



The 4th Amendment Expectation of Privacy

- The Supreme Court has long held that we do not have a 4th Amendment expectation of privacy in information we voluntarily publish to the public. They do not have a 4th Amendment expectation of privacy in records created by businesses based upon information voluntarily turned over to the business, including the numbers dialed to make or receive a telephone call.
- This isn't the legal reasoning of the intelligence community. This is the law of the land as handed down by the Supreme Court. And it has been well-settled law for over 30 years.
- In *Smith v. Maryland*, the Supreme Court held that law enforcement's collection of telephone numbers called from a particular telephone line was not a "search" within the meaning of the Fourth Amendment, and thus no warrant was required.
- In making its *Smith* ruling, the Court considered whether the person invoking the protection of the Fourth Amendment could claim a "legitimate expectation of privacy" that has been invaded by government action, and stated that such an inquiry normally addresses two questions: (1) whether the individual has exhibited an actual (subjective) expectation of privacy; and (2) whether the individual's expectation is one that society is prepared to recognize as "reasonable."
- The Court held that the petitioner had no expectation of privacy in the phone numbers he dialed, and even if he did, his expectation was not "legitimate." It cited two reasons for this: First, it is doubtful that telephone users in general have any expectation of privacy regarding the numbers they dial, since they typically know that they must convey phone numbers to the telephone company and that the company has facilities for recording

this information and does in fact record it for various legitimate business purposes. And the use of a home telephone did not affect the Court's analysis. Although perhaps calculated to keep the contents of his conversation private, the use of a home phone is not calculated to preserve the privacy of the number dialed.

- Secondly, the Court opined that, even if the petitioner did harbor some subjective expectation of privacy, this expectation was not one that society is prepared to recognize as "reasonable." This was because, when the petitioner voluntarily conveyed numerical information to the phone company and "exposed" that information to its equipment in the normal course of business, he assumed the risk that the company would reveal the information to authorities.
- And it's the long-standing procedure used by law enforcement every day in criminal investigations. Telephone toll records do NOT require a warrant in criminal investigations because they are not protected by the 4th amendment.
- Despite this, Congress chose to require a court order for telephone call data records in intelligence investigations.
- Unlike grand jury or administrative subpoenas in criminal investigations, which can simply be issued by a prosecutor, a FISA business records order must first be approved by a federal judge.
- And Section 215 orders can only be used to obtain the same type of data that can be acquired through a grand jury subpoena.
- And let's be clear here, the metadata program at issue here does NOT involve any collection of the content of a person's telephone calls. THAT, unlike telephone call data records generated by the phone companies, would require a warrant.