelman in ways paperwork couldn't.

"Doing something challenging like that is helping him become who he's supposed to become," Johnston said.

Johnston & Hutchinson contributed some travel expenses to the climb and would financially support another if Needelman plans it, Johnston said.

The one condition is that Needelman takes a giant red and white Thompson & Hutchinson flag with him wherever he goes, as he did to Kilimanjaro.

Needelman climbed with his friend since kindergarten, Chris Stapleton, a Pepperdine University School of Law student. Also along was Needelman's twin brother, Adam.

Needelman has always been adventurous, but Stapleton said his friend has come back more determined in his job and adamant about his workout regimen.

As for Stapleton, he got back the night before his Multistate Professional Responsibility Examination for his bar admission. It was risky to spend six days climbing a mountain right before, but he passed. And it was worth it to see above the clouds after rock scrambling the Barranco wall, he said.

"It was the first time we could see above the horizon... I'd never seen anything like that in person, and I hesitate to use the word, but I was in awe," Stapleton said.

Needelman said, "When I actually saw the summit — that sense of actually achieving it — I can't remember the last time I felt something like that." It's important to have those accomplishments before you put a case in front of a jury, Johnston said.

"There are similarities between trial work and what he did," Johnston said. "When you start out in both, the mountain is so high."

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Google witnesses grilled

Two top witnesses cross-examined by Oracle attorney

By Tim O'Connor
Daily Journal Staff Writer

The two top dogs for Alphabet's Google Inc. and Sun Microsystems Inc. — which was bought in 2010 by Oracle America Inc. — have taken the stand and withstood the assault of Oracle's lead trial lawyer.

Peter Bicks, a partner with Orrick, Herrington & Sutcliffe LLP, paced the front of Judge William Alsup's San Francisco federal courtroom during Tuesday's cross-examinations of Google's first two witnesses in the trial like a fighter searching for an opening to deliver a knockout blow.

But despite his feisty jabs and tersely delivered hooks, Bicks appeared to not land more than glancing blows on Alphabet Chairman Eric Schmidt and former Sun Chief Executive Officer Jonathan Schwartz, each of whom testified that Google did nothing wrong in using 37 of Sun's Java computer code application program interface packages, or APIs, to build its Android mobile smartphone platform.

With the Java APIs forming a sliver of the Android operating system, Google's little green robot has become the preeminent mobile device OS in the lucrative smartphone and tablet world, capturing 85 percent of the market.

Those APIs are at the heart of the Oracle-Google copyright infringement re-trial, where Oracle claims the APIs were illegally pilfered and the resulting Android platform robbed Oracle of its chance to bring a Java-based smartphone to market and get a cut of the $42 billion in revenue Google has reaped since Android was first shipped in an HTC mobile phone in 2008. *Oracle America Inc. v. Google Inc.*, 10-CV3561, (N.D. Cal., filed Aug. 12, 2010).

Oracle is demanding up to $9.3 billion in damages, saying Google stole the APIs as a shortcut to get the phone to a market already under the sway of Apple's iPhone.

But Schmidt was the chief technical officer at Sun and oversaw Java when it launched in 1995, saying it was created to be freely available to engineers.

"It's not possible to use the language without the interfaces," Schmidt testified. "The language was given away and so were interfaces."

The idea was that freely distributed language and APIs would encourage developers to use the code to write their own programs in the Java language. Sun could then make money by selling support products and licensing its now-famous coffee cup logo to allow software companies to assure consumers and other purchasers that their Java-based software was compatible with other Java-based programs no matter what kind of computer was running the software.

Bicks poked Schmidt about Google's guarding of its own APIs as valuable intellectual property assets that

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DAILY APPELLATE REPORT

CIVIL LAW

Attorneys: Award of attorney fees and costs vacated and case reassigned where court abuses its discretion in failing to specify reasons for drastic reduction of requested fees. *Stetson v. Grissom,* USCA 9th, DAR p. 4491

Probate and Trusts: Law firm successfully quashes service of amended petition substituting it as Doe defendant involving trust dispute. *McClatchy v. Coblentz, Patch, Duffy & Bass LLP,* C.A. 1st/5, DAR p. 4475

Workers' Compensation: Injured worker prevails where administrative law judge uses wrong inquiry when determining whether worker's injury is temporary or permanent. *SSA Terminals and Homeport Insurance Co. v. Carrion,* USCA 9th, DAR p. 4480

CRIMINAL LAW

Constitutional Law: Involuntary administration of antipsychotic medicine does not invoke USSC 'Sell' factors where purpose of administration was defendant's safety and not to render defendant fit for trial. *People v. Lameed,* C.A. 6th, DAR p. 4483

Most CJP findings against LA judge rejected

By Phil Johnson
Daily Journal Staff Writer

Three special masters rejected Monday most findings a Commission on Judicial Performance examiner made against Los Angeles County Superior Court Judge Edmund W. Clarke Jr.

