New Technology Meets Old Precedents

What Recent Supreme Court Decisions Mean for Business

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Justice Frankfurter in 1944:

The Court must tread carefully in cases considering new innovations "to ensure that we do not embarrass the future."
Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 300 (1944).

Carpenter v. United States

- Criminal case with non-criminal privacy implications.
  - Detroit police used cell phone location information obtained from MetroPCS without a warrant to place suspect at location of armed-robberies of RadioShack.
- 5-4 decision holding that the federal government needs a warrant to access cellphone location records.
  - Roberts, Ginsburg, Sotomayor, Kagan, and Breyer majority
  - Voluminous dissents by conservative block, generally resisting privacy rights and potentially overruling "reasonable expectation of privacy test" (Thomas)
  - Kennedy replacement would not have made difference, but Garland instead of Gorsuch may have resulted in much broader decision
- Overturns precedent that people can't have expectation of privacy for information that they voluntarily turn over to a third party, like a phone company.
  - *United States v. Miller*, 425 U.S. 435 (1976) (bank records); *Smith v. Maryland*, 442 U.S. 735 (1979) (dialed telephone numbers).

Carpenter v. United States (cont'd)

- Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security.

South Dakota v. Wayfair

- *Quill* (1992) upheld *Bella Hess*, which required physical presence in state to impose sales tax.
  - Scalia, Kennedy, and Thomas based their decision solely on stare decisis.
- 5-4 decision overruling 1992 ruling that said sellers only had to collect state sales taxes if they had a physical presence in the state.
  - Majority (Kennedy, Thomas, Ginsburg, Gorsuch, Alito); Dissent (Roberts, Kagan, Sotomayor, Breyer)
- States and brick and mortar retailers complained that the physical connection rules in *Quill* put them at unfair disadvantage.
- States can now require retailers to collect state sales taxes on their transactions, whether they have presence in state or not.
- GAO estimates that state and local governments could have collected up to $13 billion more in 2017 had they been allowed to require sales tax payments from online sellers.

From J. Kennedy's *Wayfair* Majority Opinion:

- **It's just plain wrong.** Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause.
- First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be "applied to an activity with a substantial nexus with the taxing State." Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow.
- **Worse still, the rule produces an incentive to avoid physical presence in multiple States.** Distortions caused by the desire of businesses to avoid tax collection mean that the market may currently lack storefronts, distribution points, and employment centers that otherwise would be efficient or desirable. The Commerce Clause must not prefer interstate commerce only to the point where a merchant physically crosses state borders. Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court's precedents.
- **The *Quill* Court itself acknowledged that the physical presence rule is "artificial at its edges."** That was an understatement when *Quill* was decided; and when the day-to-day functions of marketing and distribution in the modern economy are considered, it is all the more evident that the physical presence rule is artificial in its entirety.

From C.J. Roberts' *Wayfair* Dissent:

- ***Quill* is Precedent:** This is neither the first, nor the second, but the third time this Court has been asked whether a State may obligate sellers with no physical presence within its borders to collect tax on sales to residents. Whatever salience the adage "third time's a charm" has in daily life, it is a poor guide to Supreme Court decision-making. If stare decisis applied with special force in *Quill*, it should be an even greater impediment to overruling precedent now, particularly since this Court in *Quill* "tossed [the ball] into Congress's court, for acceptance or not as that branch elects."
- **This is going to be complicated:** Over 10,000 jurisdictions levy sales taxes, each with "different tax rates, different rules governing tax-exempt goods and services, different product category definitions, and different standards for determining whether an out-of-state seller has a substantial presence" in the jurisdiction. A few examples: New Jersey knitters pay sales tax on yarn purchased for art projects, but not on yarn earmarked for sweaters. Texas taxes sales of plain deodorant at 6.25 percent but imposes no tax on deodorant with antiperspirant. Illinois categorizes Twix and Snickers bars—chocolate and-caramel confections usually displayed side-by-side in the candy aisle—as food and candy, respectively (Twix have flour; Snickers don't), and taxes them differently.
- **The burden will fall disproportionately on small businesses.** One vitalizing effect of the Internet has been connecting small, even "micro" businesses to potential buyers across the Nation. People starting a business selling their embroidered pillowcases or carved decoys can offer their wares throughout the country—but probably not if they have to figure out the tax due on every sale. And the software said to facilitate compliance is still in its infancy, and its capabilities and expense are subject to debate. The Court's decision today will surely have the effect of dampening opportunities for commerce.
- I fear the Court today is compounding its past error by trying to fix it in a totally different era. I would let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century.

