THIS AIN'T BACKUP (AND MAYBE NOT STORAGE, EITHER)

SC Supreme Court Considers the Stored Communications Act

By Jack Pringle

It has scarcely been a month since this post describing Jennings v. Jennings, and the the S.C. Court of Appeals' construction of the Stored Communications Act. The South Carolina Supreme Court granted Certiorari to review the opinion, and on October 10th reversed the decision of the Court of Appeals. Three of the five Justices on the Court issued opinions in the case, underscoring the difficulties in construing this law enacted before the advent of browsers and webmail.

Click here for the facts.

The Majority Opinion: This is not Backup

Justice Hearn rejected the rationale of the Court of Appeals that Mr. Jennings' single copies of previously opened Yahoo emails were stored "for purposes of backup protection" pursuant to Section 2510(17)(B) of the Wiretap Act: "We decline to hold that retaining an opened e-mail constitutes storing it for backup protection under the Act." Employing the ordinary meaning of "backup" as "one that serves as a substitute or support," Justice Hearn reasoned that since Mr. Jennings possessed the only copies of these emails, nothing was being "backed up" by those messages. Therefore, the messages were not in electronic storage. This is the rationale used in U.S. v. Weaver (mentioned in the previous post).

The Chief Justice's Concurrence: This Isn't Even Electronic Storage

Chief Justice Toal concurred in result (joined by Justice Beatty), but preferred the more "traditional interpretation" of the SCA as advanced by the Department of Justice, according to which the "backup provision" historically was designed to make sure the government could not avoid the privacy protections of the SCA by going after "backup copies of unopened emails" made by an internet service provider for its "administrative purposes." This interpretation requires meeting the requirements of both Section 2510(17) (A) and (B) of the Wiretap Act:

(17) "electronic storage" means-

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; *and*

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

According to the Chief Justice, the difficulty with the Weaver rationale as adopted by the majority is that "the privacy protections of personal e-mail are contingent upon the operation of the e-mail system used." In other words, web-based email services might only "store" an email in one place, while the operation of a program (such as Microsoft Outlook) through which messages are downloaded might result in a copy being stored for "backup" purposes. The "traditional interpretation" avoids these possible "illogical results."

Justice Pleicones' Concurrence: You Are Both Right, But Here is a Different Reason Why

And finally, Justice Pleicones also concurred in result, taking the view that Section 2510(17) (A) and (B) reference two distinct types of storage, and that therefore "an e-mail is protected if it falls under the definition of either subsection (A) or (B)." Justice Pleicones agreed with the Majority's conclusion that the emails in question were not protected under Section 2510(17)(B), but reasoned that the "backup" referenced in that subsection is a specific type of copy used by an ISP to "back up its own servers," and does not include an original email transmitted to the recipient.