"Seismic Shifts in Digital Technology:" Supreme Court Creates Exception to Third-Party Doctrine for Cell-Site Location Information

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After not disturbing the Third-Party Doctrine for more than 40 years, the Supreme Court created a significant exception to it in *Carpenter v. United States*. Slip Op., 16-402 (Jun. 22, 2018). Under the Third-Party Doctrine, individuals who voluntarily provide personal information to third parties are deemed to relinquish their legitimate reasonable expectation of privacy in that information. The Court had previously held that this doctrine applied even where the business records contained sensitive personal information, such as bank records and telephone numbers dialed from a personal line. *United States v. Miller*, 425 U.S. 435 (1976); *Smith v. Maryland*, 442 U.S. 735 (1979).

However, in *Carpenter*, in a 5-4 opinion with four separate dissents, the Court ruled that the Government needs to secure a warrant to obtain cell-site location information ("CSLI"), despite the fact that these records belong to and are retrieved from a third party, a cell phone provider. In *Carpenter*, the Government had obtained a Section 2703(d) order under the Stored Communications Act, 18 U.S.C. 2701, et seq. ("SCA"), which only requires a showing of "reasonable grounds," for Carpenter's CSLI to confirm his location during a string of armed robberies. Carpenter challenged the use of this information, claiming that it violated his Fourth Amendment rights. While the trial court agreed with Carpenter, the Court of Appeals for the Sixth Circuit held that the Government did not violate the Fourth Amendment under the Third-Party Doctrine. *United States v. Carpenter*, 819 F.3d 880, 888 (6th Cir. 2016).

Writing for the majority, Chief Justice John Roberts, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, reasoned that requests for CSLI "lie at the intersection of two lines of cases": (1) those concerning a person's expectation in the privacy of his physical location and movements; and (2) those establishing the Third-Party Doctrine. Slip Op. at 7-10. In the physical location privacy cases, the Court has held that while a person does not have a reasonable expectation of privacy in discrete physical movements in a public space, *United States v. Knotts*, 460 U.S. 276 (1983), long-term, sophisticated tracking violates that person's reasonable expectation of privacy, *United States v. Jones*, 565 U.S. 400 (2012). However, under the Third-Party Doctrine, a person does not have a reasonable expectation of privacy in records voluntarily given to a third party.

Roberts concluded that although CSLI is generated for commercial purposes and is held by a third party, CSLI records are qualitatively different from the "limited types of personal information" previously addressed under the Third-Party Doctrine and that applying the Third-Party Doctrine here would constitute a "significant extension… to a distinct category of information". Slip Op at 15. According to Roberts, CSLI is deeply personal, as it provides "an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations." *Id.* at 12 (internal quotations omitted). This is largely due to the fact that cell phones are virtually an appendage in modern life. *Id.* at 13. Additionally, because carrying a cell phone is "indispensable to participation in modern society," Roberts reasoned that CSLI is not truly voluntarily shared as understood under the Third-Party Doctrine. *Id.* at 17.

Justice Anthony Kennedy, writing in dissent and joined by Justices Clarence Thomas and Samuel Alito, disagreed that CSLI is any different from the other sensitive business records the Court has held the Government can obtain under the Third-Party Doctrine. According to Kennedy, the majority has drawn "an unprincipled and unworkable line" between CSLI and financial and telephonic records. *Id.* at 3 (Kennedy, J., dissenting). Kennedy reasoned that with such an illogical distinction, "the Government can obtain a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy," but the Government conducts an unconstitutional search where it obtains more than six days of CSLI to confirm if a suspect was near the scene of several crimes. *Id.*

While this "narrow" holding may comfort many that the Government must first show probable cause prior to obtaining long-term CSLI from cell phone providers, the *Carpenter* opinion will undoubtedly create uncertainty in Government investigations. Further, it is unclear if the Court, or lower courts, will use *Carpenter* to prevent the Government from collecting other types of business records containing personal data under a 2703(d) order. While digital technology

continues to evolve in “seismic” proportions, *Carpenter* is likely the first of many exceptions to the Third-Party Doctrine, and the line between deeply-personal information excluded from the doctrine will become increasingly harder to draw.

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