Special masters found it highly probable Clarke violated judicial ethics rules when he was less than patient, dignified and courteous to a juror who complained about his clerk's behavior. But charges of conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office were rejected.

Clarke appealed the initial findings by the CJP examiner, triggering the special masters' review.

The CJP initially levied other charges against Clarke in relation to his conduct with potential jurors, the vast majority of which were dismissed by the special masters.

Privately, some judges pointed to this case as another example of the CJP's focusing on what they view as small-bore problems. Earlier this month, the commission admonished a Ventura County judge for keeping a guide dog under her bench, even though she had prior approval from court administrators to do so.

Edith R. Matthai, a partner at Robie & Matthai PC who co-counseled Clarke with Kathleen M. Ewins, a partner at Long & Levit LLP, said Clarke would behave differently if he could meet prospective juror No. 7122 again, however.

The incident that spawned the CJP's review occurred May 2014 during jury selection for a five-week murder trial. Clarke described the trial as the largest and most stressful case he had handled. Juror selection included 80 preemptory challenges, 110 prospective jurors and 86 hardship claims.

Prospective juror No. 7122 claimed severe anxiety on her hardship claim. Clarke found the claim dubious, but granted hardship. Before the juror left the courtroom, she described the court clerk as disrespectful.

Clarke interrupted the woman, and instructed her to wait in the hall so she could come back and detail her grievances.

Two hours later, the woman, who sobbed in the hallway, returned before Clarke, who admonished her for speaking out against his clerk, according to the CJP's report.

"One juror, in [seven years], out of thousands, has ever complained

See Page 3 — SPECIAL

Officials mustn't put a price on 'access'

By Stuart McPhail

New York Times

Republican gubernatorial candidate Robert McDonnell declares victory in November 2009. McDonnell argues that he has a First Amendment right to sell access, but putting a price on access denies ordinary Americans who can't afford to lavish gifts and loans on officials the right to make their case to those whom they elected.

Fifty years ago, the U.S. Supreme Court struck down Virginia's poll tax. Justice William O. Douglas, writing for the court, held that "[t]he principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors, by analogy, bars a system which excludes those unable to pay a fee to vote or who fail to pay it." Fifty years later, Virginia's former governor, Robert McDonnell, is asking the Supreme Court to authorize a new kind of poll tax on another right integral to our democracy: citizens' constitutional right to petition their government. *McDonnell v. United States*, 15-474.

McDonnell was convicted at trial of accepting bribes in violation of federal law. He sought and accepted more than $175,000 in loans, cash and luxury goods from a Virginia businessman. The businessman was seeking to persuade Virginia's prestigious state universities to conduct trials on a drug for which he was seeking FDA approval, studies he could not afford to conduct himself. While the governor did not order the studies, he sold the businessman access to himself and to the relevant state officials, and when the officials did not move forward as expected, the governor personally intervened to inquire about progress and vouched for the drug both in conversations with officials and in a product launch at the governor's mansion.

Before the Supreme Court, the governor argued that he could not be convicted of bribery because, first, he has a First Amendment right to sell access, and second, the federal laws at issue are vague. The Supreme Court would be right to reject both arguments and uphold the governor's conviction.

McDonnell grounded his audacious First Amendment argument in a misreading of *Citizens United v. FEC*, a decision which, while rightly criticized, still does not goes as far as McDonnell argues. In that case, the court held that preventing the mere possibility of a campaign donor getting additional access to a candidate was not a sufficiently compelling interest to justify the First Amendment burdens of some political spending limits. The court did not address, however, a sale of access which was not merely a possibility, but proven beyond a reasonable doubt. Rather, Justice Anthony Kennedy addressed the latter situation in a prior campaign finance case, *McConnell v. FEC*, where he distinguished the "favoritism or influence in general" that he argued could not support campaign finance regulations from "corrupt favoritism or influence" that could. He noted the latter could be proven by showing "a relationship between an official and a *quid*," exactly the agreement the jury found in McDonnell's case.

