Supreme Court to decide cops' power to search cell phones

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By Adam Serwer

We call them "phones" out of habit, but the modern cellphone is a powerful personal computer that maintains an extensive record of our private lives and interactions. The Supreme Court will soon decide whether the police need a warrant to search them – or whether being arrested with one could mean forfeiting all the information on your iPhone.

"A cell phone has the same contents that the home did in the founding era, it has digital equivalents of papers, letters, drawings, private financial documents, private medical documents," said Jim Harper, an attorney with the libertarian Cato Institute. "It's a digital incarnation of the contents of the home."

Two separate cases dealing with cell phones come down to whether or not searching your cell phone after an arrest is more like searching your home or your wallet. The Obama administration wants the high court to rule that it's the latter, arguing that encryption technology and remote wiping already make it hard enough for police to glean evidence from cell phones before it's destroyed. Civil libertarian groups say that modern cell phones carry near-infinite amounts of the very "papers and effects" that the Fourth Amendment protects from "unreasonable searches and seizures," and that allowing police to search a cell phone even after an arrest means they could map out a person's entire life without having to even think about asking a judge.

The two cases are technically being heard separately, but both involve violations of the Stringer Bell rule. In one case, San Diego police arrested David Leon Riley for expired tags and found two guns in his trunk. Searching his smartphone, they found evidence of Riley's connection to a local faction of the Bloods street gang, including pictures of Riley himself throwing up gang signs. The police eventually connected Riley to an earlier shooting using the guns in his trunk, and he was convicted on charges of assault and attempted murder.

In the other case, Boston cops arrested Brima Wurie after a suspected drug transaction, and traced a call from "home" on his flip phone. After getting a warrant and searching the apartment,

they found a large stash of crack cocaine. Both defendants are arguing that the search of their cellphones without a warrant violates their Fourth Amendment rights.

The two cases are being heard on the same day, but they're not "consolidated," which suggests the high court may see different legal issues at play in each case. One of these issues could be the relative technology of the phones – Riley had a smartphone with lots of pictures and videos, Wurie had a basic flip phone, which nevertheless contained picture of a woman the police recognized when they went to search the address linked to the number on his phone.

"The pairing of these two cases is so interesting, because even from Wurie to Riley, you see a vast leap in technology and what sort of information you can store on your phone," said Elizabeth Wydra of the Constitutional Accountability Center. "I think you might see the justices see a distinction between the two cases, I don't think they necessarily rise or fall together."

Even so, that gap is shrinking. According to a 2013 survey by the Pew Center, 91% of Americans own cell phones, 55% of whom identified their phones as "smartphones" or phones with advanced technological features like apps and web browsing. Blacks and Latinos were even more likely than whites to say they owned a smartphone. The amount of information such devices can store is staggering – according to the Center for Democracy and Technology and the Electronic Frontier Foundation, at 16 gigabytes, the smallest iPhone model can hold "well over a football field's length of books." Nonetheless, in Riley's case the California superior court concluded that smartphones contained no more personal information "than wallets and purses and address books."

The difference between Riley's smartphone and Wurie's flip phone could lead to different rules for what the police are allowed to do in either case. Yet even though they disagree on what the standard should be, they want the high court to pick one that applies to both types of circumstances.

"There isn't a line you can administer between a smart phone and a dumb phone," said Harper. "On top of that, in the future all phones are going to be smart phones with contents that reveal intimate things about people's lives."

Sometimes it's easy to guess how the Roberts Court will rule, but Fourth Amendment cases are among the hardest to figure out. Conservative Justice Antonin Scalia and Democratic appointed Justice Stephen Breyer have a tendency to switch sides in cases like these. Justices Samuel Alito and Sonia Sotomayor have written opinions that show a much more sophisticated understanding of the effects of modern technology on personal privacy than oral arguments in recent cases might imply.

"I don't know whether Justice Scalia uses an iPhone," Wydra said, "but he certainly understands the Fourth Amendment."