SONIA SOTOMAYOR, JOHN ROBERTS, AND THE RILEY DECISION

In a piece just published at Salon, I look at John Roberts' citation in his Riley v. California decision of Sonia Sotomayor's concurrence in US v. Jones, the opinion every privacy argument has invoked since she wrote it two years ago. I argue Roberts uses it to adopt her argument that digital searches are different.

> A different part of Sotomayor's concurrence, arguing that the existing precedent holding that you don't have a privacy interest in data you've given to a third party "is ill suited to the digital age," has been invoked repeatedly in privacy debates since she wrote it. That's especially true since the beginning of Edward Snowden's leaks. Lawsuits against the phone dragnet often cite that passage, arguing that the phone dragnet is precisely the kind of intrusion that far exceeds the intent of old precedent. And the courts have — with the exception of one decision finding the phone dragnet unconstitutional — ruled that until a majority on the Supreme Court endorses this notion, the old precedents hold.
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> Roberts cited from a different part of Sotomayor's opinion, discussing how much GPS data on our movements reveals about our personal lives. That appears amid a discussion in which he cites things that make cellphones different: the multiple functions they serve, the different kinds of data we store in the same place, our Web search terms, location and apps that might betray political affiliation, health data or religion. That is, in an opinion joined by all his

> colleagues, the chief justice repeats Sotomayor's argument that the sheer volume of this information makes it different.

Roberts' argument here goes beyond both Antonin Scalia's property-based opinion and Sam Alito's persistence-based opinion in US v. Jones.

Which seems to fulfill what I predicted in my original analysis of US v. Jones — that the rest of the Court might come around to Sotomayor's thinking in her concurrence (which, at the time, no one joined).

> Sotomayor, IMO, is the only one ready to articulate where all this is heading. She makes it clear that she sides with those that see a problem with electronic surveillance too.
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> > I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.
> >
> > [snip]
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> > I would also consider the appropriateness of entrusting to the, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent"a too permeating police

> surveillance,”
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> And in a footnote, makes a broader claim about the current expectation of privacy than Alito makes.
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> > Owners of GPS-equipped cars and smartphones do not contemplate that these devices will be used to enable covert surveillance of their movements.
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> Ultimately, the other Justices have not tipped their hand where they’ll come down on more generalized issues of cell phone based surveillance. Sotomayor’s opinion actually doesn’t go much further than Scalia claims to when he says they can return to Katz on such issues—but obviously none of the other Republicans joined her opinion. And all those who joined Alito’s opinion seem to be hiding behind the squishy definitions that will allow them to flip flop when the Administration invokes national security.

Sotomayor’s importance to this decision likely goes beyond laying this groundwork two years ago.

There’s evidence that Sotomayor had a more immediate impact on this case. In a recent speech — as reported by Adam Serwer, who recalled this comment after yesterday’s opinion — Sotomayor suggested she had to walk her colleagues through specific aspects of the case they didn’t have the life experience to understand.

> *The Supreme Court has yet to issue opinions on many of its biggest cases this term, and Sotomayor offered few hints about how the high court*

> *might rule. She did use an example of a recent exchange from oral argument in a case involving whether or not police can search the cell phones of arrestees without a warrant to explain the importance of personal experience in shaping legal judgments.*
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> *"One of my colleagues asked, 'who owns two cell phones, why would anybody?' In a room full of government lawyers, each one of them has two cell phones," Sotomayor said to knowing laughter from the audience. "My point is that issue was remedied very quickly okay, that misimpression was."*
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> *The colleague was Chief Justice John Roberts, who along with Justice Antonin Scalia, seemed skeptical during oral arguments in Wurie v. United States that anyone but a drug dealer would need two cell phones.*
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> "That's why it's important to have people with different life experiences," Sotomayor said. "Especially on a court like the Supreme Court, because we have to correct each other from misimpressions."

In my Salon piece, I suggest that some years

from today, some Court observer (I had Jeffrey Toobin in mind) will do a profile of how Sotomayor has slowly brought her colleagues around on what the Fourth Amendment needs to look like in the digital age.

> I come away from this opinion with two strong hunches. First, that years from now, some esteemed court watcher will describe how Sonia Sotomayor has gradually been persuading her colleagues that they need to revisit privacy, because only she would have written this opinion two years ago.

Of course, it likely took Roberts writing the opinion to convince colleagues like Sam Alito. Roberts wrapped it up in nice originalist language, basically channeling James Madison with a smart phone. That's something that surely required Roberts' stature and conservatism to pull off.

But if this does serve as a renewed Fourth Amendment, with all the heft that invoking the Founders gives it, I'll take it.