At oral argument, the Supreme Court expressed little interest in the governor's First Amendment argument, but struggled with his other argument: that the law is too vague and should be limited to those instances where an official sells more than access. The justices appeared concerned that if the federal bribery law were read to cover any paid-for attempt to influence an official act — as the text of the statute provides — an overzealous prosecutor might prosecute politicians for simply accepting gifts from constituents and then doing favors, something the justices worried happened every day.

The justices should not be so concerned. The federal bribery law does not outlaw gifts or constituent services; it outlaws corrupt sales. A prosecutor has to prove to a jury beyond a reasonable doubt the existence of a *quid pro quo*. That evidentiary hurdle is appropriately high, but also recognizes that bribery can take many forms.

Reasonable officials know the difference between an exchange and a gift. And despite the fact that the existence of an agreement may be inferred from the circumstances — a fact which apparently concerned Justice Samuel Alito during oral arguments — this is not an uncommon feature in criminal law. In fact, a few days after hearing McDonnell's case, Alito himself issued an opinion in *Ocasio v. United States* noting the importance of the proof of an agreement to a conspiracy conviction: that conspiracy required a showing that an auto body shop owner agreed to provide payments in exchange for a police officer's referring car crash victims to the shop. The line between an illegal conspiracy and a legal relationship was the existence of the agreement. Just as that line suffices to provide clear guidance to ordinary citizens on how to conform to criminal laws, it also suffices for government officials.

In contrast, accepting McDonnell's approach to federal bribery laws would actually make them more vague, not less. Courts and officials would be left to guess which powers of office one may lawfully sell and those which cross an imaginary line. Indeed, even with such a caveat, the distinction between lawful responsiveness and the corrupt sale of those powers all parties agree should be covered by the bribery laws would still depend on the existence of an exchange: the very standard to which McDonnell objects. Rather than crafting a novel safe harbor of powers of office that officials may sell for their own enrichment, the Supreme Court should enforce the clear statutory text, apply ordinary principles of criminal liability, and hold that all sales are illegal. Anything else would simply invite inventive corruption from officials and those who seek to influence them.

A fundamental feature of our system of government is that each level of government can vigilantly watch the other and check excesses. Those checks include the constitutionally authorized power of the federal government to ensure states retain a republican form of government by prosecuting state and local corruption that undermines the founding principles of representative government, including each citizen's right to petition his or her government.

Putting a price on access denies ordinary Americans who can't afford to lavish gifts and loans on officials the right to make their case to those whom they elected. While there may be close and difficult cases that would require federal prosecutors and courts to draw a fine distinction between a responsive official and a corrupt one, Governor McDonnell's case is not one of them.

Stuart McPhail *is litigation counsel for Citizens for Responsibility and Ethics in Washington, a government ethics watchdog group which filed an amicus curiae brief in support of the government before the Supreme Court in* McDonnell v. United States.

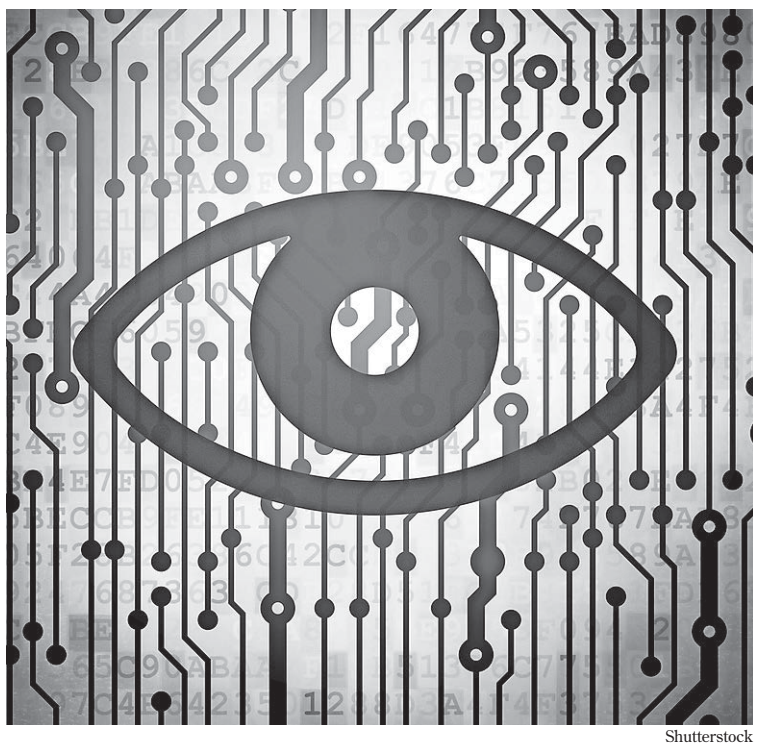
Rule change would significantly expand surveillance authority

