Warrantless Searches of Cell Phone Data

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20 Apr 2011

A report by http://www.thenewspaper.com/news/34/3458.asp from 19 Apr 2011 discusses a practice sanctioned by the Michigan State Police in which officers are equipped with a scanning device that allows them to download all the information contained on a cell phone, including pictures, calling history, and texts. Apparently the State Police are allowed to extract all this data from the cell phone of anyone stopped for minor traffic violations. The ACLU has so far been unsuccessful in finding out what the rules of engagement are, that is, under what circumstances the police actually collect the data, and what it is subsequently used for.

This only shows how far away we have gotten from the Fourth Amendment to the U. S. Constitution (and mirrored by Article I, section 11 of the Michigan state Constitution), which requires a search warrant signed by a judge and supported by an oath in order to conduct a search, with a few exceptions. Apparently the Michigan State Police are both officers and judges, since they apparently can determine entirely on their own when a search is "justified".

Historically, the Fourth Amendment arose after the ratification of the U. S. Constitution in order to ensure that the new federal government did not commit the same abuses against the people that had provoked the Revolutionary War only 30 years earlier. (The Fourth Amendment was not proposed until 25 Sep 1789, and was not ratified by the states until 15 Dec 1791. It was not part of the original Constitution, which was ratified by the required ninth state, New Hampshire, on 21 Jun 1788.) The provocation I am referring to in 1761 was the imposition of "writs of assistance" by the British crown upon the people of Massachusetts.

The "writ of assistance" was first established by the British under Charles II. The main purpose was to aid enforcement of the revenue laws. They were issued by the British Chancellor of the Exchequer (similar to our Secretary of the Treasury) to any officer of the crown. The writ required everyone who was employed in any commerce to cooperate with crown officials to make sure the revenue laws were being obeyed, that is, to ensure duties and excises were being paid, and to suppress smuggling. But, in practice, they were not limited to just operators of customs houses; they applied equally to every person in the colony. They allowed any officer of the crown to conduct a search of any person or premises, without any evidence that any violation of the revenue laws had been committed. Naturally, such a power is easily abused. It is worse than that: they demand abuse, and even if not abused, are a violation of the basic principles of privacy and presumption of innocence. These writs had the effect of turning everyone into a revenue agent of the crown; they could not be challenged; the motivation for a search could not be examined; they subjected everyone to the arbitrary caprice, prejudice, or malice of any minor clerk in the department of revenue. A Massachusetts lawyer named James Otis stated his opposition to the writs in a hearing in Boston in February of 1761, when the writs were being reviewed. He asserted that Parliament had no power to establish such a writ; that they are null and void because no act of Parliament against the constitution is legitimate.

But the chief justice of Massachusetts at that time, Thomas Hutchinson, permitted the writs to be valid and enforceable in Massachusetts. These later turned out to be a major factor in the cause of independence from Great Britain.

In retrospect, one has to give the British their due. At least the Chancellor of the Exchequer took the time and effort to issue a writ of assistance to enforce a particular law. In the state of Michigan, in 2011, we have rank-and-file police officers conducting searches as they please, without regard for any law or the Constitution that they allegedly took an oath to uphold.

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