

Resources

Supreme Court Debates Fourth Amendment Privacy Rights in *Carpenter*

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The Supreme Court, in recent years, has addressed the intersection of technology with the long-established principles of the Fourth Amendment that protect individual privacy. Last month, the Court heard oral argument for another Fourth Amendment privacy case, *Carpenter v. United States*, No. 16-402, on appeal from the U.S. Court of Appeals for the Sixth Circuit, *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), which questions whether cell site location records require a probable cause warrant, or simply a subpoena under the Stored Communications Act, 18 U.S.C. §§ 2701 et. seq. The oral argument showed the Court's range of opinions on privacy as it seeks to apply the Fourth Amendment to the increasing use of electronic means for third parties to transmit and store personal information.

The Oral Argument

The Court focused its questions on how Petitioner proposed the Court distinguish this case from *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979), in which the Court established the third-party doctrine. Under the third-party doctrine, information that individuals voluntarily provide to third parties, such as bank records or cancelled checks, can be subpoenaed by the Government without a warrant because the individual has no legitimate reasonable expectation of privacy in the information.

In *Miller*, the Supreme Court held the respondent had no Fourth Amendment interest in subpoenaed bank records. Because those records were voluntarily conveyed to a bank, any expectation of privacy was eliminated. Similarly, in *Smith*, the Court held that no privacy expectations were invaded when a telephone company installed a pen register at its office to record dialed telephone numbers from the petitioner's home. Since the telephone numbers were automatically transmitted to the telephone company, a third party, there was not any reasonable privacy expectation.

Here, Petitioner unsuccessfully tried to distinguish the third party doctrine based on the length of time cell site location records were accessed. None of the Justices looked favorably on this proposed rule. Chief Justice Roberts explicitly stated that "the line is between information to which the authorities have access and information to which they don't" and that he did not understand focusing on a time limit. Oral Argument Transcript, *Carpenter v. United States*, No. 16-402, at 11 (Nov. 29, 2017).

Counsel for Respondent, the United States of America, argued that the "well-developed" third-party doctrine is on point. The Government stressed that the "technology here is new, but the legal principles that this Court has articulated under the Fourth Amendment are not." *Id.* at 40. The Court should defer to Congress to determine how privacy expectations are to be established in light of rapidly changing technology.

Justice Kagan argued that the information requested here, cell site location data, was even more sensitive than information obtained from a GPS tracker. She asked the Government if it was arguing that, regardless of the sensitivity of information and lack of voluntariness, the Government could nonetheless obtain information from third-party providers. The Government responded that while the sensitivity of the information did not matter, voluntariness was still important and was present in this case. Justice Alito commented that overruling the Sixth Circuit's ruling would be "revolutionary" and would "fundamentally change the understanding of the application of the Fourth Amendment to subpoenas." *Id.* at 86.

The Impact of *Carpenter*

The Supreme Court's decision in *Carpenter* will be another tile in the mosaic of balancing privacy expectations with government investigations. It will likely determine the applicability of the third-party doctrine to electronically-stored information on the "cloud" or other servers. If the Court overturns the Sixth Circuit's ruling, the government could lose a major investigative tool. However, if the Court affirms the Sixth Circuit's ruling, the government will potentially have access to increasingly personal information.

Supreme Court Debates Fourth Amendment Privacy Rights in *Carpenter* (Cont.)

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Practice Areas

Privacy and Data Security

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