Does Cell-Phone Case Imperil NSA Spying?

Though the Republican-controlled U.S. Supreme Court often splits 5-4 on partisan and ideological issues, a consensus is emerging against the government's electronic intrusion on personal privacy, which could portend trouble for NSA spying, says Marjorie Cohn.

By Marjorie Cohn

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* 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.

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

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*,

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.” U.S. 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 the *Riley/Wurie* decision: “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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president of the National Lawyers Guild. Her next book, *Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues*, will be published in September. [This piece first appeared on Jurist: http://jurist.org/forum/2014/06/marjorie-cohn-metadata-privacy.php]

Obama's Half-Billion to Syria's 'Moderates'

President Obama's plan to spend another half-billion dollars on Syria's "moderate" rebels will add more fuel to the destructive violence just as the killing was finally dying down. It's also hard to see how this investment will promote serious negotiations, notes ex-CIA analyst Paul R. Pillar.

By Paul R. Pillar

The Obama administration's proposal to spend $500 million on training and equipping "appropriately vetted elements of the moderate Syrian armed opposition" leaves unanswered some of the same questions that always have surrounded proposals to give lethal aid to Syrian rebels.

Some of those questions involve the challenges in determining who qualifies as a "moderate." "Vetting" sounds so much easier to do than it actually is to do. It is very difficult to do with anything that is even half as jumbled, confused, and extremist-ridden as is the current armed opposition to the Syrian regime.

It is interesting how many of those in Washington who are quick to lambaste the national security bureaucracy for supposedly being unable to perceive and predict accurately who is doing what in the Middle East seem to have ample confidence in the ability of that same bureaucracy to "vet" Syrian rebels.

"Moderate" presumably refers to long-term political objectives rather than to current methods, given that anyone who is engaging in armed rebellion is by definition using non-moderate methods. The principal difficulty in identifying those political objectives stems not from faulty information or analysis today but rather from the impossibility of predicting the directions that groups or leaders, facing changed circumstances, will take in the future.

History is replete with examples of leaders whose trajectories once in power could not have been extrapolated from what they did or said while they were still rebels. Another complication is that fighters and the arms they carry have a way of moving from group to group. There already has been some of this

movement in the Syrian civil war.

One hears the argument that the presence of many nasty and immoderate people in the Syrian opposition is all the more reason to aid moderate groups, so that fighters will gravitate toward the moderate groups rather than the extreme ones. But if allegiance and political inclination can be transferred or bought this easily, this calls into question the validity of any "vetting."

The most fundamental question about any aid to Syrian rebels is exactly how this type of support advances whatever is our own political objective for Syria, or at least makes more likely an outcome of the war that is more rather than less consistent with U.S. interests.

The White House statement about the aid proposal says the assistance is intended to "help defend the Syrian people, stabilize areas under opposition control, facilitate the provision of essential services, counter terrorist threats, and promote conditions for a negotiated settlement." That sounds reasonable enough, although the nature of the objective concerning a negotiated settlement is unclear given that we never appear to have rescinded explicitly the previously stated objective that Assad must go.

Perhaps some aid to the rebellion would shift the momentum on the battlefield enough for some figures in the regime's camp to support a negotiated settlement more than they do now. If that is to happen, however, rather than aid to rebels being just one step in a new spiral of escalation, a more complete pro-negotiation strategy will have to become apparent, with everything that entails particularly for the roles of Russia and Iran.

We also should be wary of a dynamic we observed with some of our client groups in Afghanistan. When a group realizes that it is being aided only because of its role in an ongoing war, it has an incentive to keep the war ongoing. And that means it is more likely to oppose negotiations, at least under any terms that are reasonable and feasible, than to support them.

Meanwhile, we have the irony of the Syrian regime of Bashar Assad reportedly conducting air strikes against positions of the hated ISIS group in Iraq. The Iraqi prime minister says he didn't ask for the strikes but welcomes them. Some of the same Washington hawks who have been most gung-ho about toppling Assad have also been gung-ho about doing what Assad's own forces are doing in Western Iraq.

You can't tell the players in the Middle East without a scorecard. Or rather, the line-ups are so confused even with a scorecard that we need to think again about trying to play whatever is the game that's going on.

It is unclear how much of what the Obama administration has been doing lately in Iraq and Syria, including this proposal to give lethal aid to Syrian rebels, it would have done without the political pressure from critics to “do something” in those countries.

Both the administration and its critics need to keep end games and broad strategy in mind and continually to ask themselves, as well as making more clear for the rest of us, how any move today will make more probable a desired end state in either country.

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