Continued from page 1

for the district courts." Frankfurter said that the Supreme Court lacked first-hand experience with trial court practice necessary to realize "vividly what rules of procedure are best calculated to promote the largest measure of justice." He argued that the rules could "hardly escape provisions in which lurk serious questions for future adjudication by this Court." He concluded it was more important for the Supreme Court to decide "issues coming here with the impact of actuality" rather than "lay down rules in the abstract."

The proposed changes to Rule 41 pending before Congress today pose the same problem that Justice Frankfurter identified in 1944: They would make substantive changes in law and usurp a key legislative function.

The Supreme Court has previously attempted to address these concerns by delegating the initial rulemaking process to an advisory committee consisting of judges, practitioners and legal experts. But the larger problem persists — if the Supreme Court adopts rules that define the scope of important procedural rights prospectively, the court may necessarily alter the scope of those rights. Congress recognized this problem when it amended the Rules Enabling Act in 1988 to make clear that the rules "shall not abridge, enlarge or modify any substantive right." However, Congress also created a mechanism that allows proposed changes to go into effect "unless otherwise provided by law."



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Proposed changes to the Federal Rules of Criminal Procedure raise substantial questions about searches of remote computers.

The Supreme Court has amended Rule 41 14 times since 1944, though many of those amendments included only minor technical and procedural changes. More substantive amendments were usually adopted following changes in statute or major decisions by the court. Congress has recognized when rules have gone beyond these limits. For example, in 1977 Congress modified proposed amendments to Rule 41 that authorized telephonic warrants, to ensure adequate protections. The same level of congressional intervention is necessary now to ensure that the proposed amendments do not water down important Fourth Amendment procedures.

The proposed changes to Rule 41 raise substantial questions about searches of remote computers, including the scope of judicial authority and necessary procedural protections, that cannot be resolved without consideration by Congress. Specifically, the proposed changes would grant magistrate judges the authority to "issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located *within or outside* the district" in two cases. The first case is where the location of the information has been "concealed through technological means." The second case is where the investigation concerns computer fraud and the computers to be searched are victims of hacking "and are located in five or more districts."

These amendments authorizing "remote access" warrants would significantly modify current Fourth Amendment law. First, the new rule would fundamentally alter the jurisdictional reach of a magistrate judge's order authorizing an electronic search. The extraterritorial reach of U.S. Court orders is not only hotly debated, it is the main issue in *Microsoft Corp. v. United States*, a major case pending before the 2nd U.S. Circuit Court of Appeals. Second, the new rule would relax the notice requirement that the Supreme Court has previously found to be a core part of the Fourth Amendment's procedural protections.

The new rule would also affirmatively authorize two types of searches that Congress has never considered in depth or recognized as legitimate. It might be the case that there are important reasons to grant authority for searches of remote computers whose location cannot be reasonably determined or that have been subject to a malicious attack. But even if that is true, it is Congress and not the Supreme Court who should make that determination following fact-finding and public debate. After the Supreme Court struck down a New York state wiretap law in 1967, Congress stepped in to provide clear procedural protections with enactment of the Wiretap Act. Similar protections are necessary for remote electronic searches, which could be much broader even than telephonic wiretaps.

Any debate over whether these amendments would alter "substantive rights" can be quickly resolved by re-reading the computer fraud provision — Rule 41(b)(6)(B). This rule would give a magistrate judge in one state the power to authorize searches of possibly hundreds or thousands of remote computers in other states (or countries) without any probable cause. These computers need only be "damaged without authorization." The computers of the *victims* of a malicious hack could be searched without probably cause or notice because of a procedural rule drafted by an obscure advisory committee without any oversight or input from Congress or the public. This would be an unprecedented overreach.

If Congress does not take action before Dec. 1, we will see a fundamental shift in government searches of remote computers.

Alan Butler *is senior counsel for the Electronic Privacy Information Center.*

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