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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*

Hypothetical

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

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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%.

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%. 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 . . . .” 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. 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. Finally, in criminal investigations, judges may be asked to issue search warrants for homes, cars, or a suspect’s blood.

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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.


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.


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).


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.


14 See id.
Part II of this article explains the legal analysis of extraterritorial search warrant jurisdiction. Part II also describes Wyoming circuit court and district court jurisdiction over search warrants for electronically stored information. 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.

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? 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. 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.

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. 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.
I. 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, in 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

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.
28 Id.
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.”\textsuperscript{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 government\textsuperscript{31} may require disclosure of any electronic information stored for 180 days or less.\textsuperscript{32} The government may also compel disclosure of information stored beyond 180 days by following the portion of the SCA applicable to RCS.\textsuperscript{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.”\textsuperscript{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 . . . .\textsuperscript{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.\textsuperscript{36} However, notice to the subscriber


\textsuperscript{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).

\textsuperscript{32} See 18 U.S.C. § 2703(a).

\textsuperscript{33} See 18 U.S.C. § 2703(b).

\textsuperscript{34} See 18 U.S.C. § 2703(a).

\textsuperscript{35} 18 U.S.C. § 2711(3).

\textsuperscript{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.”

Additionally, the government may request records from the service provider concerning the subscriber or customer accounts without notice to the customer. 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. 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.

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. 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. In addition, state courts are expressly considered courts of competent jurisdiction under the SCA. Thus, the plain language of the SCA illustrates the legislative intent to allow all states the ability to utilize the SCA.

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. For example, the SCA provides:

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38 See 18 U.S.C. § 2703(c)(3).
40 See 18 U.S.C. § 2703(c)–(g).
42 See 18 U.S.C. § 2703(a), (b)(1)(A)–(B), (c)(1)(A), (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)
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).
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. 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.

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.

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. 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.

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. In

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55 See, e.g., Cal. Penal Code § 1524.2(c); Ala. Code § 13A-8-115(c).
56 Cal. Penal Code § 1524.2(c).
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).
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.


\(^63\) 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).


\(^66\) 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.


(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).

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

Although Rule 41(a) is clear when applied to circuit courts, it is ambiguous
when applied to district courts. Using the doctrine of \textit{expressio unius est exclusio alterius},\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{77} On the other hand, no language in Rule
41(a) expressly permits out-of-state reach.\textsuperscript{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.\textsuperscript{79} The Wyoming Constitution grants its citizens security
against search and seizure, but says nothing about the exercise of jurisdiction
outside state lines.\textsuperscript{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.\textsuperscript{81}

\textsuperscript{72} \textit{Wyo. R. Crim. P. 41(a)} (emphasis added).
\textsuperscript{73} \textit{See Busch v. Horton Automatrics, Inc.}, 2008 WY 140, ¶ 13, 196 P.3d 787, 790 (Wyo. 2008); \textit{see also supra text accompanying notes 65–66}.
\textsuperscript{74} \textit{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.” \textit{Expressio unius est exclusio}, \textit{Black’s Law Dictionary} (4th ed. 2011).
\textsuperscript{75} \textit{See Walters v. State ex rel. Wyoming Dep’t. of Transp.}, 2013 WY 59, ¶ 18, 300 P.3d 879, 884 (Wyo. 2013).
\textsuperscript{76} \textit{See Wyo. R. Crim. P. 41(a)}.
\textsuperscript{77} \textit{Id}.
\textsuperscript{78} \textit{Id}.
\textsuperscript{79} \textit{See generally Wyo. Const.} (containing no language allowing or prohibiting extraterritorial jurisdiction for search warrants).
\textsuperscript{80} \textit{See generally Wyo. Const.} art. I, § 4.
\textsuperscript{81} \textit{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. Sections 7-7-101 through 7-7-105 describe the law concerning search warrant issuance, execution, and procedure. As previously discussed, multiple statutes control search warrant procedures in specific contexts. These statutes do not appear to authorize nor prohibit out-of-state jurisdiction by district court judges. 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, freewheeling, 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

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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.  

Judge Posner addressed the distinction between strict and loose construction in a very intricate manner. 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.” 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. In turn, Wyoming judges can “adjust for the limitations of foresight of legislators,” 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. Language exists within the Rules to support such a reading. First, the language does not explicitly discuss out-of-state jurisdiction. This is problematic

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87 See supra note 86, at 954.

89 See supra note 86, at 954.

90 See supra note 86, at 954.


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
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.
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

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.
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

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

\textit{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 \textit{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.\textsuperscript{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.\textsuperscript{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.

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\textsuperscript{121} See \textit{Esarey}, 67 A.3d at 1008 n.17; see also \textit{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).

\textsuperscript{122} See generally \textit{Esarey}, 67 A.3d at 1008 n.17.

\textsuperscript{123} See supra notes 86–122 and accompanying text.

\textsuperscript{124} See supra notes 1–2 and accompanying text.
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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. The Oregon statute begins by laying out the basic jurisdictional rules.

(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.

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

(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:

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 extraterritorial jurisdiction search warrants. 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. 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. 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.

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. 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.