Written by **Joe Wolverton, II, J.D.** on June 26, 2014

Supreme Court Bans Warrantless Cellphone Searches

Chalk one up for the Bill of Rights — for a change.

In a decision handed down Wednesday, the Supreme Court ruled that police must obtain a search warrant before searching the contents of cellphones belonging to people being held in custody.

The ruling in *Riley v. California* and *U.S. v. Wurie* is being described as a "landmark decision" and one that makes future warrantless searches of cellphone data "unconstitutional."

Writing for a unanimous bench, Chief Justice John Roberts identified several privacy concerns associated with the unwarranted search of cellphone data by law enforcement:

> First, a cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record. Second, the phone's capacity allows even just one type of information to convey far more than previously possible. Third, data on the phone can date back for years. In addition, an element of pervasiveness characterizes cell phones but not physical records. A decade ago officers might have occasionally stumbled across a highly personal item such as a diary, but today many of the more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives.

Roberts recognizes, furthermore, that Wednesday's ruling "will have some impact on the ability of law enforcement to combat crime. But the Court's holding is not that the information on a cell phone is immune from search; it is that a warrant is generally required before a search."

The effect of this decision on the Fourth Amendment is indisputable. If the Obama administration had received a favorable ruling from the Supreme Court, one holding that police do not need a specific — constitutionally qualifying — warrant to search a suspect's cellphone, the threat to the Fourth Amendment and individual liberty would have been incalculable.

For example, a person arrested on a bench warrant for failing to appear for a hearing would have had his entire life subject to search and seizure if he were carrying his smartphone at the time he was taken into police custody. Then, the texts, social media posts, and photos stored on that phone would have come under the scrutiny of government and the data could be collected and saved in order to blackmail the citizen-turned-suspect.

That, fortunately, is not the case.

Of specific interest in the *Wurie* case was the government's claim that a cellphone is no different from any other items a suspect might be carrying that are subject to search by law enforcement, "including notebooks, calendars, and pagers."

Roberts addressed that assertion directly, writing, "That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Modern cell phones, as a category, implicate privacy

concerns far beyond those implicated by the search of a cigarette pack, a wallet or a purse."

Privacy advocates praised the court's decision. As quoted by *Wired*:

> Hanni Fakhoury of the Electronic Frontier Foundation calls it a "bright line, uniform, pro-privacy standard," and the American Civil Liberties declared the decision "revolutionary."
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> "By recognizing that the digital revolution has transformed our expectations of privacy, today's decision … will help to protect the privacy rights of all Americans," reads a statement from Steven R. Shapiro, the ACLU's national legal director. "We have entered a new world but, as the court today recognized, our old values still apply and limit the government's ability to rummage through the intimate details of our private lives."

Not surprisingly, proponents of expanded (unconstitutional) authority for law enforcement criticized the ruling, warning, about the potential impact of placing such restraints on the ability of police to "fight crime." The *Wall Street Journal* reports:

> Law-enforcement officials were disappointed. Technology "is making it easier and easier for criminals to do their trade," while the court "is making it harder for law enforcement to do theirs," said Thomas Zugibe, district attorney in Rockland County, N.Y., who signed a friend-of-the-court brief arguing warrantless device searches were constitutional.

Curiously, the government argued in the pair of cases just decided that cellphone data should be exempt from Fourth Amendment procedural safeguards because of the ability of data stored on the devices to be remotely erased or encrypted.

This argument is ironic considering that law enforcement is clamoring for the authority to use "kill switch" technology.

Stating that the court "has little reason to believe that either problem is prevalent," Justice Roberts identifies a couple of ways police can prevent third-party, off-site destruction of cellphone data:

> Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves.

In other words, if police genuinely believe the suspect will trigger some sort of data erasing operation while under arrest, they can find ways to thwart that without violating the suspect's rights as guaranteed by the Fourth Amendment.

Specific language in the decision published Wednesday points to the massive, wholesale collection of personal data occurring daily in the United States.

Referring to Apple's iPhone, Roberts writes, "The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos."

Distinguishing that modern technological reality with prior years' method of carrying a corresponding collection, Roberts explains:

"Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read — nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held

to require a search warrant."

Given the scope of the NSA's dragnet surveillance and collection of previously private personal data stored digitally, the Supreme Court's decision should impact more than just law enforcement, although such an application is not specifically anticipated in the language of the ruling.

While Wednesday's Supreme Court decision can be seen as something of a victory for the Constitution and the rights it protects, one wonders what the reaction had been had the Supreme Court found in the government's favor, declaring such warrantless searches to be "constitutional."

Not even the most ardent advocate of centralized federal power can point to a single syllable written by the Founders ascribing the rights protected by the Bill of Rights to the creation of the amendments mentioning those rights.

That is to say, the drafters of the Constitution considered the right to be safe from warrantless searches and seizures to be a pre-existing right, one that comes from being free, not from being governed, even by a very well written constitution.

In fact, this right is so fundamental to the Anglo-American conception of liberty that it was enshrined in the Magna Carta. As Thomas Davies explained in a 2007 article in the *Mississippi Law Journal*:

> The conventional view that search-and-seizure history is simply Fourth Amendment history is incorrect. Sir Edward Coke explicated common-law standards for warrantless arrest in detail in his discussion of the due process of law required by Magna Carta's the law of the land chapter, and the Framers were undoubtedly conversant with that treatment. Moreover, framing-era warrantless arrest standards were virtually unchanged from Coke's time.

In truth, then, the federal government, regardless of the Supreme Court's ruling in the *Wurie* and *Riley* cases, could not have taken what they did not give — the natural right of free people to be free from warrantless searches and seizures.

Another constitutional reality is that nine black-robed oligarchs should not — in fact, do not — possess the power to define the limits of federal authority.

Thomas Jefferson had something to say in the matter. In 1804, he wrote that giving the Supreme Court power to declare unconstitutional acts of the legislature or executive "would make the judiciary a despotic branch." He noted that "nothing in the Constitution" gives the Supreme Court that right.

Renowned constitutional scholar Von Holtz explained the error in accepting the Supreme Court as the ultimate arbiter of constitutional fidelity. "Moreover, violations of the Constitution may happen and the injured cannot, whether states or individuals, obtain justice through the court. Where the wrongs suffered are political in origin the remedies must be sought in a political way," he wrote.

He continued, regarding this "aristocracy of the robe," "That our national government, in any branch of it, is beyond the reach of the people; or has any sort of 'supremacy' except a limited measure of power granted by the supreme people is an error."

How can anyone read these statements and honestly conclude that any branch of the federal government is intended to be the surveyor of the boundaries of its own power?

Every department of the federal government was created by the Constitution — therefore, by the states — and has no natural sovereignty. No branch can define its own authority. Such a thought is ridiculous and contrary to any theory of republic self-government ever proposed. If courts, Congress, or

presidents had such power, it would instantly endow them with the complete authority of judge, jury, and executioner in every case in which their own act exceeding constitutional authority is at bar.

The full text of the *Wurie* and *Riley* decision can be found here.

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