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Lawyers React To Supreme Court's Cellphone Search Ruling

Law360, New York (June 25, 2014, 6:21 PM ET) -- In a major victory for privacy advocates, the nation's highest court found Wednesday that in most circumstances law enforcement officers cannot search information on a detained suspect's cellphone without a warrant. Here, attorneys tell Law360 the significance of the decision.

Jeffrey Alberts, Pryor Cashman LLP
"Riley [v. California] is important because it reveals the Supreme Court's recognition that technical developments in the digital age require rethinking categorical rules governing the ability of law enforcement officers to conduct searches without violating the Fourth Amendment. The court reasoned that recent developments allow people to carry cellphones that are essentially minicomputers, which required changing the categorical rule concerning the search of physical objects in the pockets of an arrestee. This recognition could lead the Supreme Court to reconsider a wide variety of rules governing other types of searches. For example, similar concerns could lead the court to require lower courts to more narrowly tailor search warrants that authorize searches of personal computers connected to remote servers through cloud computing or searches of social networking accounts that aggregate information from a wide variety of sources."

Tillman J. Breckenridge, Reed Smith LLP, Counsel of record on an amicus brief
"The Supreme Court decided Riley and United States v. Wurie today, and unanimously held that the search incident to arrest doctrine does not allow law enforcement officers to search data on cell phones without a warrant. Without the protections this opinion provides, law enforcement officers could have had free reign to search vast swaths of personal, private information accessible through anyone's phone, simply by arresting him or her for any violation as small as driving without a seatbelt or a minor violation of a restraining order. The cases arose out of law enforcement officers, after arresting suspects, viewing data on the phones they had at the time of arrest without a warrant. The court stated if law enforcement officers are concerned with the potential for remote wiping of phones by the arrestee's compatriots, they can place the phone in a Faraday bag to prevent remote wiping. … As a result of this decision, Faraday bags likely will become more prevalent in law enforcement officers' squad cars and pockets, and regular people can feel more secure that a neutral magistrate will be involved before anyone searches their phones after an arrest."

Ted Claypoole, Womble Carlyle Sandridge & Rice LLP
"The U.S. Supreme Court announced a unanimous decision Wednesday — Riley v. California — holding that police must have a warrant to search digital information on a mobile phone seized pursuant to a person's arrest. Non-digital information may still be seized and read by police upon arresting a suspect, but Chief Justice Roberts, writing for the court, held that cell phones differ in both a quantitative and a qualitative sense from other objects that may be carried by an arrestee. Cell phones hold massive

amounts of personal data, often many years' worth, and the phone may access data on remote servers."

Albert Gidari Jr., Perkins Coie LLP
"The court has given a boost to [Electronic Communications Privacy Act] Reform by recognizing that information stored in the cloud is worthy of 4th Amendment protection. The court noted data may be stored in places other than on the device itself and seemed to imply that getting information from a cloud provider requires a warrant: 'Cell phone users often may not know whether particular information is stored on the device or in the cloud, and it generally makes little difference.' Indeed, one might ask whether the court is signaling an end to the third party doctrine."

Adam Golodner, Kaye Scholer LLP
"The court showed it clearly understands advances in technology, and the potential privacy and liberty impacts of new forms of computing and use of data on citizens and the government. The court understood a lot of nuance here, particularly around the quantitative and qualitative qualities of data stored and accessed on current devices, and technical means to affect that data. This is a great example of applying new facts to underlying Constitutional concerns and principles, and it is through that continuing process that the rules of the road in new technology will become clearer. "

Mark Graber, University of Maryland Francis King Carey School of Law
"The near unanimity of the court reflects that this was, at bottom, a very easy case. As Chief Justice Roberts noted, the Fourth Amendment permits a search only to protect the safety of arresting officers and to prevent evidence from being destroyed. Once a cell phone is in the hands of the police, neither of these two factors plays. Moreover, cell phones now contain a treasure trove of information about people, precisely the sort of information that the persons responsible for the Fourth Amendment believed should normally not be open to official scrutiny without a warrant."

Wendee Hilderband, Bass Berry & Sims PLC
"Good for the court. The result seems obvious, but on the slippery slope of Fourth Amendment jurisprudence, the court could have focused on the reduced expectation of privacy we have come to expect when we store personal data alongside dozens of apps designed to collect and transmit that data to third parties. Essentially, the court has afforded our personal data more protection than many of us afford it ourselves. The decision is practical and refreshingly modern. Time will tell whether it has any influence over the privacy controls that govern the mobile app sphere."