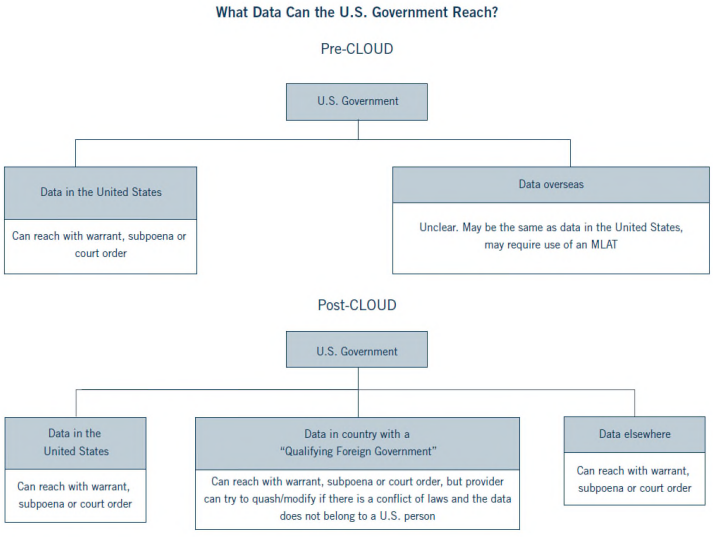
The CLOUD Act—Congressional Enactment Mooted Pending Case in *United States v. Microsoft*

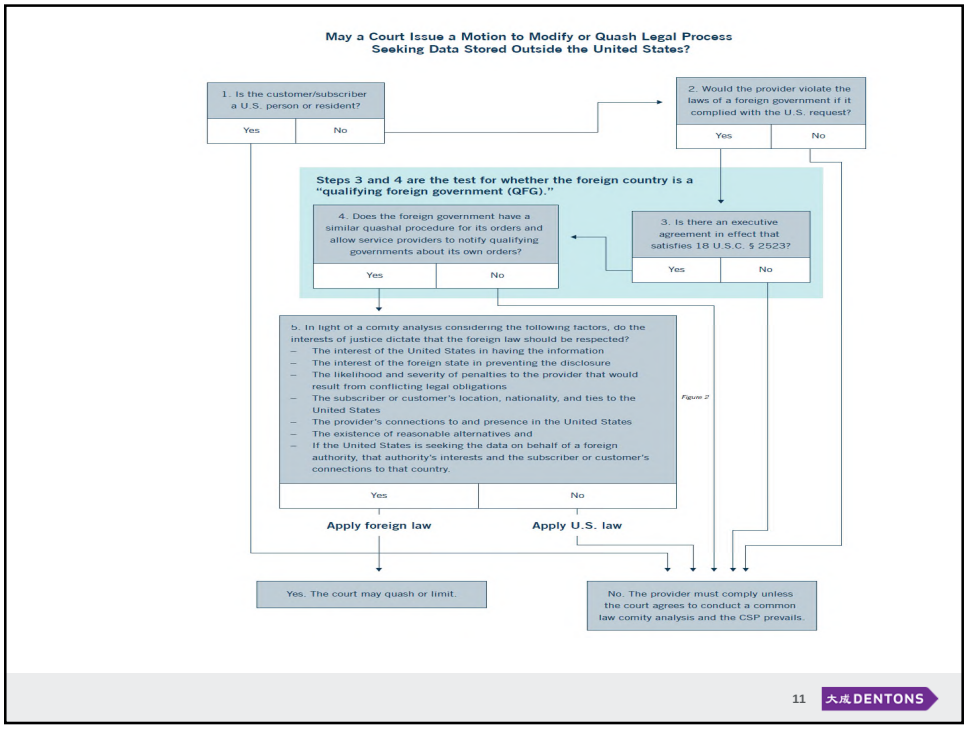
- Question before Court was whether a U.S. technology company can refuse to honor a court-ordered U.S. search warrant seeking information that is stored at a facility outside the United States.
- Congress enacted CLOUD Act (as part of massive spending bill), thereby mooting the Supreme Court case.
- "Clarifying Lawful Overseas Use of Data"--Perfect Acronym

The CLOUD Act Made Four Major Changes to U.S. Law:

- U.S. law enforcement agencies (both federal and state) now have express legal authority to seek electronic data in the possession, custody or control of U.S. electronic communications and cloud companies regardless of where the data is physically stored.
- U.S. cloud providers (not the owners of the data) can seek to quash or modify a request for data of a non-U.S. person when the disclosure would violate the laws of a "qualifying foreign government."
- The Act proposes a legal framework — subject to congressional disapproval but not judicial oversight — by which data sharing executive agreements can be entered into with foreign governments certified by the U.S. Attorney General as having similar legal protections as the United States with respect to civil liberties, judicial process, data privacy and cybersecurity.
- Countries certified by the Attorney General (and not overturned by Joint Resolution of Congress) can seek disclosure of data held by U.S. cloud companies in the United States for criminal investigations without U.S. oversight or cooperation.

CLOUD Act:





Upcoming this term: *Apple v. Pepper*

- A group of iPhone buyers are claiming that Apple's App Store artificially inflates the prices of apps because all developers must go through a single store that takes a cut of their revenue. The buyers argue that Apple has established an unlawful monopoly over iOS apps, and they're asking the courts to make Apple allow third-party iOS apps, in addition to repaying every iOS user it's overcharged in the past.
- The Ninth Circuit held that the plaintiffs have standing against Apple because they are direct purchasers from Apple.
- In 1998, Eighth Circuit rejected concertgoers who sued Ticketmaster for driving up ticket prices, saying that Ticketmaster was actually selling distribution services to concert venues. The concertgoers were not its customers. The Ninth Circuit's opinion explicitly says that decision was wrong.
- Outcome could open door for users to pursue claims, as customers, against other providers such as eBay, Etsy, Amazon's Marketplace division, secondary ticketing site StubHub and Google Play, the app store for Android smartphones.

Other unresolved legal/technology issues that are lurking for future review?

Questions?

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