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INSIGHT: Carpenter v. United States: An Initial Assessment

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In a landmark Fourth Amendment decision, the Supreme Court held in *Carpenter v. United States*, 2018 BL 222220 (U.S. June 22, 2018), that the government generally must demonstrate probable cause to obtain location information routinely generated by all cell phones. In this short article, we summarize the key aspects of the decision and then explore some of its ramifications for practitioners.

The Decision

Background *Carpenter* followed years of litigation across the country over the proper standard by which the government could obtain cell-site location information (''CSLI'') from cell phone service providers. CSLI is the information that is created every time a cell phone connects to a cell site tower at a particular geographic location. Using CSLI, the government is able to determine—with rough proximity—where a cell phone user is or was at a particular moment in time.

Specifically, the Court examined whether the government could obtain CSLI pursuant to a court order under 18 U.S.C. § 2703(d), a provision of the Stored Communications Act, which Congress enacted in 1986, allowing the government to obtain customer records from a service provider so long as the government ''offers specific and articulable facts showing that there are reasonable grounds to believe'' that the records ''are relevant and material to an ongoing criminal investigation.'' In this case, the government obtained 127 days of CSLI data from two service providers—12,898 location points in all—and used this data at trial to prove that Carpenter was in the vicinity of several armed robberies. Carpenter argued that the government was required to make the higher showing of probable cause, as required under the Fourth Amendment for a search warrant or a Title III wiretap.

The majority decision Chief Justice Roberts wrote the majority opinion, with Justices Ginsburg, Breyer, Sotomayor, and Kagan in agreement. He observed that technological developments have forced the Court to apply the Fourth Amendment in previously unimagined contexts. Where the Fourth Amendment was traditionally '' 'tied to common-law trespass,' '' *Carpenter*, 2018 BL 222220, at *5, it later expanded to cover ''people, not places'' in *Katz v. United States*, 389 U.S. 347 (1967). There, the Court had held that eavesdropping on a private phone booth infringed on an individual's ''reasonable expectation of privacy'' and therefore constituted a search. Since *Katz*, the Court has developed divergent Fourth Amendment doctrines. On one hand, it has often extended Fourth Amendment protections in cases where new technology has given the government new means for surveillance. For example, the Court has held that the use of a thermal imager to detect heat emanating from a defendant's home was a search requiring probable cause. *See Kyllo v. United States*, 533 U.S. 27 (2001); *see also Riley v. California*, 134 S. Ct. 2473 (2014) (requiring a warrant to examine the contents of a cellular phone); *United States v. Jones*, 565 U.S. 400 (2012) (requiring a warrant to install a GPS tracker on

a car and record its movements remotely for 28 days). On the other hand, other Supreme Court decisions adhered to the ''third-party doctrine,'' which provides that there is no expectation of privacy in information voluntarily provided to third parties. *See United States* v. *Miller*, 425 U.S. 435 (1976) (bank records); *Smith v. Maryland*, 442 U.S. 735 (1979) (dialed telephone numbers).

Carpenter falls where these doctrines intersect, and the majority ruled in favor of expanding Fourth Amendment protections. In doing so, it rejected the applicability of the third-party doctrine to the ''novel circumstances'' of CSLI, holding that ''[g]iven the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection.'' Instead, ''an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI,'' rendering the government's collection of CSLI a search under the Fourth Amendment. *Carpenter*, 2018 BL 222220, at *9. The Court identified several reasons for its conclusion: CSLI allows law enforcement to ''surveil'' individuals for a much longer period of time than could be undertaken without technology; CSLI reveals the phone user's ''familial, political, professional, religious, and sexual associations''; CSLI provides ''near perfect surveillance'' because a phone is almost always carried; and CSLI allows detailed historical reconstruction of prior movements, ''a category of information otherwise unknowable.'' *Id.* at *9–10.

Carpenter describes itself as a ''narrow'' decision that does not ''express a view on matters not before us,'' such as real-time CSLI monitoring, ''tower dumps'' that provide information on all devices connected to a particular cell site, the use of closed-circuit television for surveillance, and the use of a subpoena to obtain business records incidentally providing location information (potentially including bank records indicating the use of a particular ATM machine, and even E-ZPass records relating to the use of toll roads or bridges). In the ''overwhelming majority'' of cases, the Court reasoned that the government should be able to use subpoenas. However, a ''warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.'' *Id.* at *9 n.3.

The four dissenters The Court's decision prompted several spirited dissents, each of which drew on different approaches to the question presented. Justice Kennedy relied primarily on the third-party doctrine, seeing this case as similar to the ones involving bank records and dialed-number phone records. Justice Thomas would have gone further and overruled the ''reasonable expectation of privacy'' test laid out in *Katz*, dramatically rewriting Fourth Amendment jurisprudence. Justice Alito conducted a historical inquiry, looking to practices as far back as the 14th century in order to discern the correct ruling. He also expressed concern that *Carpenter* could not be squared with longstanding precedent refusing to treat subpoenas to compel production of business records as searches under the Fourth Amendment. Finally, Justice Gorsuch dissented in an opinion that called for a wholesale reexamination of the Fourth Amendment body of law, cryptically writing that ''[m]uch work is needed to revitalize this area.'' He acknowledged that he did not ''begin to claim all the answers today,'' and criticized the defendant for ''forfeit[ing]'' the arguments that he might have liked to squarely consider. *Carpenter*, 2018 BL 222220, at *61–66.

