Why Michael Cohen's Request for a Special Master is so Important

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Draft as of April 15, 2018

President Trump's personal lawyer, Michael Cohen, is asking Federal Judge Kimba Wood to appoint a Special Master to control access by the FBI and federal prosecutors to information seized from him pursuant to a series of search warrants. Whether she grants this request may change the course of American history.

The most compelling and – for Donald Trump the most ominous – analogy to the Cohen warrants is the FBI's search in fall 2016 of a laptop belonging to Anthony Weiner, the estranged husband of Hillary Clinton aide Huma Abedin.

The Fourth Amendment to the Constitution states that all search warrants must "particularly describe[] the place to be searched" and "the things to be seized" and that "probable cause" must be shown "by Oath" that the "things to be seized" are evidence of a crime. In a 1976 case,[1] the Supreme Court explained that this "particular description" provision prohibits "general, exploratory rummaging in a person's belongings and prevents the seizure of one thing under a warrant describing another."

To comply with the Constitution the search of Weiner's laptop search should have been limited to evidence relating to the probable cause basis for the warrant: that he had engaged in sexting with a minor and possessed child pornography. However, that search instead led to former FBI Director James Comey's Oct. 28, 2016 bombshell letter to Congress saying that the FBI "has learned" of the existence of emails "that may be pertinent" to the closed investigation of Hillary Clinton's use of a personal email server during her tenure as secretary of state.

FBI agents searching Weiner's laptop for evidence of his sexual misconduct were able to report to Comey that the laptop also contained email between Abedin and Clinton dating to the time Clinton was Secretary of State by taking advantage of an exception the Supreme Court has carved into the Fourth Amendment called "plain view." The government is allowed to seize evidence not particularly described in the warrant if it comes into "plain view" during the search and appears to show commission of another crime – bags of cocaine scattered across a coffee table can be seized during a search for a stolen television.

But how did Abedin's email with Clinton come into "plain view" during a search for evidence of her husband's completely unrelated sexual misconduct? The Federal Rules of Criminal Procedure were amended in 2009 to specify that a search warrant "may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information … [for] later review of the media or information consistent with the warrant." The accompanying comment described this amendment as authorizing "a two-step process: officers may seize or

[1] Andresen v. Maryland, 427 U.S. 463, 480 (1976).

copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant."

The government routinely uses this "two step" process to download the entire contents of on-line email accounts, laptops and cell phones. Thus all of the electronic content of Weiner's laptop came into the FBI's "view" including "metadata" that disclosed the existence of Abedin's emails with Clinton. The FBI then used this information as probable cause to obtain a second warrant, to search Weiner's laptop for evidence relating to the closed Hillary Clinton investigation. The rest is history.

In a recent Yale Law Journal article[2] I argued that rigorous safeguards need to be built into the second "later review" part of the "two-step process" to prevent the kind of "general, exploratory rummaging" prohibited by the Fourth Amendment. Federal magistrate judges are charged with the authority to issue search warrants, and two of the country's most respected magistrate judges – John Facciola [3]and David Waxse [4]– published decisions coming to similar conclusions.

In the Cohen case the government argued, in a brief filed last Friday with Judge Wood, that a "filter team" internal to the FBI provides a sufficient safeguard. "The FBI agents who seized materials pursuant to search warrants were filter agents who are not part of the investigative team and have been walled off from … the investigation." However, close reading of that same brief shows that the asserted "filter team" safeguards are illusory.

The brief revealed that the government had "already obtained search warrants – covert until this point – on multiple email accounts maintained by Cohen". Then, even though the review of that email was to have been done by a "filter team" supposedly "walled off" from the investigative team, the prosecutors heading the investigative team wrote in their brief: "The results of that review, as reported by the Filter Team, indicate that Cohen is in fact performing little to no legal work, and that *zero* emails were exchanged with President Trump."

