the Atlantic

The Shaky Legal Foundation of NSA Surveillance on Americans

Judges who have ruled that the snooping doesn't violate the Constitution are forgetting the essential final clause of the Fourth Amendment.

Conor Friedersdorf

May 1 2014

A secret opinion of the Foreign Intelligence Surveillance Court recently released to the public is a reminder that the NSA is still conducting mass surveillance on millions of Americans, even if that fact has faded from the headlines. This would seem to violate the Fourth Amendment if you read its plain text. So how is it that FISA-court judges keep signing off on these sweeping orders?

They base their rulings on *Smith v. Maryland*, a case the Supreme Court decided decades ago. Before we examine the glaring flaw in the jurisprudence of the FISA-court judges applying it to mass surveillance, here's a brief refresher on that case.

Smith began with a 1976 house robbery. After the break-in, the victim started getting obscene phone calls from a man identifying himself as the robber.

> On one occasion, the caller asked that she step out on her front porch; she did so, and saw the 1975 Monte Carlo she had earlier described to police moving slowly past her home. On March 16, police spotted a man who met McDonough's description driving a 1975 Monte Carlo in her neighborhood. By tracing the license plate number, police learned that the car was registered in the name of petitioner, Michael Lee Smith. The next day, the telephone company, at police request, installed a pen register at its central offices to record the numbers dialed from the telephone at petitioner's home. The police did not get a warrant or court order before having the pen register installed. The register revealed that on March 17 a call was placed from petitioner's home to McDonough's phone. On the basis of this and other evidence, the police obtained a warrant to search petitioner's residence.

The Supreme Court ruled that the defendant had no reasonable expectation of privacy for numbers dialed from his house because a third party, the telephone company, kept a record of all calls dialed, as is commonly understood by phone users. The NSA argues that, per this precedent, they can obtain the call records of every American, even if the vast majority of us are suspected of no wrongdoing.

Georgetown Professor Randy Barnett explains why judges relying on *Smith* to legitimize mass surveillance are actually going far beyond the precedent that the Supreme Court established. A key difference between what the Court allowed in *Smith* and what the NSA is doing: *Particularity*.

Recall the text of the Fourth Amendment, and especially the part that I've rendered in bold:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, **and particularly describing the place to be searched, and the persons or things to be seized.**

Barnett argues that last clause of the Fourth Amendment should matter to FISA-court judges ruling on the constitutionality of the NSA's mass surveillance. He refers to the latest FISA-court opinion, written by Judge Rosemary Collyer (my emphasis):

> The paradigm of what the Fourth Amendment prohibited as "unreasonable" in its first sentence was the use of *general* warrants, which is why its second sentence requires that warrants must be particular. And, as USD law professor Donald Dripps has shown, the seizure of papers *for later search for evidence of criminal conduct* was the epitome of an unreasonable search and seizure that was closely akin to general warrants.
>
> In short, she and others like Stewart have failed to come to grips with the following distinction between what was upheld in *Smith* and the unprecedented NSA bulk data seizure program: a particular seizure vs. a general or undiscriminating one. **The unprecedented nature of this program makes it imperative for judges to think carefully before blindly applying some of the language of *Smith* to this new situation**.
>
> It is not "*deviating*" (Judge Collyer's word) from a Supreme Court precedent for a lower court judge to ask whether it should be *extended* to a new situation. Lower court judges are not obligated to take Supreme Court decisions beyond where they have previously gone if there is good reason not to. The Supreme Court needs lower court judges (in adversarial proceedings) to thrash this out among themselves before stepping in to authoritatively decide the question.

Jim Harper of the Cato Institute has also argued persuasively that it is wrongheaded to rest a regime of mass surveillance on the ruling in *Smith v. Maryland*.

With Edward Snowden's revelations, the constitutionality of NSA surveillance has started to be adjudicated in actual courts of law, not just the secret FISA "court" system, with its legitimacy-sapping secrecy and dearth of adversarial proceedings. When the matter reaches the Supreme Court, as it eventually must, Americans who care about privacy should be hoping for a majority opinion written by Justice Sonia Sotomayor, who has published her own critique of *Smith* logic*:*

> ... it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers ...
>
> I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.

Sotomayor is right.