Obama administration asks Supreme Court to back warrantless cell phone searches

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23 August 2013

The Obama administration is seeking the approval of the US Supreme Court for police to search the cell phones of arrested suspects without a warrant. In a petition filed last week, Solicitor General Donald B. Verrilli, Jr. and other government officials argued that warrantless cell phone searches do not violate protections of the Fourth Amendment of the US Constitution against unreasonable searches and seizures.

The Obama Justice Department is moving to overturn a ruling of the First Circuit Court of Appeals in the 2007 arrest of a Massachusetts man suspected of selling crack cocaine. The police seized his "flip" cell phone, noticed that it was receiving calls from a particular caller and then opened the phone to determine the number. This led them to the man's home, where the police found drugs, cash and guns.

The defendant was subsequently tried and convicted, largely on the basis of the evidence obtained through the search of his cell phone. He argued on appeal that the warrantless search was a violation of his Fourth Amendment rights, and earlier this year the First Circuit Court of Appeals ruled that the police should have obtained a warrant before accessing any information on the man's cell phone.

The Obama administration argues that the circuit court's ruling conflicts with several lower court rulings as well as rulings of the Supreme Court, in which police had been given broad leeway to search the possessions of an arrested suspect, including notebooks, calendars and pages.

The government's petition notes that a previous high court ruling held that "items found on the person of an arrestee may be searched incident to a lawful arrest and had emphasized that the rule was designed to avoid case-by-case determinations of whether a particular search incident to arrest was lawful."

The Obama administration's aggressive move to allow such warrantless searches comes in the context of the continual revelations of massive illegal spying by the National Security Agency (NSA), in which the government has secretly compiled vast databases containing private information of the public, including personal emails, web site searches, mobile phone GPS location data, medical records and much more.

Warrantless access to today's "smart" phones would allow police to extract vast personal data about an individual without a warrant, including call logs, phone numbers, text messages and emails, photos, videos, passwords, location data, and more. Information found through such warrantless searches would also violate the constitutional rights of other individuals whose identity and other personal information could be extracted and stored as evidence.

Government claims that these searches are vital to "fight crime" are disingenuous at best. Warrantless searches could be utilized by police to search the cell phones of anti-war or other protesters, or of whistle-blowers or others opposing government policy. It could be used as well against undocumented immigrants picked up in government sweeps to locate their families and associates.

The Obama Justice Department argues that the ability of the police to put criminals, drug offenders in particular, behind bars, would be hampered by the inability to conduct these warrantless searches. They contend that by the time a warrant had been obtained, the content of the phone could be wiped out by the suspect, or remotely by another person, and evidence would be destroyed.

The ruling of the First Circuit Court of Appeals, however, noted that it is "not … particularly difficult"

for police to prevent this from occurring. Police can turn off the device, remove its battery, or place it in a "Faraday enclosure," an aluminum container that blocks the cell phone from receiving wireless signals. The appeals court concluded that concern that evidence on a cell phone could be quickly destroyed was, therefore, merely "theoretical."

The government argued that the circuit court's speculation ignored "the burden on the police of having to traipse about with Faraday bags or [other] technology and having to be instructed in the use of these methods for preventing remote wiping or rendering it ineffectual." Police practices to protect a suspect against unreasonable searches and seizures are thus derided as burdensome traipsing about on the part of police officers.

The government also argued at the time that there was no reason to believe that police conducting the search of cell phones would seize evidence outside the bounds of their investigation. "While officers could arguably have searched [respondent's] entire phone," they wrote, "they limited [the search] to gathering information specific to the ongoing drug investigation, i.e., the location of his residence." In fact, there is no reason to believe that police would not utilize evidence obtained in such searches to implicate the suspect or other individuals in criminal activity disconnected from the immediate arrest.

The Obama administration's petition to allow warrantless searches of cell phones is of a piece with the government's drive to assemble massive databases of personal information on virtually every American, which can be shared between government agencies. According to Reuters reports published earlier this month, information gathered by the NSA is being shared with the Drug Enforcement Agency (DEA), a Justice Department division.

The Special Operations Division (SOD), an interagency unit that includes the DEA, the FBI and the NSA, is using this information to target US citizens for investigation and prosecution, including for narcotics crimes. On the basis of this shared data, police could pull a person over for what appears to be an ordinary traffic stop. This individual could potentially be arrested and prosecuted, never knowing that he or she was the victim of illegal surveillance.