Privacy in the Cellular Age

Do people have a right to privacy in a closed telephone booth? In 1967, the Supreme Court said they do and prohibited government eavesdropping there without a warrant. But what about a cellphone with no booth? What about a phone that also sends messages, scours the Internet and records your exact location?

Technology is evolving too quickly to fit into easy legal formulas. In an opinion issued on Thursday, the Supreme Court told government employees that they cannot expect privacy when using government machines, but, thankfully, did not remove the expectation of privacy for most other users of electronic communication.

The case was about an Ontario, Calif., police sergeant, Jeff Quon, who had been given a text-messaging device by his department. The department had made it clear that officers had no right to expect privacy when using city computers, though it was not explicitly stated that this rule also applied to text messages.

When department officials considered raising the quota of free messages, they asked the wireless company for a transcript of texts from Sergeant Quon and another employee. In the course of that review, Sergeant Quon’s superiors discovered that most of his messages were not official but personal, some of them sexual suggestions to his wife and his mistress.

Sergeant Quon sued the city, saying this search was illegal under the Fourth Amendment. The United States Court of Appeals for the Ninth Circuit upheld his position. The Supreme Court unanimously reversed that decision, but its opinion, written by Justice Anthony Kennedy, was deliberately narrow.
It made clear that for now such searches are considered legal only when the employer is a government agency, when the employee is using government equipment and had been warned not to expect privacy, and when the search was conducted for a legitimate work-related purpose.

Justice Kennedy wisely resisted using the case to impose a sweeping new privacy doctrine on electronic communication, even when a device is owned or paid for by an employer. The impact of this technology on society is changing too rapidly to be the subject of a judicial fiat now, he said. Cellphones are widely considered essential means of self-expression, he pointed out, but the phones are so cheap that employees can afford to buy their own.

It is clear now that government employees should not assume their messages are private when using government equipment. Private employees should think twice when doing the same thing on office equipment, because many employers maintain the right to inspect all such messages. The government should always be required to get a warrant before rummaging through the messages of private citizens, whether on computers or phones. The court must keep that phone booth intact.