Observations and Possible Ramifications

While the *Carpenter* majority decision itself is only 23 pages long, the four dissenting opinions render the entire set of opinions a hefty 119 pages. There is a lot to say, and many scholars of the Fourth Amendment and criminal procedure have already begun to parse the finer points of *Carpenter*. What are some initial insights for those who practice in this area?

The third-party doctrine still lives, but it has been limited. It would be a stretch to read *Carpenter* as signifying the end of the third-party doctrine. One can expect that subpoenas will still be used to obtain many types of business records that are retained by third parties, even when those records disclose information that is in some sense ''personal.'' *Id.* at *14. However, the Court recognized that CSLI is qualitatively different from other types of evidence: ''In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach . . . the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection.'' *Id.* at *15. Future courts will need to sort out whether there are other types of records that are equally or more revealing than CSLI, but they will begin with *Carpenter*'s characterization of itself as ''the rare case.'' *Id.* at *14.

Public safety need not be compromised by this ruling. The Court takes pains to observe that the traditional exceptions to the warrant requirement will apply with respect to CSLI, such as when exigent circumstances require the collection of CSLI in order ''to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence.'' The Court specifically identifies ''bomb threats, active shootings, and child abductions'' as situations in which exigent circumstances justify an exception to the warrant requirement. *Id.* at *15.

The facts of* Carpenter *and CSLI looked extreme to the Court. The Court stated that ''the seismic shifts in digital technology . . . made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years.'' *Id.* at *11. Here, the government obtained Carpenter's location for 127 days—an inordinately long period of time. One wonders if the case would have turned out differently if the government had only obtained the records for a few hours, or even two or three days. *See id.* at *9 n.3 (reasoning seven days is too long, absent exigency).

The accuracy of cell-site data should not be overstated. The majority opinion goes a little far when it says that ''the accuracy of CSLI is rapidly approaching GPS-level precision.'' *Id.* at *11. It really all depends on where the person is located, and as courts have increasingly recognized, the art of decoding CSLI records is beyond the ken of the ordinary trial witness. *See United States v. Natal*, 849 F.3d 530, 536 (2d Cir. 2017) (''[T]estimony on how cell phone towers operate must

be offered by an expert witness.''). To be sure, the technology is constantly improving, but CSLI is by no means the equivalent of an electronic fingerprint, and it would be wrong for judges or prosecutors to assume that it is.

Congressional inaction may have spurred the Court's decision. In his dissent, Justice Kennedy contended that the Supreme Court should not have intervened because when Congress enacted Section 2703(d), it ''weighed the privacy interests at stake and imposed a judicial check to prevent executive overreach.'' *Carpenter*, 2018 BL 222220, at *26. He admonished that the Court ''should be wary of upsetting that legislative balance and erecting constitutional barriers that foreclose further legislative instructions.'' However, this critique arguably overlooks the fact that the last time Congress weighed the competing interests was in 1986, some 32 years ago—well before our current technology was even imagined, let alone before it existed and shaped human behavior. One wonders whether Justice Kennedy's understandable desire to defer to congressional balancing would have been more persuasive to his colleagues if Congress had done its balancing more recently.

The Court will not be persuaded by inapt historical analogy. In a case involving the constitutionality of a video game regulation in California, Justice Alito once gently ribbed the late Justice Scalia, remarking at oral argument that ''I think what Justice Scalia wants to know is what James Madison thought about video games,'' a comment that was received with laughter from those in attendance. *See* Transcript of Oral Argument at 17, *Schwarzenegger v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2010) (No. 08-1448), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/08-1448.pdf. The shoe is on the other foot in *Carpenter*, as Justice Alito engages in the same type of close historical analysis that is often associated with Justice Scalia and the doctrine of ''original meaning.'' *See Carpenter*, 2018 BL 222220, at *40. But this analysis holds little or no currency with the *Carpenter* majority. It seems as if this is one context in which originalism cannot answer the question posed by the case. We have no idea how the text of the Fourth Amendment would have been applied to the facts of this case by the founding generation. Nor do we know whether the Founders would have viewed the Fourth Amendment at a low level of abstraction (''secure in their persons, houses, papers and effects'') or at a higher level of generality (to protect privacy more generally). The challenge of matching modern-day inventions with some analogous technology from 1791 is intellectually interesting, but it should not dictate the outcome in cases like these.

Carpenter *is not meant to answer every question about technology and the Fourth Amendment.* The majority opinion quotes Justice Frankfurter, a noted incrementalist, for the proposition that ''the Court must tread carefully'' in cases considering new innovations ''to ensure that we do not 'embarrass the future.' '' *Id.* at *13 (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944)). This is a sensible approach given the speed with which technology evolves. It can be difficult to remember that e-mail was not ubiquitous until the mid-1990s and the iPhone was not released until June 2007. Technology changes rapidly, and there is no reason for the Court to speak in overly abstract terms when tomorrow's technology may be very different from today's.

Future decisions will be important in understanding how* Carpenter *has changed our understanding of the Fourth Amendment. The narrow nature of the decision is a positive, for the reasons discussed above, but it will also lead to considerable litigation in the lower courts as litigants and district judges work out the parameters of the rule announced in *Carpenter*. Given the uncertainty here, defense counsel may be well advised to consider challenging many government efforts at evidence collection as running afoul of *Carpenter*, at least until there is a robust body of post-*Carpenter* decisional law.

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