



UPDATE: Supreme Court Takes Fourth Amendment Case about Cell Phone Location Data

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*Update: On June 22, 2018, the Supreme Court [held](#) in a 5-to-4 decision in *Carpenter v. United States* that government acquisition of historical cell site location information (CSLI) constitutes a Fourth Amendment search. The Court further held that the government needs a warrant supported by probable cause—not merely a court order under the Stored Communications Act—to acquire historical CSLI in most circumstances. The majority opinion, authored by Chief Justice Roberts and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, [concluded](#) that “an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.” A central issue in the case concerned the viability of the Court’s third-party doctrine, which generally recognizes that no reasonable expectation of privacy exists as to information that a person discloses voluntarily to third parties. The majority in *Carpenter* reasoned that the third-party doctrine, which developed in cases holding that individuals have no reasonable expectation of privacy in the telephone numbers that they dial or in financial records held by their banks, [does not apply](#) to CSLI, because “[t]here is a world of difference between the limited types of personal information addressed in [those cases] and the exhaustive chronicle of location information casually collected by wireless carriers today.” The Court recognized, however, that certain exceptions to the warrant requirement, including the exception for ongoing emergencies, remain in place and will likely allow law enforcement to obtain CSLI without a warrant in some circumstances.*

*Justices Kennedy, Thomas, Alito, and Gorsuch dissented and each wrote separate dissenting opinions. Justices Kennedy, Thomas, and Alito argued, to varying degrees, that *Carpenter* did not have a demonstrated property interest in the CSLI held by his wireless carriers and that no violation of his Fourth Amendment rights therefore occurred when the government obtained the CSLI from the carriers without a warrant. Justice Gorsuch also focused on property interests as a key consideration in applying*

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the Fourth Amendment, but he appeared on the verge of determining that provisions of the Telecommunications Act that protect the privacy of CSLI gave Carpenter a property right sufficient to shield his CSLI from unreasonable government search. Justice Gorsuch ultimately concluded, however, that Carpenter had failed to preserve this argument. Justices Kennedy and Alito made the additional argument that, even if the government's acquisition of Carpenter's CSLI constituted a search, the procedure that the government followed in obtaining the CSLI through a court order under the Stored Communications Act was "reasonable" and therefore did not violate the Fourth Amendment. Multiple dissenters also pointed out various issues that the majority opinion arguably leaves unresolved, such as the extent to which the Court's ruling will apply to document subpoenas or to government acquisition of prospective CSLI that allows law enforcement to track a suspect in real time.

The original post from June 27, 2017, previewing the Carpenter case is reprinted below.

On June 5, 2017, the U.S. Supreme Court granted certiorari in *Carpenter v. United States* to determine if the government's collection of cell phone location information without a warrant violates the Fourth Amendment of the U.S. Constitution. The case could decide whether cell phone users have a protected Fourth Amendment privacy interest in the trove of location data held by their wireless carriers.

The petitioner in *Carpenter* was convicted of a series of robberies. At trial, in order to tie the defendant to the general location where the robberies took place, the government presented data about the towers to which his cell phone connected during calls. Such data is known as cell site location information (CSLI). Instead of getting a warrant, the government obtained Carpenter's CSLI from his wireless carrier under Section 2703(d) of the Stored Communications Act (SCA). That provision allows the government to obtain a court order for wire or electronic communication records by offering "specific and articulable facts showing that there are reasonable grounds to believe" that the records "are relevant and material to an ongoing investigation." This is a lower threshold than the probable cause needed for a warrant, which requires the government to show that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Carpenter moved to exclude the CSLI evidence on Fourth Amendment grounds, but the trial court denied the motion and the Sixth Circuit Court of Appeals (Sixth Circuit) affirmed.

The Fourth Amendment prohibits "unreasonable searches and seizures," which generally means that the government must obtain a warrant supported by probable cause before conducting a "search." Since the landmark 1967 Supreme Court case *Katz v. United States*, it has been recognized that a "search" occurs if a government investigative measure violates a person's reasonable expectation of privacy. Thus, to use the facts in *Katz* as an example, law enforcement officers may not attach a device to a telephone booth to listen to a suspect's conversations without a warrant. The Court in *Katz* found that, inside the phone booth, a person reasonably believes that his conversation is private, and the government therefore needs a warrant to eavesdrop with a listening device.

