CONSTITUTION Daily
Smart Conversation about the Constitution

The Fourth Amendment: Cars, Phones, and Keys?

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Here's a law-school hypothetical for you: Suppose a gang-banger is pulled over for having expired tags on his car. He has no driver's license, and records show that he has repeatedly driven without a license. The protocol in such situations is to impound the car to prevent him from driving unlicensed again, and the impoundment search reveals that he has guns hidden in the car. He is arrested, patted down, and his possessions seized to secure officer safety during his transportation and booking.

Now suppose that police officers take the gang-banger's car out of the impound yard and drive it around looking for his confederates and for more evidence against him. Can they use the car for this purpose?

If you're like most people, you probably think the answer is: "No." But can you say why?

In two cell-phone-seizure cases headed for Supreme Court argument on Tuesday, Ilya Shapiro and I have argued for a sharp delineation of the property right that government agents seize when they arrest a suspect and take control of his things. They may rightly seize possession of an article, but they may not therefore put that item to whatever use they please.

The first paragraph above describes the facts in *Riley v. California*, on which we briefed the Court last month. Government agents did not use Riley's car to further investigate him, but they twice used his cell phone to gather more evidence of his wrongful behavior.

Though they had properly seized the physical phone, they did not get a warrant to search the phone's contents, and we think that violates the Fourth Amendment. Phones today carry huge amounts of information that are equivalent to the papers, postal mail, books, drawings, and portraits of the founding era, which the Fourth Amendment was designed to protect.

The second case we filed on April 9. It's called *United States v. Wurie*, and it's a similar case, in which arresting officers seized an arrestee's flip-phone. After it received calls identified on the exterior display screen as coming from "my house," they opened his phone and looked to see what the number was so they could learn the address and take their investigation there. We argue that they were entitled to observe and take cognizance of the information the phone put in plain

view, but having seized the phone didn't entitle them to use the phone for further investigation without a warrant—even though it seemed to provide easy access to interesting evidence.

They didn't get a warrant to search at Wurie's house either. They took his keys, which they had also seized upon his arrest, and used them to open the door to the vestibule of his duplex apartment, then test the lock on a second floor residence. The keys unlocked the door of the first-floor apartment, behind which was a woman and her baby.

Possession of those keys didn't entitle government agents to go use them on the doors of two houses, even to turn the locks and confirm or deny their suspicions about Wurie's residency.

The use of the keys is not an issue in the case, but it helps illustrate the difference between possession and use. When an item is taken from an arrestee in the interest of officer safety and preventing destruction of evidence, this does not entitle law enforcement officer's to use it any way they please. Government agent's *use* of Wurie's cell phone to investigate him was an additional seizure beyond the taking of possession that happened when he was arrested. It should have required a warrant because of the volume of personal and private information—digital papers and effects—that cell phones access and store.

It may be easier to argue that cell phones shouldn't be searched without a warrant because that violates a "reasonable expectation of privacy"—and it probably does—but that has not proven to be a constitutional test that courts can reliably administer. It is as likely to produce bad results as good ones because it puts judges in the role of making sweeping statements about societal values rather than determining the facts and law in individual cases.

If we can convince the Court to flex some atrophied property muscles and recognize the difference between taking possession of a thing and making use of it, this could be the basis of stronger Fourth Amendment law, in which the courts apply the terms of the law to the facts of cases rather than pronouncing rules based on soaring, untethered doctrine like the "reasonable expectation of privacy" test.

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