WHEN THE GOVERNMENT COMES KNOCKING, WHO HAS YOUR BACK?

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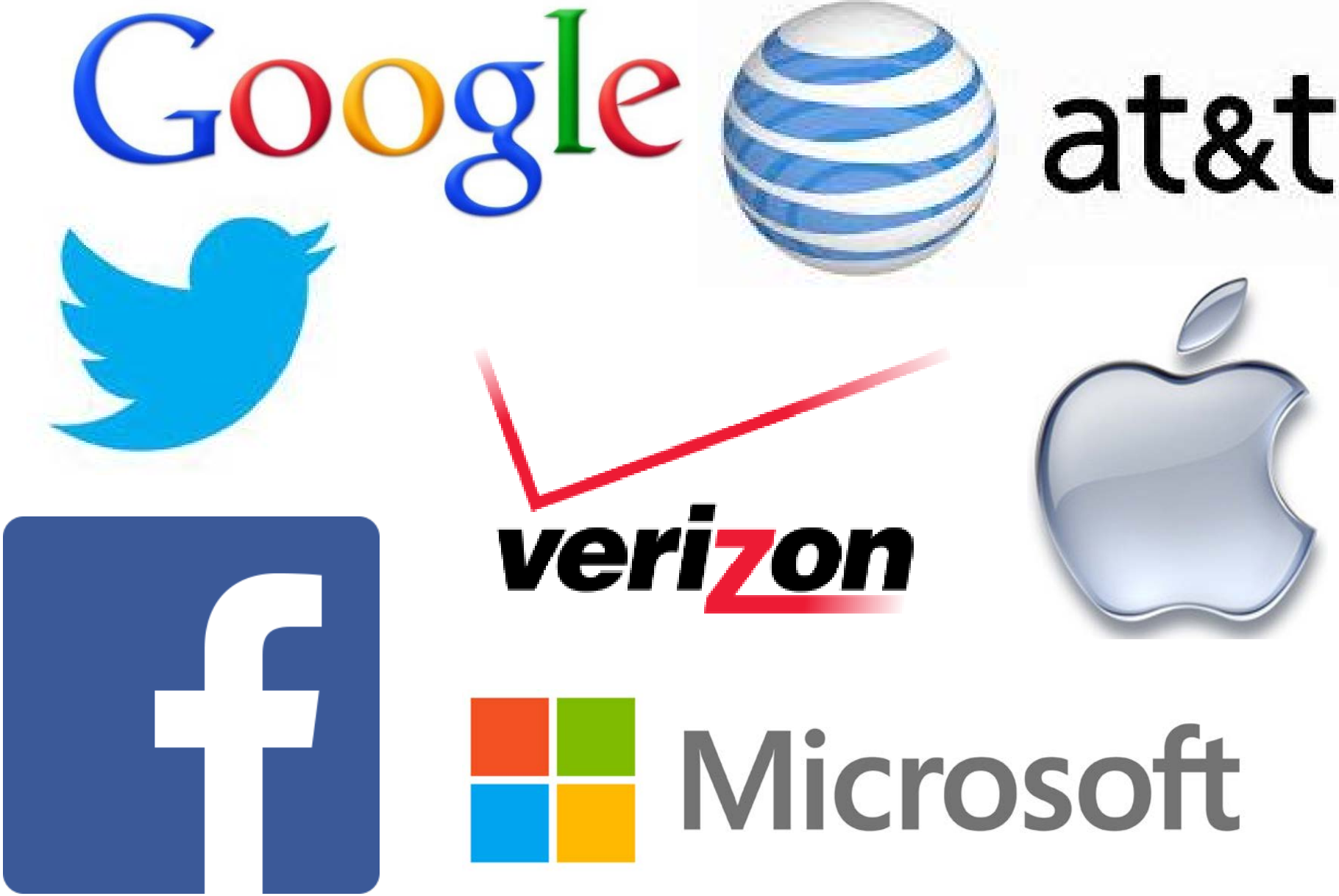
Google
at&t
verizon
Microsoft

WHO Has Your Back?

Which companies help protect your data from the government?

	Requires a warrant for content	Tells users about government data requests	Publishes transparency reports	Publishes law enforcement guidelines	Fights for users' privacy rights in courts	Fights for users' privacy rights in Congress
amazon	☆	☆	☆	☆	★	★
Apple	☆	☆	☆	☆	☆	★
at&t	☆	☆	☆	☆	☆	★
comcast	☆	☆	☆	★	★	☆
Dropbox	★	★	★	★	☆	★
facebook	★	☆	☆	★	☆	★
foursquare	★	★	☆	★	☆	★

https://www.eff.org/who-has-your-back-2013

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Issue

"The Court argues—and I agree—that 'we must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. . .' But it is almost impossible to think of late–18th-century situations that are analogous to what took place in this case."