Importantly, however, the Court has held that no reasonable expectation of privacy exists as to information that a person discloses voluntarily to third parties. Thus, the Court determined in a 1979 case that police do not violate the Fourth Amendment if, without a warrant, they ask a telephone company to install a "pen register" in its central office to record the phone numbers dialed from a suspect's home phone. The suspect voluntarily conveys the numbers to the phone company when he dials them and therefore cannot reasonably expect them to remain secret, the Court reasoned. Similarly, the Court held in 1976 that police do not violate the Fourth Amendment by obtaining microfilms of a suspect's account statements and deposit slips from his bank without a warrant, because the suspect has voluntarily disclosed the information contained in those documents to the bank.

In *Carpenter's* case, the Sixth Circuit held that the government's warrantless collection of the CSLI did not constitute a Fourth Amendment search under these third-party disclosure cases. Just as a person does not have a protected privacy interest in dialed phone numbers, the circuit court reasoned, Carpenter did

not have a protected interest in the location data that his phone transmitted to his carrier. The court framed the distinction as one between the “content of personal communications” and “routing information”: a reasonable expectation of privacy generally exists as to the first but not the second type of information.

The Sixth Circuit decision aligns with decisions of [other federal appellate](#) courts. But [some judges](#) on these courts, while accepting that the Supreme Court’s third-party cases require lower courts to hold that the warrantless collection of CSLI does not violate the Fourth Amendment, nonetheless have questioned whether precedent about phone booths, pen registers, and microfilm provides an adequate framework for analyzing privacy expectations in the smartphone era. One of the Sixth Circuit judges who decided *Carpenter* went even further. In a [concurring opinion](#) expressing disapproval of “the nature of the tests [courts] apply in this rapidly changing area of technology,” the judge declined to apply the third-party cases. Instead, she assumed, without deciding, that a Fourth Amendment violation had occurred but voted to uphold *Carpenter*’s convictions on an independent ground.

Ultimately, only the Supreme Court can determine whether its third-party disclosure precedents should be retained, discarded, or modified to account for technological developments. The Court has considered Fourth Amendment [cases](#) about searches in the context of more modern technology in recent years, but it has largely avoided making major doctrinal pronouncements. In perhaps the most relevant such case, *United States v. Jones*, the Court held that police violated the Fourth Amendment by attaching a GPS tracking device to a suspect’s vehicle to track his movements for 28 days. The majority opinion did not conduct a privacy analysis under *Katz*. Instead, it made a much more limited holding under a theory of trespass: that a Fourth Amendment violation occurred when the police physically attached the GPS device to the vehicle without the suspect’s consent. However, five justices authored or joined [concurring opinions](#) indicating that, had the case required application of *Katz*, they would have determined that the warrantless tracking violated the suspect’s reasonable expectations of privacy. These concurring votes in *Jones* suggest that a majority of the justices could see *Carpenter* as a case raising clear privacy concerns, rather than a simple case under the third-party disclosure doctrine.

However the Supreme Court decides *Carpenter*, the case could prompt the Justices to call for congressional action. Justice Alito made such a call in his concurring opinion in *Jones* when he argued that the legislative branch is in the best position to balance privacy concerns against law enforcement requirements, particularly in “[circumstances involving dramatic technological change](#).” As the prime example of such legislative balance, he pointed to [Title III of the Wiretap Act](#), which largely displaced constitutional case law in setting boundaries on law enforcement use of wiretaps. The SCA—the statute under which the government obtained the court orders for *Carpenter*’s CSLI after demonstrating “reasonable grounds to believe” that the data would be relevant to the robbery investigation—appears to be a similar example of legislative balance. But the SCA was enacted in 1986 and has not undergone substantive amendment since 1994, which was before cell sites gained their current ubiquity on the American landscape. Bills currently in the [House and Senate](#) propose updated rules for government access to the content of electronic communications, but those bills would not change the SCA standard for obtaining non-content records such as CSLI. Whether the SCA strikes a compelling legislative balance between the privacy concerns and law enforcement interests implicated by modern CSLI collection is a question likely to figure prominently in the Supreme Court’s decision.