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Police State America: Will the US Supreme Court Apply Cell Phone Privacy to NSA Metadata Collection?

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In one of the most significant Fourth Amendment rulings ever handed down by the Supreme Court, all nine justices agreed in an opinion involving two companion cases, Riley v. California [PDF] and United States v. Wurie, that police generally need a warrant before reading data on the cell phone of an arrestee. This decision may well presage how the court will rule on the constitutionality of the National Security Agency (NSA) metadata collection program when that issue inevitably comes before it.

Warrants Needed to Search Cell Phone Data

There has always been a preference for search warrants when the police conduct a Fourth Amendment search or seizure. But, over the years, the court has carved out certain exceptions to the warrant requirement, including the search incident to a lawful arrest. The 1969 case of Chimel v. California defined the parameters of this exception. Upon a lawful arrest, police can search the person of the arrestee and areas within his immediate control from which he could secure a weapon or destroy evidence. Four years later, in United States v. Robinson, the court confirmed that the search incident to a lawful arrest is a bright-line rule. These types of searches will not be analyzed on a case-by-case basis. If the arrest is lawful, a search incident to it needs no further justification. It does not matter whether the officer is concerned in a given case that the arrestee might be armed or destroy evidence.

In Riley/Wurie, the court declined to apply the search incident to a lawful arrest exception to searches of data contained on an arrestee's cell phone. Chief Justice John Roberts wrote for the court that the dual rationales for applying the exception to the search of physical objects—protecting officers and preventing destruction of evidence—do not apply to the digital content on cell phones: "There are no comparable risks when the search is of digital data."

Moreover, "[m]odern cell phones, as a category," Roberts noted, "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." Responding to the government's assertion that a search of cell phone data is "materially indistinguishable" from searches of physical items, Roberts quipped, "That is like saying a ride on horseback is materially indistinguishable from a flight to the moon." Indeed, Roberts observed, the search of a cell phone would typically provide the government with even more personal information than the search of a home, an area that has traditionally been given the strongest privacy protection. Modern cell phones, Roberts wrote, "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might

conclude they were an important feature of human anatomy." Roberts was referring to the ubiquitous presence of cell phones appended to our ears as we walk down the street.

But the court held that while a warrant is usually required to search data on an arrestee's cell phone, officers could rely on the exigent circumstances exception in appropriate cases. For example, when a suspect is texting an accomplice who is preparing to detonate a bomb, or a child abductor may have information about the child's location on his cell phone, or circumstances suggest the phone will be the target of an imminent attempt to erase the data on it, police may dispense with a search warrant.

Metadata Collection Implicates Similar Privacy Concerns

The Riley/Wurie opinion provides insights into how the court will decide other digital-era privacy issues. Roberts was concerned that

> "[a]n Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD."

The Chief Justice could have been describing the NSA metadata collection program, which requires telecommunications companies to produce all of our telephone communications every day. Although the government claims it does not read the content of those communications, it does monitor the identities of the sender and recipient, and the date, time, duration, place and unique identifiers of the communication. As Roberts pointed out in the cell phone case, much can be learned from this data. Calls to a clinic that performs abortions or visits to a gay website can reveal intimate details about a person's private life. A URL, such as www.webMD.com/depression, can contain significant information, even without examining the content. Whether we access the Internet with our cell phones, or with our computers, the same privacy considerations are implicated.

Roberts quoted Justice Sonia Sotomayor's concurrence in United States v. Jones [PDF], the case in which the court held that a warrant is generally required before police install and monitor a GPS tracking device on a car. Sotomayor wrote, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." US District Court Judge Richard J. Leon also cited that concurrence by Sotomayor in his 2013 decision that the metadata collection probably violates the Fourth Amendment (Klayman v. Obama).

And both Roberts and Leon distinguished the cell phone search and metadata collection, respectively, from the 1979 case of Smith v. Maryland, in which the court held that no warrant is required for a telephone company to use a pen register to identify numbers dialed by a particular caller. The Smith Court concluded that a pen register was not a Fourth Amendment "search," and therefore the police did not need to use a warrant or an exception to the warrant requirement. In order to constitute a "search," a person must have a reasonable expectation of privacy that is violated. The court said in Smith that a person does not have a reasonable expectation of privacy in numbers dialed from a phone since he voluntarily transmits them to a third party—the phone company.

Roberts stated in Riley/Wurie: "There is no dispute here that the officers engaged in a search of Wurie's cell phone." Likewise, Leon wrote that the issue of "whether a pen register constitutes a 'search' is a far cry from the issue in the [metadata collection] case." Leon added,

> "When do present-day circumstances—the evolution of the government's surveillance capabilities, citizens' phone habits, and the relationship between the NSA and the telecom companies—become so thoroughly unlike those considered by the Supreme Court thirty-four years ago that a precedent like Smith simply does not apply? The answer, unfortunately for the Government, is now."

If the court is consistent in its analysis, it will determine that the collection by the government of all of our electronic records implicates the same privacy concerns as the inspection of the data on our cell phones. It remains to be seen if and when the metadata collection issue comes before the court. But the fact that the cell phone decision was 9-0 is a strong indication that all of the justices, regardless of ideology, are deeply concerned about protecting the privacy of our electronic communications.

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