- *US v. Jones*, 132 S. Ct. 945, 958 (2012) (Alito, J., concurring in the judgment)

"Search" Defined

- Subjective expectation of privacy that society is prepared to recognize as reasonable; or
  - *Katz v. US*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)
- Physical occupation of private property for the purpose of obtaining information
  - *US v. Jones*, 132 S. Ct. 945, 949 (2012)

"Aggregation"

- "…foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."
  - *Kyllo v. US*, 533 U.S. 27, 33-34 (2001)
- "…meaning of a Fourth Amendment search must change to keep pace with the march of science."
  - *US v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007)

"Aggregation"

- "whether something is 'expose[d] to the public,' *Katz*, 389 U.S. at 351, depends not upon the theoretical possibility, but upon the actual likelihood, of discovery by a stranger."
- Even if a person can reasonably expect to reveal some information to the public, aggregating that information may reveal "more" than "the sum of its parts" in a way not reasonably expected
  - *US v. Maynard*, 615 F.3d 544, 559-60 (D.C. Cir. 2010)

"Aggregation"

- GPS evidence
  - *Maynard*, 615 F.3d at 559-670; *Comm. v. Rousseau*; 990 N.E.2d 543 (2013); *State v. Zahn*, 812 N.W.2d 490 (S.D. 2012); *People v. Weaver*, 909 N.E.2d 1195 (2009)
- Cell phone searches incident to arrest
  - *Compare US v. Wurie*, --- F.3d ----, 2013 WL 2129119 (1st Cir. 2013) *with Silvan W. v. Briggs*, 309 Fed. Appx. 216, 225 (10th Cir. 2009) (unpublished)
- Computer Searches
  - *US v. Carey*, 172 F.3d 1268 (10th Cir. 1999)

Computer Searches

- "The potential for privacy violations occasioned by an unbridled, exploratory search of a hard drive is enormous. This threat is compounded by the nature of digital storage."
  - *US v. Galpin*, 720 F.3d 436, 447 (2d Cir. 2013)
- "'…warrants for computer searches must *affirmatively limit* the search to evidence of specific federal crimes or specific types of material.'"
  - *US v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009) (quoting *US v. Riccardi*, 405 F.3d 852, 862 (10th Cir. 2005))

Computer Searches

- Magistrates have authority to impose *ex ante* conditions on execution of a search warrant in order to avoid a general warrant
  - *In re Appeal of Application for Search Warrant,* 71 A.3d 1158 (Vt. 2012); *see also US v. Comprehensive Drug Testing*, 621 F.3d 1162 (9th Cir. 2010) (en banc) (per curiam)
- "…even if courts do not specify particular search protocols up front in the warrant application process, they retain the flexibility to assess the reasonableness of the search protocols the government actually employed in its search after the fact."
  - *US v. Christie*, 717 F.3d 1156, 1167 (10th Cir. 2013)

A Word on Trespass…

"…introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that. . .To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to — well, call the police. The scope of a license — express or implied — is limited not only to a particular area but also to a specific purpose."

- *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013)

Trespass

- Consent to a trespass is invalid if the trespasser knew or should have known "the plaintiff was mistaken as to the nature and quality of the invasion intended."
  - *Theofel v. Farey-Jones*, 359 F.3d 1066, 1073 (9th Cir. 2003) (quoting Prosser and Keeton on the Law of Torts § 18, at 119 (W. Page Keeton ed., 5th ed. 1984))

Video Surveillance

- "Admittedly, any invitee has the ability to describe events occurring within the privacy of another's residence, a risk borne by the dweller of any residence. However, the dweller of a residence does not expect that an invitee would videotape events occurring inside his or her residence without his or her consent."
  - *Commonwealth v. Dunnavant*, 63 A.3d 1252, 1256 (Pa. Sup. 2013); *but see US v. Wahchumwah*, 710 F.3d 862 (9th Cir. 2012)

Only One Problem…

3rd Party Doctrine

- No reasonable expectation of privacy in information disclosed to a third party
  - *US v. Miller*, 425 U.S. 435 (1976)
  - *Smith v. Maryland*, 442 U.S. 735 (1976)
- Insufficient statutory protection to fill the void
  - Warrant required to access unopened communications in “electronic storage” for less than 180 days
    - 18 U.S.C. § § 2703(a) and (b)

3rd Party Doctrine

- Used to defeat expectations of privacy in
  - Historical cell site information
    - *In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013)
  - Internet "subscriber" and routing information
    - *United States v. Perrine*, 518 F.3d 1196 (10th Cir. 2008)
    - *United States v. Forrester*, 512 F. 3d 500 (9th Cir. 2007)
  - Social media metadata
    - *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. 2703(d),* 830 F.Supp.2d 114 (E.D.Va. 2011)

Cracks in the Doctrine?

- "…our holding…does not imply that more intrusive techniques or techniques that reveal more content information are also constitutionally identical to the use of a pen register."
  - *Forrester*, 512 F.3d at 511
- "I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."
  - *Jones*, 132 S.Ct. at 957 (Sotomayor, J., concurring)

Limiting *Smith*

- Not a bright line rule
  - *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Bond v. US*, 529 U.S. 334 (2000); *US Dept. of Justice v. Reporters Committee*, 489 U.S. 749 (1989)
- Less invasive information revealed
  - Quality of the information
  - Just discrete, not “aggregated” information

Limiting *Smith*

- Greater knowledge re: phone call records
- Information voluntarily disclosed by active action
  - "Depending on the circumstances or the type of information, a company's guarantee to its customers that it will safeguard the privacy of their records might suffice to justify resisting an administrative subpoena."
    - *US v. Golden Valley*, 689 F.3d 1108, 1116 (9th Cir. 2012)

Promising Results

- Reasonable expectation of privacy in:
  - E-mail
    - *US v. Warshak*, 631 F.3d 266 (6th Cir. 2010); *US v. Ali*, 870 F.Supp.2d 10 (D.D.C. 2012); *In re Applications for Search Warrants*, 2013 WL 4647554 (D. Kan. 2013)
  - Private Facebook messages
    - *R.S. ex rel. S.S. v. Minnewaska Area School Dist. No. 2149*, 894 F.Supp.2d 1128 (D. Minn. 2012)
  - Historical cell site information
    - *State v. Earls*, 70 A.3d 630 (N.J. 2013)

Questions?

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