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The Founding Fathers Would Have Protected Your Smartphone

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Privacy is a core American value. For 235 years, the Fourth Amendment has protected us from unwarranted searches of our personal belongings. All the while, technology has been changing where and how we keep those belongings. On April 29, the Supreme Court held oral arguments in two cases, *Riley v. California* and *United States v. Wurie*. At question is whether the police can search the contents of a phone without a warrant during an arrest. At stake is whether technological advancements have rendered one of our most treasured civil liberties obsolete.

Today, many Americans keep their entire lives on their phones: family photos, emails, calendar appointments, Internet searches and even location history. Considered separately, each of these categories can reveal very private information. Taken together, they can present a pretty good picture of who you are, what you do, where you go, what you read and what you write. What protection does the Constitution offer them from suspicionless search by the government?

The Fourth Amendment grants to the people the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It did not find its way into the Constitution by accident. It was, rather, a specific response to a principal grievance of colonial Americans under British rule — namely, the use of the "general warrant" whereby the crown gave officials almost unfettered authority to search colonial homes, rifle through papers and scour personal belongings.

As the Constitutional Accountability Center explains in its friend-of-the-court brief in *Riley* and *Wurie*, "Stated simply, the Framers wanted to strip the government of the arbitrary power to rifle through a person's belongings in the hope of finding something incriminating."

There can be little doubt that the modern smartphone is today's equivalent of our Founders' "papers and effects."

The Fourth Amendment protects us from unreasonable, warrantless searches of these modern-day versions of "papers and effects." Indeed, as the Cato Institute observes in its own friend-of-the-court brief, allowing for warrantless searches of cellphones "would throw open too-wide a

door onto suspects' personal and private information without judicial supervision. Cellphones are doorways into people's lives as broad as the front doors of their homes."

The government argued that public safety demands the police have unfettered liberty to search a person under arrest. This is a false tension between liberty and security; robust protection of our Fourth Amendment rights can coexist with the prerogatives of law enforcement. The Supreme Court already recognizes an exception when a search is necessary to protect officer safety or the destruction of evidence; that's not at issue.

At issue is: What happens when a police officer has absolutely no reason to believe that a cellphone poses such a threat? In that case, the Fourth Amendment and the privacy values that it enshrines require that a police officer go to a judge and get a warrant, justified by probable cause, before conducting a search.

The evolution of technology and modern life creates challenges for a Constitution ratified 235 years ago. *Riley* and *Wurie* will not be the last time the Supreme Court will have to contend with the intersection of the Fourth Amendment, modern communications technology and our long-standing constitutional abhorrence of general warrants. How the Supreme Court addresses this challenge will set an important precedent as technology continues to present capabilities and threats never specifically considered by our Founders.

Technology will continue to evolve, but our Constitution endures. We took an oath to uphold the Constitution. So did every member of the U.S. Supreme Court. The government says that it has the authority to search phones without a warrant.

As a matter of text and history, however, the Fourth Amendment says that they do not. We hope the Supreme Court agrees.