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Fourth Amendment law is at a crossroads

By Jim Harper

In this commentary, Cato's Jim Harper says the Supreme Court needs to carefully consider how police search the contents of cellphones in two huge cases the Justices will hear in April.

The Supreme Court is gradually coming to terms with the effect information technology is having on the Fourth Amendment. In 2001, the *Kyllo* court curtailed the use of high-tech devices for searching homes. In its early 2012 decision in *United States v. Jones*, a unanimous Court agreed that government agents can't attach a GPS device to a vehicle and track it for four weeks without a warrant.

But the Court was divided as to rationale. The majority opinion in *Jones* found (consistent with Cato's brief) that attaching the device to the car was at the heart of the Fourth Amendment violation. Four concurring members of the Court felt that the government's tracking violated a "reasonable expectation of privacy."

What is the right way to decide these cases? Fourth Amendment law is at a crossroads.

The next round of development in Fourth Amendment law may come in a pair of cases being argued in April. They ask whether government agents are entitled to search the cell phone of someone they've arrested merely because the phone has been properly seized. *Riley v. California* and *Wurie v. United States* have slightly different fact patterns, which should allow the fullest exposition of the issues.

Cato's brief in *Riley*, filed this week, again seeks to guide the Court toward using time-tested principles in Fourth Amendment cases. Rather than vague pronouncements about privacy and people's expectations around it, we invite the Court to apply the Fourth Amendment as a law.

"Courts should examine whether there was a seizure or search," the brief concludes, "and whether any such seizure or search was of persons, papers, houses, and effects. If those conditions are met, courts should examine whether the warrantless seizures and searches were reasonable."

The brief argues that the Court should carefully examine the many distinct seizures and searches that occur in the typical law enforcement stop. Crucially, the Court should recognize that the search of a phone is a distinct, additional step from the seizure of the phone that occurs when all items are taken off a suspect for the purposes of officer safety. Looking through the phone's contents requires its own legal justification, and typically, given the massive amounts of personal and private information on a cell phone, that search for additional evidence will require a warrant.

Cato's brief invites the Court to openly discuss a premise that the government and the petitioner share: that a cell phone is an "effect" for purposes of Fourth Amendment analysis. No court we found has yet held this. And the contents of phones are distinct "papers and effects," which serve the same human ends that papers, postal mail, books, drawings, and portraits did in the founding era.

In *Jones*, both the majority and the concurring opinion quoted *Kyllo* in agreeing that the Court should "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." The Cato Institute's brief in *Riley* shows them how to do that.

Cato's brief does not cite *Katz v. United States*, the 1967 case that produced the "reasonable expectation of privacy" test. With luck, the *Katz* test will not survive into its second half-century of weakening Americans' constitutional protections for privacy from government.

Cato senior fellow Jim Harper works to adapt law and policy to the unique problems of the information age, in areas such as privacy, telecommunications, intellectual property, transparency, and security. From 2004 to 2014, Harper was director of information policy studies at Cato. In 2014 he became a Cato senior fellow and global policy counsel at the Bitcoin Foundation.