If they were complying with their constitutional obligations, the filter team should only have been looking at a presumably small set of emails potentially relevant to the subject matter of the search – reportedly the payments and settlement agreements arranged by Cohen with women who claimed sexual relationships with Trump. Surely the warrant did not authorize searching for all emails between Cohen and Trump, yet how could the filter team report there were no emails with Trump in those accounts without engaging in just such a search? And how could the filter team report with such confidence that Cohen "is in fact performing little to no legal work" without actually looking at all the email in his various accounts – most of it certainly having nothing to do with the purported justification for the search?

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[2] Clark D. Cunningham, Apple and the American Revolution: Remembering Why We Have the Fourth Amendment, 126 Yale Law Journal Forum 218 (Oct. 26, 2016)

[3] In the Matter of the Search of Apple IPhone, IMEI 013888003738427, Magistrate Case N0. 14-278 (JMF), **31 F.Supp.3d 159** (D.D.C., March 26, 2014)

[4] In the Matter of the Search of premises known as: Three Hotmail Email accounts, No. 16-MJ-8036-DJW, 2016 WL 1239916 (D. Kansas March 28, 2016)

The "two step process" search process as planned by the government will allow a similarly comprehensive review of electronic evidence contained on Cohen's laptop, tablet and cell phones physically seized last week from Cohen's office, home and hotel. The government's brief asserts that its investigation is independent from the Special Counsel's Office, but what will happen if the "filter team" encounters information "in plain view" they consider relevant to the Special Counsel's criminal investigation?

Take for example the moment's hottest topic: did Cohen make a secret trip in 2016 to meet Russians in Prague despite his statement to Congress that he has never been in Prague? Absent some court-ordered safeguard, if the "filter team" finds evidence that Cohen lied to Congress about that trip, as fellow law enforcement officials they will report that information to Mueller, just as the FBI agents supposedly searching Weiner's laptop for child pornography told Comey they had found emails between Abedin and Clinton.

The combination of comprehensive review of electronic information seized under the "two step process" with the "plain view" exception risks the complete nullification of Fourth Amendment protections. For this reason, in a notorious case of misconduct in a federal search of computer data before the federal court of appeals for the 9th Circuit, in 2010 five judges recommended in a concurring opinion that when a search warrant authorizes downloading a large set of data, the data should be placed under the control of a court-appointed third party.

The judges said: "That third party should be prohibited from communicating any information learned during the search other than that covered by the warrant. Once the data has been segregated (and, if necessary, redacted), the government agents involved in the investigation should be allowed to examine only the information covered by the terms of the warrant."[5]

The Special Master being requested by Cohen could be the kind of court-appointed third party recommended by the 9th Circuit judges. If such a Special Master had reviewed Weiner's laptop, instead of FBI agents, Abedin's emails with Clinton would have been noted and then properly set aside rather than reported to Comey – and thus Comey's potentially election-shifting announcement would never have been made.

The use of a Special Master would guarantee what has been promised by the Department of Justice: that the New York prosecutors are not functioning as proxies for the Office of the Special Counsel. Public confidence in the integrity and honesty of the Special Counsel's work is at this moment of paramount importance. And the appointment of a Special Master to take control of the massive body of electronic data swept up by the Cohen search warrants would guarantee that only information in that data strictly relevant to the New York investigation is produced to prosecutors and the FBI, protecting the privacy of Cohen, his clients, associates, friends and family, setting an important example for our nation's steadfast commitment to constitutional values amidst a tempest of partisan conflict.

Prior on-line essays on this subject:
Clark D. Cunningham, Restoring transparency and fairness to the FBI investigation of Clinton emails, The Conversation (Oct. 31, 2016)

[5] United States v. Comprehensive Drug Testing Inc., 621 F.3d 1162, 1180 (9th Cir. 2010) (en banc).

https://theconversation.com/restoring-transparency-and-fairness-to-the-fbi-investigation-of-clinton-emails-67967

Clark D. Cunningham, In getting 'new' Clinton emails, did the FBI violate the Constitution?, The Conversation (Oct. 29, 2016) https://theconversation.com/in-getting-new-clinton-emails-did-the-fbi-violate-the-constitution-67906

Clark D. Cunningham, Feds: We can read all your email, and you'll never know, The Conversation (Sep. 21, 2016) https://theconversation.com/feds-we-can-read-all-your-email-and-youll-never-know-65620