Frederick M. Joyce, Venable LLP
"Given the absence of any mention of 'privacy' in the U.S. Constitution, and the existence of at least one strident 'Originalist' on the U.S. Supreme Court, it remains a curiosity that electronic privacy cases seem to be the only ones that get unanimous votes from this court. Still, the manner in which the court arrived at what a majority of Americans would presumably consider to be the correct result suggests that there is a grave risk that someday soon the court's ability to apply outdated privacy laws to increasingly sophisticated technologies will fail. Two years ago in U.S. v. Jones, this court employed common law trespass concepts, of all things, to find that police could not use a GPS device to track bad guys without a search warrant. Today, Chief Justice John Roberts found that a search of the contents of a cellphone without a warrant was unconstitutional under the Fourth Amendment. In his concurring opinion, Justice Samuel Alito points out this legal anomaly: if comparable information happened to be in the suspect's wallet or pockets rather than in his cellphone the evidence would probably have been admissible. Justice Alito now seems to be carrying the tune that Justice Sonia Sotomayor hummed in her concurrence in U.S. v. Jones: U.S. electronic privacy laws are in serious need of modernization. This and other privacy cases suggest that the Supreme Court's ability to apply its precedents to modern

technologies has become increasingly suspect."

Janet Levine, Crowell & Moring LLP
"In an unexpectedly sweeping opinion, a nearly united Supreme Court recognized the Fourth Amendment's protection for digital privacy. Chief Justice Roberts' opinion is grounded on the Founders' abhorrence of general warrants and unparticularized intrusions into our private lives. It highlights the pervasiveness of cell-phone — 'minicomputer' — use, as well as the volume and breadth of data, current and historical, accessible through such devices. Continuing the sea-change started with Justice Sotomayor's concurrence in Jones, and citing to John Adams, the court voices deep concern about providing law enforcement warrantless windows into our lives, and skepticism about the government's officer-safety and risk-of-evidence-destruction rationales. Recognizing the revolutionary nature of modern technology, the court affirms that cell phones are different and tells the government the answer to its concerns is 'simple' — get a warrant."

Don Mitchell, Arent Fox LLP, Filed an amicus brief on behalf of The Liberty Project
"The Supreme Court spoke with a loud and rare unanimous voice in favor of the privacy rights of citizens. No longer are law enforcement authorities permitted to peruse the private contents of one's cellphone even when they have arrested someone — unless a judge approves it. 'Cellphones differ in both a quantitative and a qualitative sense,' the court found, and constitute papers and effects protected from search without a warrant under the Fourth Amendment. The answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple — get a warrant."

Robert Mintz, McCarter & English LLP
"While past decisions regarding warrantless searches have pitted law enforcement safety concerns and the preservation of evidence against individual privacy rights, this ruling is clearly a reaction to the vast amount of detailed personal information that can be stored on smartphone devices. Today, virtually every aspect of a person's private life, from their finances to their medical information, can be stored on these phones. This decision draws a line in the sand limiting opportunities for law enforcement to quickly gain access to this information in favor of the personal privacy rights of arrested individuals."

Tyler Newby, Fenwick & West LLP
"The Supreme Court's unanimous decision today reached the expected outcome of deciding that law enforcement must obtain a warrant before searching the contents of cellphones incident to an arrest. The court's opinion contained sweeping statements on the privacy interests of individuals in the content stored on their phones that provide clues on how the court will address privacy issues on a wide range of electronic privacy issues, including Internet search history, geo-location information, mobile app purchases and cloud storage."

Andy Pincus, Mayer Brown LLP
"The court's ruling is a strong reaffirmation of the Constitution's protection of individuals' privacy against intrusions by the government. In particular, the court makes clear that the Fourth Amendment requires it to take into account the evolution of technology in assessing the intrusion on privacy — and construe the Fourth Amendment's protections to preserve pre-existing privacy. It followed that course in the Jones GPS decision two years ago, and did so again today."

Chas Short, Carlton Fields Jorden Burt
"This is an important pro-privacy decision recognizing the reality that in our digital age, many of us carry smartphones detailing every aspect of our personal and professional lives. This decision prevents law

enforcement from routinely trolling through those details using the excuse of a 'search incident to arrest' to avoid the warrant requirement. Because the court left the door open for police to search cell phone data without a warrant if exigent circumstances required it, it is likely that we will see law enforcement attempt to justify warrantless searches by pointing to concerns about destruction of digital evidence."

Alexander Southwell, Gibson Dunn & Crutcher LLP
"The law and those who enforce it will always struggle to keep up with new challenges presented by modern technology. Today's decision marks an important leap forward in protecting privacy interests arising from cellphone searches upon arrest. While it will require a significant change in tactics, law enforcement can evolve their methods to expedite warrants for such searches. Ultimately, law enforcement should not be hampered significantly by the decision, except by being subject to additional judicial oversight."

--Editing by Emily Kokoll.
